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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY A.7/84

BETWEEN KELVIN RICHARD THOMPSON

Plaintiff

A N D WRIGHTSON N.M.A. LIMITED

Defendant

Hearing : 17th February 1984

Counsel : C.S. Withnall for Plaintiff
H.J. Ross for Defendant

Judgment : 17th February 1984

(ORAL). JUDGMENT OF BARKER, J.

The plaintiff applied ex parte yesterday, 16th February 1984, for an interim injunction to restrain the defendant from proceeding with a mortgagee's sale of the plaintiff's property through the Registrar of the High Court at Timaru. The plaintiff is the registered lessee of a farm some 17 kilometres from Timaru, with an area of approximately 162 hectares. On this land the plaintiff has conducted a grain-farming business. The land is held on a lease from the Crown in perpetuity.

The land is encumbered with several registered mortgages and with caveats supporting unregistered mortgages. It is not necessary to go into details; counsel advise me that the total amount of all encumbrances is of the order of

$400,000. In addition, from material placed before me, the plaintiff is in arrears with his rates and with his rental payments to the Crown as lessor.

The application for injunction was filed ex parte yesterday; although I was in the course of a lengthy trial, I saw counsel in Chambers. Mr Ross had acted for the defendant in related litigation to which I was soon referred. He accepted the invitation conveyed from me through the Registrar to appear at the hearing of the ex parte application. I extended this invitation in accordance with the practice developing with interim injunctions that, if it is known that the defendant has solicitors acting for him, where the Court is not happy about granting an injunction ex parte, those solicitors are to be advised of the time when the Court is to hear the ex parte injunction and given the opportunity to put something formal on behalf of the defendant.

Mr Ross had no instructions to accept service of the motion. I should have been prepared to have authorised short service; he accepted my invitation to make submissions at the hearing of the plaintiff's application this morning. In the result, he has made helpful submissions and, without objection from Mr Withnall, has provided me with a number of relevant documents.

It is necessary, in considering whether there is a serious question to be tried, to relate some of the relevant history. It is necessary also to give an immediate judgment because the mortgagee's sale through the Registrar of the High Court at Timaru is scheduled for 2 p.m. this afternoon.

The plaintiff is presently in South Australia. No explanation has been given as to why he is there and why he is not sufficiently interested to be in New Zealand when his most valuable asset is the subject of a forced sale. No undertaking as to damages has been filed from the plaintiff. As will be noted later, it is doubtful whether such an undertaking would be worth very much.

The plaintiff sued the defendant in the Timaru Registry of this Court, claiming $800,000 damages for alleged breach of duty by the defendant to provide finance to enable him to continue farming and thus overcome his financial difficulties. The defendant counter-claimed for the amount due on the mortgage at the date of trial. In a reserved judgment delivered in August 1983, Cook, J. found for the defendant on both claim and counter-claim.

An appeal was lodged against this decision; that appeal has lapsed because security for costs was not given within the requisite time. Although there has been talk of an application for special leave to appeal, there is none filed either in this Court or in the Court of Appeal.

The defendant issued a notice under Section 92 of the Property Law Act 1952. This was served personally by a Police Constable on the plaintiff on 17th August 1983. It was also served on the numerous encumbrancers, one of whom is the solicitor for the plaintiff, Mr Wood of Waimate. The notice, to which no exception is taken as to form, required the plaintiff's default to be remedied by 29th September 1983,

after which date the defendant mortgagee claimed the right to sell up the land.

On 27th October 1983, the plaintiff's solicitors in Waimate wrote a letter of protest to a firm of auctioneers in Timaru instructed by the defendant, that the Assistant Manager had visited the land; the letter expressed surprise and amazement that such a visit should be made without the personal invitation of the plaintiff. It is difficult to reconcile this attitude with the view now advanced on behalf of the plaintiff that the mortgagee did not supply the Registrar with sufficient information so as accurately to describe the property to prospective purchasers in newspaper advertisements. Obviously, it would have been prudent for the auctioneer to have visited the property in order properly to carry out his functions one would have thought.

There followed desultory correspondence between solicitors; late in November 1983, the defendant applied to the Registrar of the High Court at Timaru to conduct a mortgagee sale. This application was made under Section 99 of the Property Law Act.

On 21st December 1983, the Registrar approved the terms and conditions of sale; he directed that an advertisement in a form approved by him be published on 3 occasions in newspapers in Invercargill, Dunedin, Christchurch and Timaru, with a 4th insertion in the Timaru newspaper.

The form of approved advertisement mentioned the Government valuation of the land as at 1st July 1983 at $440,000

capital value. The advertisement mentioned that there was "a large drying shed for grain". This statement is relevant because one of the plaintiff's present complaints is that the advertisement did not properly draw to the minds of potential purchasers the property's grain facilities. It is said that there is a valuation of the property of $493,000 but this valuation was not shown to the Court.

The evidence before me apart from the agreed series of correspondence and other matters of record, came from an affidavit from Mr Guest who had acted as the plaintiff's counsel in the case before Cook, J. Of necessity he was deposing to matters of hearsay and frequently double hearsay. Although Mr Wood wrote to the Registrar at Timaru on 16th January 1984 threatening an injunction to stop the sale, no action was taken until yesterday when the motion for injunction was filed to stop the sale today. I should add that no criticism at all can be attached to Mr Withnall who received instructions to proceed only on Wednesday; he has acted with commendable efficiency and despatch.

In a memorandum, and in his own submissions today, Mr Withnall claimed that there is an arguable case that the defendant has not acted in good faith and in accordance with the mortgagee's duty to attain the best possible price in the interests of the mortgagor; and, in the words of the Privy Council in McHugh v. Union Bank of Canada, (1913) A.C. 299, 311, he submitted that the defendant has not acted as if it were realising its own property.

It is alleged by the plaintiff first, that the period of advertising was far too short; that a prospective purchaser would be unlikely to have time to make the necessary arrangements because the first advertisement was directed by the Registrar to be published only on 28th January. Reference is also made to difficulties of any purchaser in finding finance.

Next, it is alleged that this farm, being a specialised property, is of interest only to those involved in the growing of grain; at the present time, the grain harvest is in full swing; potential purchasers are working from dawn to dusk and would be unable to spend the requisite time to investigate the purchase of a property.

Next it is said that the advertising was poor and that there was an implication in the words "has been cropped with mixed results" that the soil fertility was doubtful. As against that, the defendant's attitude is that the sale must be held now in order for any purchaser to prepare the ground for grazing; there is also a wild oat problem which needs immediate attention; it is thought that a delay of the kind sought by the plaintiff of some 2 to 3 months would make it difficult for a purchaser to take possession of the property in time to prepare the ground for the sowing of the next seasonal crop.

Against that factual background, I now consider whether there is a serious question to be tried. Mr Ross submits that the mortgagee defendant is protected by acting through the Registrar and that the complaints, if any, of the

plaintiff should be directed to the Registrar who is not made a party. This submission seems to have the support of authority; in Public Trustee v. Wallace, (1932) N.Z.L.R. 625, Myers, C.J. in the Court of Appeal considered the role of the Registrar in dealing with an application for mortgagee sale in these words:

> "Now, I think that the scheme whereby a mortgagee may sell the mortgaged property under the conduct of the Registrar of the Supreme Court and become himself the purchaser is (as shown by s.6 of the Conveyancing Ordinance Amendment Act 1860, by which section the right was originally given) a scheme intended for the benefit and protection not only of the mortgagor, but also of the mortgagee. Though the point does not arise here, provided a mortgagee has in fact become entitled to exercise the power of sale contained or implied in his mortgage and the jurisdiction of the Registrar, on the mortgagee's application to him, is thereby brought into existence and a sale is thereafter conducted in accordance with the provisions of s.110 and the following sections of the Land Transfer Act, I do not at present see how, in the absence of something in the nature of fraud or collusion, the mortgagor could have any cause of action against the mortgagee by reason, or in consequence, of the sale. This would seem to follow from the statement in Hamilton's case that "there can be no doubt that the Registrar has an absolute power to say what the conditions shall be, so that they are proper conditions, having regard to the usage in such matters", and that, as to the fixing of the place of sale, the employment of an auctioneer, and all other necessary acts for effectuating a sale, the Registrar's control is absolute. The mortgagee, it is said, cannot interfere, although he may, of course, make suggestions to the Registrar, as also may the mortgagor, or, indeed, any other person."

Section 99(2) of the Property Law Act 1952 gives the Registrar a certain discretion as to when the advertisement is to be published and when the sale is to be conducted. The subsection requires the Registrar to fix a time of sale not less than 1 month and not more than 3 months from the date of the application to him. It appears from the Wallace case that the

Registrar may, in fixing the terms and conditions of sale and the contents of the advertisement, receive representations not only from the mortgagee but also from the mortgagor, but this discretion is absolute.

Although there have been recent cases such as Downes v. Consolidated Traders Limited, (1981) 2 N.Z.L.R. 247, dealing with the rights of mortgagors on mortgagee sales and on the duties of receivers, in my view, a similar situation does not arise here. On the facts, I do not consider that there is any ground for saying that the defendant has acted in bad faith, unreasonably or negligently; indeed, he has elected to sell through the Registrar. On the authority of the Wallace case, it is the Registrar who has the discretion to fix the conditions of sale and the time of the sale. On the facts, I cannot see that there is any reason why I should stop this mortgagee sale; I consider that, on the facts, the mortgagee has acted properly.

One cannot resist the temptation of feeling that the plaintiff has used every step to put off the evil hour. He might well have made this application a good deal earlier; certainly, once it seemed clear to him from the visit of the auctioneer to the property that the mortgagee was in earnest in proceeding with a sale. His financial situation seems clearly hopeless. The amount of debt secured on the property comes close to the value of the property.

These factors added to the failure of the plaintiff to pay his rates and rent, do not add much confidence to the

undertaking as to damages which would have to be required of the plaintiff if the injunction were to have been granted.

However, I find that there is no serious question to be tried because there is no arguable cause of action on the information presently supplied.

If I had to deal with the balance of convenience, I should have to take account of the following matters adverse to the plaintiff:

(a) The plaintiff is not able realistically to supply an undertaking as to damages. He is not here; his absence has not been explained; the undertaking embodied in any order would not be worth very much. On the contrary, the defendant is a large public company which would be in a position to pay damages if the plaintiff is ultimately successful;

(b) The plaintiff has to some extent gone to sleep on his rights; he may have been in a much stronger position if he had an extant appeal pending before the Court of Appeal; one should have thought that when it was discovered that the appeal had lapsed, for whatever reason, a more prompt application would have been made either to this Court or to the Court of Appeal for leave to appeal out of time. That has not yet been filed, if it is ever to be filed.

(c) The timing of this application leaves much to be desired. It was known by the solicitor for the plaintiff what was happening as long ago as 16th January, if not earlier. It therefore seems that, if I were to consider the balance of convenience, that would lie in favour of the plaintiff.

Accordingly, the application for interim injunction is dismissed; the question of costs is reserved.

R.J. Barker J.

SOLICITORS:

Henderson, McGeorge, Wood and Blaikie, Waimate, for Plaintiff.

Ross, Dowling, Marquet, Griffin, Dunedin, for Defendant.