Set 1

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

A.34/84

BETWEEN CLEMENT ALAN CLEMANCE of Opotiki, Orchardist and KATHERINE GRACE CLEMANCE, his wife

PLAINTIFFS

AND PAUL HOLLIS of Edgecumbe, Orchardist and SHARON PATRICIA HOLLIS, his wife

DEFENDANTS

Hearing 19 July 1984

Counsel J P Doogue in support
G R Joyce to oppose

Judgment 30 JUL 1984

JUDGMENT OF DAVISON C.J.

The plaintiffs seek an interim injunction to restrain a mortgagee's sale.

The factual background is as follows. The plaintiffs, who had been dairy farmers, sold their dairy farm and received from the sale nett proceeds of approximately $331,000. On 12 February 1982 they entered into an agreement to purchase the defendants' kiwi fruit orchard at Opotiki for the sum of $625,000. $325,000 was payable in cash and the balance of $300,000 remained on first mortgage to the defendants and was to be payable on 8 June 1985. Interest on the mortgage was provided for at 18 per cent per annum reducible to 17 per cent per annum if paid within 14 days. The interest amounted to $51,000 per annum at the reduced rate.

The plaintiffs entered into possession of the property on 8 June 1982. Their first harvest was in May 1983 but when the harvest was completed they found that the gross income from the kiwi fruit was only about $66,644, which sum

they say was quite inadequate to meet their costs of production let alone pay the interest to the defendants. The interest has not been paid.

The defendants have taken steps to exercise the power of sale contained in their mortgage and I was advised from the bar that the application is at present in the hands of the Registrar of the High Court at Gisborne.

THE PRESENT PROCEEDINGS

The plaintiffs have issued a writ against the defendants in this Court pleading four causes of action.

First Cause of Action

The plaintiffs claim that during negotiations leading up to the contract, Stewart Morrison, the defendants' agent, represented to them that production of kiwi fruit from the orchard would be 12,000 export trays in May 1982 and that production would double by May 1983. They claim further that John Meagher, also the defendants' agent, represented to them that production from the orchard in 1983 would be double that for 1982. The actual production for May 1983 was, however, only 7893 trays and not the figure of 24,000 represented.

The plaintiffs rely upon s 6 of the Contractual Remedies Act 1979 and say that the representations made to them concerning production figures became a term of the contract and had the effect of amounting to a warranty.

Second Cause of Action

The plaintiffs claim that prior to entering into the contract one of the defendants, Paul Hollis, represented to them that the orchard should easily do 21,000 trays of export kiwi fruit during the year 1983.

They also claim that Paul Hollis, when referring to the report of a consultant - Balasingham - projecting a production of 12,000 trays of export kiwi fruit for the year 1983, said such projection was unreasonable, unrealistic and excessively conservative.

Third Cause of Action

This deals with the report made by Mr Balasingham which projected a production of 12,042 trays of export kiwi fruit for the year May 1983 and 21,006 trays for the year May 1984.

The plaintiffs claim that Mr Morrison, the defendants' agent, represented to them that Mr Balasingham had in writing asserted that the projections given could be revised by moving the production total forward by one year with the result that the orchard could be expected in 1983 to achieve a production level of 21,006 trays of export kiwi fruit rather than 12,042 trays. Such representations, the plaintiffs say, became a term of the contract.

In respect of all of the first three causes of action the plaintiffs claim for loss of revenue $179,292 and general damages $15,000.

Fourth Cause of Action

This is based on the provisions of the Credit Contracts Act 1981, ss 10(a)(b) and (c) and the plaintiffs seek a reopening of the mortgage contract for payment of the sum of $300,000 upon the grounds:

(a) The mortgage was granted by the plaintiffs to the defendants to secure the purchase price of a property which had been materially misrepresented to the plaintiffs by the defendants and/or their agents, which misrepresentations influenced the plaintiffs in their decision to purchase that property.

(b) In particular, the defendants misrepresented to the plaintiffs the amount of income which the plaintiffs might reasonably have expected to derive from that property when the defendants knew or ought to have known that the assessment of the amount of such income by the plaintiffs was an essential factor which would influence them in deciding whether or not to buy the orchard

and incur the liability that was the subject of the mortgage.

(c) The defendants knew or ought to have known that the levels of income which they had represented to the plaintiffs would be available from the property were untrue, incorrect and inaccurate.

Under this cause of action the plaintiffs seek an injunction restraining the exercise of the power of sale by the defendants and an order pursuant to s 10 of the Credit Contracts Act 1981 setting aside or varying the terms of the mortgage.

THE APPLICATION FOR INTERIM INJUNCTION

The application for interim injunction does not refer in any meaningful way to the grounds upon which the injunction is sought. I asked Mr Doogue at the outset of the hearing to define these. In doing so he acknowledged that he could not impeach the mortgage contract but claimed that the matters referred to in the first three causes of action gave rise to a claim to equitable set-off which would justify the grant of the interim injunction sought. The fourth cause of action seeks the injunction on the grounds that it is unjust to allow the power of sale contained in the mortgage contract to be exercised when the application to reopen it under the Credit Contracts Act 1981 is pending.

DECISION

The plaintiffs must first establish that there is a serious question to be tried and if there is then they must show that the balance of convenience lies in granting the injunction sought: American Cyanamid v Ethicon Ltd [1975] AC 396; Eng Mee Yong v Letchumanan [1980] AC 331; Consolidated Traders Ltd v Downes [1981] 2 NZLR 247.

A suitable approach to adopt in considering whether there is a serious issue to be tried is enunciated

by Lush J. in Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd [1976] VR 309, 311:

> " In order to determine whether there is a serious question to be tried, it is necessary to consider what is the applicable law and whether there are arguable differences concerning it, what the facts are said to be on the opposing sides, and where the issues lie, and whether there is a tenable combination of resolutions of the issues of law and fact on which the plaintiffs could succeed. If there is it may still often be necessary to decide whether the balance of convenience requires the granting or the withholding of the injunction. "

I propose to deal first with the three causes of action founded on representation/warranty under the Contractual Remedies Act 1979. They raise two main issues. They are:

First: Is there a serious question to be tried on the factual issues?

Second: If there is such a serious question which could result in a finding and award of damages in favour of the plaintiffs, is the prospect of such a successful finding sufficient to establish a right of equitable set-off as to justify the grant of an injunction?

In examining the factual issues I do not look at the facts uncritically and do not ignore any inherent improbabilities that may appear in the plaintiffs' case. However, where there appears to be a conflict of evidence which is not on the face of it implausible, such a conflict should not be disposed of on affidavit evidence only. It leaves a serious question to be tried.

It is the plaintiffs' case that they made known to the defendants in the course of negotiations that their only income would be from the proceeds of sales from the kiwi fruit orchard and that they would be dependent upon the

profits from the orchard to pay the interest payable under the mortgage. It was for this reason that they were anxious to know what the production of the orchard for their first full year - ending May 1973 - would be.

The plaintiffs allege that representations as to production were made to them by three persons - Mr Morrison, the defendants' agent; Mr Meagher, the defendants' agent; and Mr Hollis, one of the defendants.

Mr Morrison does not deny in his affidavit that he told the plaintiffs that production would be 12,000 trays in May 1982 and that that production would double by May 1983. He does deny, however, that he told them that the Balasingham projection of 21,000 trays by May 1984 could be revised by moving the total forward one year to May 1983. The plaintiffs must, however, have obtained that figure from somewhere because it was used by the plaintiffs' accountant as the basis for a budget prepared by him.

In so far as the representations allegedly made by Mr Meagher are concerned, Mr Hollis says:

> " As to his alleged comments, I can imagine him saying that we anticipated production doubling from May 1982 to May 1983 since this is what we, in fact, anticipated. "

Mr Hollis, in relation to the representations allegedly made by him says:

> " In commenting on the productive capacity of the orchard I said that in 1983 it could produce between Twelve Thousand (12,000) and Twenty Thousand (20,000) trays but this would depend on a lot of things including pollination and the weather. I am certain I did not say 'should easily do Twenty One Thousand (21,000) in May 1983'. As I have said in Paragraph 11 of this Affidavit, I was anticipating Ten Thousand (10,000) trays in May 1982 and had in fact ordered ten thousand trays in which to put the crop before the Easter storm put paid to that. In the circumstances I consider that my statement that May 1983 could see between Twelve Thousand (12,000) and Twenty Thousand (20,000) trays was reasonable. "

In view of those facts, although there are differences between the various versions, there are certainly not grounds for finding that the plaintiffs could not establish a case to show that the representations they allege were made, that they relied upon them in entering into the contract, and that such representations became a term of the contract under s 6 of the Contractual Remedies Act 1979. To the extent that there are differences, the conflicts in the evidence are essentially ones to be resolved at trial and not simply on affidavit evidence. The fact that the production allegedly represented did not achieve those figures was not challenged by the defendants.

The defendants raise, however, several issues in defence.

First: They deny the authority of Mr Morrison to make the representations allegedly made by him.

Second: They say that Mr Balasingham was engaged as the consultant of the plaintiffs, by Mr Williams on behalf of the plaintiffs, and Mr Williams had no authority to misrepresent Mr Balasingham's opinion as to production capacity.

Third: The defendants have expressed no more than an honest and reasonable opinion as to production prospects and are not liable for any shortfall in production as a consequence: Bisset v Wilkinson [1927] AC 177.

Fourth: The shortfall in production from the figures anticipated was due in whole or in part to -

(a) The Easter storm of 1982 which reduced production for that year and took away a lot of new growth from the following year's crop - the 1983 crop.

(b) Poor pollination during 1982/83.

(c) Lack of water during the extensive drought of 1982/83.

(d) Wind rub owing to shelter being cut out by plaintiffs.

(e) The plaintiffs' orcharding practices.

These are all matters properly to be determined at trial where the onus of proving them is upon the defendants. In the result, I find that there arise in this case substantial factual matters to be resolved at trial and that there are serious issues to be tried. They are not matters to be dealt with on affidavit evidence.

That brings me to the second main issue under this head of the case, namely, whether the possibility of a successful claim for damages will support a right of equitable set-off sufficient to support the injunction to restrain the mortgagee's sale.

The doctrine of equitable set-off was examined by Barker J. in Popular Homes v Circuit Developments [1979] 2 NZLR 642. He referred to the divergent views in England and Australia as to the correct extent of the doctrine. The English view represented by the Court of Appeal decisions in Morgan & Son Ltd v S Martin Johnson & Co Ltd [1949] 1 KB 107 and Hanak v Green [1958] 2 QB 9 allows equitable set-off of unliquidated claims between the original parties to a contract so long as the claims are based on the same contract, or flow out of it, or are directly connected with it. The Australian view as stated by Spry in his book on Equitable Remedies (1971) p 166 is that:

> " What generally must be established is such a relationship between the respective claims of the parties that the claim of the plaintiff has been brought about by, or has been contributed to by, or is otherwise so bound up with, the material breach of the rights of the defendant that it would be unconscionable that he should proceed without allowing a set-off."

In an article in 43 ALJ 265, 268 Spry had stated his proposition as follows:

> " What must be established was such a relationship between the claim of the plaintiff at law and the claim of the defendant that the right of the plaintiff should be regarded in equity as dependent on satisfaction of the claim of the defendant. This would be the case where,

> for example, there had been not only fraud on the part of the plaintiff such as to give rise to a claim against him, but that fraud had also led to the incurring of the obligation of the defendant."

In Parry v Grace [1981] 2 NZLR 273 Thorp J. appears to have preferred the Australian approach as stated by Spry.

In Roberts and Hoskin Ltd v N.Z.I.Securities Ltd (High Court, Hamilton, No 138/82, 15 March 1983) Prichard J. summed up the different approaches in a way which I am happy to adopt. He said:

> " He (Spry) suggests that the English judgments show a tendency to depart from the correct and orthodox view by failing to appreciate that an equitable set-off will arise when, and only when, the respective claims of the parties bear such a relationship to each other that it can be said that the claim of the defendant 'impeaches' the claim of the plaintiff. Mr Spry predicts that the Australian Courts will adhere the narrower and more orthodox approach.
> ....
> According to the orthodox view, a party seeking protection on equitable grounds against his adversary's demand has to do more than merely show that he has a cross-demand. The requirement is that there be such a relationship between the respective claims of the parties that the claim of the defendant 'impeaches' that of the plaintiff. 'To impeach' - originally 'to catch' or 'entangle' - means 'to challenge' or 'call in question'.
>
> The relationship is described by Spry (2nd Edition, pp 170-1) as follows:
>
> '...if any otherwise sufficient equity can be found, it does not matter whether or not the material claim of the defendant is for an unliquidated amount, nor whether or not the opposing claim might properly be described as 'mutual'. But a defendant can establish an equity only by bringing forward a claim which impeaches that of the plaintiff. For this purpose it is not sufficient

which the other two Judges agreed, said:

> " However, speaking for myself, it seems to me clear that where the parties use a system of payment under a contract which involves in fact notional payment in full and a lending on mortgage of a sum, it could lead to abuse if the mortgagee was to be kept out of his undoubted rights, expressly provided for, by allegations of some connected cross-claim which may prove to be without foundation. Megarry J. in the course of his judgment below, said:
>
> ' Unless and until the mortgage in this case is discharged in the appropriate way on actual payment and acceptance of the sum due, I think that the mortgage remains a mortgage, and that the mortgagee is entitled to any surplus proceeds of sale in the hands of the bank up to the amount properly due under the mortgage. A doctrine of the discharge of a mortgage debt by the existence of unilateral appropriation of an unliquidated claim is one to which I gave no countenance; I regard it as neither convenient nor just. Even where there is a claim which is both liquidated and admitted, and it exceeds the mortgage debt in amount, it may be to the interest of one party or the other, or both, that the mortgage and the mortgage debt should continue in existence. The rate of interest may be attractively high or seductively low; there may be fiscal advantages in keeping the mortgage alive; there may be new projects to be financed which make liquid cash preferable to the satisfaction of mortgage debts; and so on. Nor have I heard any reason why it should be the mortgagor who is to have a unilateral power to discharge the mortgage debt by appropriation without payment.'
>
> I entirely agree with what he there says, and, accordingly, I uphold the decision of the judge not to stay the action against the bank. "

But the granting of an injunction to restrain the exercise by a mortgagee of his power of sale has been allowed in a number of cases. The circumstances under which this has been done were referred to by Thorp J. in Parry v Grace (ante) at p 275:

" For the plaintiffs, Mr Dugdale in his memorandum first of all conceded:

1. That where the validity of the mortgagee's powers is not impeached the mortgagor will normally be required to pay into Court the amount secured by the mortgage before he will be granted an injunction restraining the exercise of those powers; and

2. That the existence of a cross-demand does not displace this rule.

In my view it is clear that such concessions were properly made. The principles in question appear first to have been enunciated in the judgment of Sugerman J. in Harvey v McWatters (1948) 49 SR (NSW) 173. They have often been adopted in Commonwealth and English Courts, recently in Inglis v Commonwealth Trading Bank of Australia (1972) 126 CLR 161; Forsyth v Blundell (1973) 129 CLR 477 and Duke v Robson [1973] 1 All ER 481; [1973] 1 WLR 267. There seems to me no reason why they should not be accepted as settled law and applied in this country. "

It will be noted that it is said that the requirement of payment of the amount of the mortgage debt into Court applies "where the validity of the mortgagee's powers is not impeached". But where the mortgagor claims that he was induced to enter into a contract of sale and to give a mortgage back to the vendor to secure the balance of the purchase price, does he not impeach the mortgagee's right to sell up under the mortgage if the contract has been induced by misrepresentation? The point appears to be arguable. It may give rise to an equitable set-off. The contract to purchase the orchard at the price of $625,000 was entered into, it is said, on the basis of certain representations. Those representations are claimed to have induced the plaintiffs to enter into the contract and to agree to the terms of the mortgage securing the balance of the purchase price of $300,000 and interest. If they establish that the production as represented and upon which all parties knew they relied to provide the income to pay the mortgage interest did not result then there is no income to pay the mortgage interest.

The plaintiffs claim in their writ for the loss of production amounting to $179,292 which they say they

suffered. If they succeed and that sum is set off against the defendants' claim for interest it will extinguish the interest claim and go a long way towards paying off the principal sum owing under the mortgage.

I think that the present case is similar in principle to Roberts and Hoskin Ltd v N.Z.I. Securities (ante) where Prichard J. found that the plaintiffs' claim impeached the right asserted by the defendant under its mortgage. The plaintiffs' claim is not simply a cross-demand. That being so the dictum of Sugerman J. in Harvey v McWatters (1948) 49 SR(NSW) 173, relied upon by Thorp J. in Parry v Grace (ante), requiring a mortgagor where the validity of the mortgagee's powers is not impeached, to pay into Court the amount secured by the mortgage before an injunction restraining the exercise of the powers under the mortgage will be granted, has no application here.

I have considered the decision in Samuel Keller Ltd v Martins Bank Ltd (ante) but I think it must be limited to cases where the mortgage in issue is a simple mortgage debt and not cover the situation where the mortgage debt has arisen out of a transaction where the mortgage secures a balance of purchase money where claims or equities arising out of the transaction may impeach the mortgage debt itself in the sense referred to by Spry (ante).

I am satisfied, too, that where justice so requires, the Court may grant an injunction without requiring the mortgagor to pay into Court the amount of the mortgage debt. This was the conclusion arrived at by Holland J. in Thompson v Stevenson (High Court, Christchurch, A.374/83, 21 December 1983) and I agree with him. If justice requires that the sale of the plaintiffs' property be stayed, then justice would be denied if the Court were to order the stay on the condition that the amount secured by the mortgage be first paid into Court. It is impossible for the plaintiffs to raise the money and pay it into Court.

I turn now to consider the plaintiffs' fourth cause of action founded on the Credit Contracts Act 1981.

They seek to invoke s 10(1)(a)(b) and (c). It provides:

> "(1) Where, in any proceedings (whether or not instituted pursuant to this Act), the Court considers that -
>
> (a) A credit contract, or any term thereof, is oppressive; or
>
> (b) A party under a credit contract has exercised, or intends to exercise, a right or power conferred by the contract in an oppressive manner; or
>
> (c) A party under a credit contract has induced another party to enter into the contract by oppressive means -
>
> the Court may re-open the contract. "

The three grounds upon which the plaintiffs seek to re-open the mortgage contract are set out earlier in this judgment but basically they are all founded on the misrepresentations alleged in relation to production.

I was not referred to any case where the application of the Credit Contracts Act to a situation like the present one has been considered apart from the judgment of Prichard J. in Roberts and Hoskin Ltd v N.Z.I.Securities (ante where he made passing reference to the Act. Prichard J. observed:

> " No principles have yet been evolved as to the application of the statutory provision for re-opening credit contracts: I apprehend that each case will be considered on its own facts, but that the existence of a collateral purpose on the part of the mortgagee will usually be a relevant consideration. My view of the present case is that an attempt to exercise the mortgagee's power of sale against sureties while there is an outstanding question as to whether there is a recoverable amount owing by the principal debtor is indeed harsh and unconscionable. "

That case, however, involved the exercise of a power of sale against sureties whilst the question of recovery of the debt from the principal debtor remained outstanding.

In the present case, it may well be oppressive in terms of the Act for the defendants, who face a claim for some $179,000 arising out of their alleged misrepresentations which are alleged to have been the cause of the failure of the plaintiffs to meet their liabilities under the mortgage, to exercise their power of sale and deprive the plaintiffs of their property and also possibly cause the plaintiffs further loss by reason of the property selling at a reduced price by reason of the forced sale.

I think the plaintiffs at least have an arguable case for re-opening the transaction.

BALANCE OF CONVENIENCE

In so far as damages are concerned they would not be an adequate remedy for the plaintiffs. If the mortgagee's sale is not stopped they will lose their property. The price which might be obtained on sale could well be far below the price of $625,000 paid. It is well known that forced sales frequently result in prices being low, so that even if the plaintiffs succeed in their claim they would have lost the property and possibly a substantial amount of the original purchase price.

From the defendants' point of view, they are seeking only a monetary sum from the plaintiffs. Their debt is adequately secured by their mortgage over the plaintiffs' property. A delay in receiving their money can be compensated in interest. Perhaps more importantly when considering where the balance of convenience lies is the fact that if the sale is not stopped then the plaintiffs will lose their home and their income. During the hearing the plaintiffs acknowledged that they had placed their property on the market but that was simply on the basis that it would be preferable to try to sell it themselves rather than see it sacrificed by a mortgagee's sale.

I was advised from the bar that the plaintiffs anticipate being able to pay the interest falling due for the 1984-85 year, leaving owing the interest which has

accrued up until June 1984. The plaintiffs have available at present the sum of approximately $17,000.

The defendants have given evidence of their financial position and it appears that the failure of the plaintiffs to pay interest has caused them some financial embarrassment but there seems little doubt that their money is secure even if payment is to be delayed.

RESULT

I find that there are serious questions to be tried in this case and that the balance of convenience lies in granting the plaintiffs an interim injunction restraining the sale of their property by the defendants.

The interim injunction, however, is granted upon the following terms:

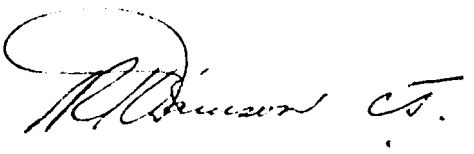
(a) That plaintiffs pay to defendants within seven days the sum of $10,000 on account of interest.

(b) That plaintiffs pay in full the quarterly instalment of interest falling due in September 1984.

(c) That plaintiffs proceed urgently to have their action ready for a hearing and accept the first fixture made available for the hearing of their action which shall be notified to them after four weeks from the present date.

(d) If the plaintiffs fail to pay either of the sums referred to in (a) and (b) the defendants have leave to bring this matter before the Court.

The form of the injunction is to be agreed by counsel and to follow generally the form contained in the motion. If counsel can not agree, the matter can be referred to the Court. Costs reserved.



Solicitors for the plaintiffs: McCaw Lewis Jecks (Hamilton)

Solicitors for the defendants: Hamerton, Chappell, Dumbill & Moore (Whakatane)