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IN THE HIGH COURT OF NEW ZEALAND

A. 1352/83

AUCKLAND REGISTRY

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BETWEEN ASSOCIATED TELERAD SERVICING COMPANY LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Retailer

PLAINTIFF

A N D N.Z.I. FINANCE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Finance Company

DEFENDANT

Judgment: 12 March 1984

Hearing: 8, 9, 10 February 1984

Counsel: M.W. Vickerman for Plaintiff
C.A. Johnston for Defendant

JUDGMENT OF CASEY J.

In October 1982 the Defendant (N.Z.I Finance) and the Plaintiff (Telerad) established a bulk discounting facility whereby the former agreed to accept hire purchase paper written by Telerad to a net value of $370,000. The security was an assignment by way of mortgage over all the hire purchase agreements together with the personal covenant of Mr Peter Beric, a Director of Telerad. These terms were confirmed in the Defendant's letter of 7th December 1982, a copy of which is annexed to the affidavit of its Advances Manager, Mr Russell. Blocks of agreements were assigned at intervals to the Defendant which made the appropriate advances thereon, repayable together with interest at 27% by equal monthly instalments over their "average weighted term", the maximum to be no more than twelve months. A number of blocks were dealt with in this way but in May 1983 Telerad encountered cash flow problems. Many of the agreements were for longer than twelve months so

the instalments it was required to pay the Defendant exceeded current repayments from its own customers. A meeting was held on 6th May at which Mr Beric sought a month's postponement of instalments. There is a dispute about whether he had already given the appropriate instructions to his bank cancelling the automatic payments. The letter of the same date which he gave to Mr Hamilton (Northern Regional Manager of the Defendant) certainly confirms the latter's view that he was presented with a fait accompli. In any event, the company agreed to this postponement and confirmed it in a letter to Telerad of 12th July setting out details of eleven blocks of assignments with the amended maturity dates and the amount of the instalments. It stipulated that each of the unpaid instalments would incur penalty interest at the 3% provided in the original Deed of Assignment of 9th November 1982.

The next development came in August 1983. The May Moratorium did little to relieve Telerad's cash flow problems and Mr Beric decided the only solution was to re-schedule the amounts of the instalments to bring them more in line with the amounts the customers were paying. In his affidavits he explained and illustrated how they got badly out of step at times, notwithstanding the "weighting" calculations made by the Defendant. He says he reached a verbal agreement with Mr Hamilton in early August that he could re-schedule the payments in this way and did so, but later he was told that the Defendant had agreed only to "appraise" the proposal and that he was in default by making the reduced payments and, as a result, a formal demand for payment was made.

A number of discussions and letters followed, culminating in an offer from N.Z.I. Finance to re-schedule the repayments over a longer term by means of a new advance if Telerad would provide security by way of mortgage over the property of an associate company at Galway Street, in respect of which there were two prior mortgages, the first securing $630,000, and the second $100,000 to the Bank of New Zealand. Following a meeting on 1st November, officers of the Defendant were under the impression that the stipulated loan conditions

were accepted, among them being confirmation of the amounts secured by the prior mortgages. However, the company deleted three of the other conditions in its written acceptance returned the next day, and the result was that on 4th November N.Z.I. Finance served a notice under s.218 of the Companies Act, 1955 for a total of $230,341.71 being the aggregate due under ten blocks of assigned agreements covered by the earlier demand. Mr Vickerman initially maintained this had not been served at the company's registered office, but it is now clear that this was its address from 20th April 1983.

As a result of this notice there were further discussions and N.Z.I. Finance sent Telerad a letter dated 11th November 1983 repeating the offer on the same terms, but with the deletion of one condition no longer thought relevant, and this was accepted. Telerad was negotiating to change its bankers and asked that instead of a mortgage, N.Z.I. Finance be satisfied with a caveat over the property protecting an unregistered mortgage from its associate company and this was acceptable. The Defendant's solicitors went ahead with preparation of the documents, but on 5th December they were informed by Telerad's solicitors they had prepared a mortgage for the National Bank to secure $300,000 against the Galway Street property and the combined total of the prior securities ($1.4 million) then greatly exceeded its value of $940,000.

N.Z.I. Finance immediately confronted Mr Beric with this situation at a meeting on 6th December and said he undertook to approach the bank with a view to limiting their mortgage security to $100,000. He was not successful and the Defendant thereupon attempted to get priority by lodging a caveat against the land on 7th December 1983, mistakenly alleging an agreement to mortgage of 1st November, but was too late because the bank's mortgage had been registered two hours earlier. The Defendant then indicated that the arrangements would not proceed and it intended filing a winding-up petition based on the default in paying the amount claimed in the notice. However, it agreed to withhold action to give Telerad an opportunity to issue these proceedings, while the latter under-

took to maintain payment of the instalments at the new rate and has continued to do so.

Telerad issued a writ against the Defendant on 21st December 1983 and in its Statement of Claim alleged that the agreement of 11th November entitled it to re-schedule repayments in respect of the blocks of assigned agreements, in consideration of it giving an unregistered mortgage to be secured by way of caveat over 88 Galway Street, and that it made payments in accordance with those arrangements and the Defendant duly registered the caveat. The latter's demand for payment on the basis of their original facility arrangements was accordingly in breach of this agreed variation. It sought orders for specific performance of the agreement, and restraining the Defendant from filing a winding-up petition based on the s.218 notice. It now moves for an interim injunction in respect of the winding-up petition threatened by the Defendant. Very full affidavits have been filed on both sides traversing virtually every aspect of the parties' dealings, and both Counsel left no stone unturned in their submissions. In particular, Mr Vickerman favoured me with a painstaking analysis of the affidavits and exhibits.

I do not propose reviewing the authorities cited to me. The Companies Act confers a right on a creditor to petition for a winding-up order in appropriate circumstances. However, the Court will restrain such action if the debtor can show the debt is genuinely disputed on substantial grounds. I am satisfied N.Z.I. Finance is not acting fraudulently or in bad faith. Accordingly, apart from the question of whether or not it is a "creditor", there is no other reason to believe that the presentation of a petition should be restrained as an abuse of proceedings. While it is true that the Court will not normally attempt to resolve disputed questions of fact on affidavit evidence in an interlocutory application, there are occasions when it may do so and I refer to the well-known passage from the judgment of Lord Diplock at p.341 of Eng Mee Yong v. Letchumanan (1980) A.C. 331, followed in a number of unreported decisions cited to me by Counsel.

The basic issue is whether there was a concluded agreement to vary the payments, as alleged by Telerad. I see no need to resolve the conflicting evidence about the way the May moratorium was arrived at, beyond repeating that the terms of the letter Mr Beric delivered to Mr Hamilton on 6th May clearly support the latter's belief that Telerad had already arranged with its bank to delay the automatic payments by one month. It reads:-

> "Dear Michael,
>
> With reference to the Auto. Payments on Associated Telerad Servicing Company Ltd. as listed, due to negative cash-flow experienced in our Trading account by discounting long term paper over a relatively short period, it has become necessary to delay Auto payments made out in your favour by one month.
>
> I sincerely trust that the above measure does not cause too much difficulty. It will be of the greatest assistance to our Company.
>
> We will be happy, of course, to pay for any additional costs incurred, and of course all future payments will be met on time."

In the light of this I find it difficult to accept Mr Beric's statement in his second affidavit contradicting Mr Hamilton, and claiming that the bank authorities were not cancelled until later. He produced some bank statements showing reversals of earlier debits to support this, but did not actually say when he gave the instructions to his bank.

Much the same conflict occurred over the arrangement Mr Beric said were made in August to re-schedule the payments. As I understand his affidavits he says an agreement to do so was reached with Mr Hamilton at a discussion early that month, and he referred to a subsequent letter to him of 5th August, in response to Mr Hamilton's invitation to provide details matching the customer's payments. Mr Hamilton flatly denies any agreement and in paragraph 4 of his affidavit says:-

> "4. IN early August 1983 Mr Beric called me to inform that he had cancelled his company's automatic payments

and was to replace them with other automatic payments which would involve repayments to N.Z.I. Finance at a lesser rate. When Mr Beric advised me of this I told him that his action was quite unacceptable and that I would not consider any rescheduling of his accounts unless he brought up to date the outstanding amounts owed by Telerad. I told him that he was in breach of the arrangement which we had recorded in our letter of 12th July 1983 and that he was not entitled to reschedule his company's payments without our agreement.

I refer to paragraph 10 of Mr Beric's affidavit. The rescheduling of payments which is referred to in that paragraph and in the letter of 5th August 1983 annexed as exhibit "E" to his affidavit contains a proposal by Mr Beric which was not accepted or agreed to by N.Z.I. Finance."

Again the terms of the letter he wrote on 5th August appear to give unequivocal support to Mr Hamilton's version of this discussion. It reads:-

"Dear Mike,

Further to our telephone conversation, in order to correct the imbalance between Cash received and the moneys we pay to you by Automatic payments, it is necessary for us to take the following action:

Cancel the existing Automatic Payments in your favour, and replace them with multiple ones related to the actual Contracts, based on months to run - 6 months for 6 months, 12 months for 12 months, etc.

We apologise for any difficulty it may cause, but the above action is necessary to overcome our mid-term cash short-fall caused by the averaging factor.

To illustrate, enclosed please find a graph setting out an average Hire Purchase transaction done with your Finance company.

As the Automatic payments fall due, there may be a slight delay between the new Authorities taking effect."

In the light of what he has so clearly written, I find the statements in Mr Beric's affidavit unconvincing, insofar as they suggest that an agreement was reached contrary to Mr Hamilton's account of the matter. Then Mr Hawkes (N.Z.I. Finance Credit Manager) wrote on 26th August protesting at the reduced

payments and stating that the company had only agreed to appraise the scheme. The formal notice of demand was enclosed with this letter. Mr Beric says he rang Mr Hamilton and told him the letter was not in accordance with their agreement. Again, the latter flatly denied he was told this. Instead, he informed Mr Beric that Mr Hawkes (who was away) had already taken action against Telerad because it was in default of the earlier arrangements, but he would be prepared to discuss it when he returned. He indicated they were also ready to discuss the cash flow problems and he says that after this Mr Beric wrote apologising for the inconvenience his action had caused. Again I quote this letter in full:-

> "Dear Mike,
>
> Further to our telephone conversation of 1 September 1983, we would just like to confirm the agreement reached, that nothing will be done until Mr Hawkes comes back on Monday morning, at which time we will meet to discuss further action.
>
> We apologise for any inconvenience that our action has caused, and trust that any misunderstanding can be cleared up to our mutual satisfaction."

Mr Vickerman explained this letter as written in a tone of polite cordiality befitting the position of a borrower granted a concession. I do not see it in this light, and find it impossible to accept the proposition that an agreement to re-schedule the instalments had been reached with Mr Hamilton at the beginning of August and accordingly Telerad's reduced payments thereafter were not made with the consent of N.Z.I. Finance. Notwithstanding any conflict of evidence in the affidavits, I am satisfied that Mr Beric simply took unilateral action in the light of his cash flow crisis and confronted N.Z.I. Finance with a fait accompli. An example given by Mr Hawkes related to a block of assignments of 9th November 1982, where the normal monthly payment of $11,362.79 was reduced by Mr Beric to $3,189.95. In these circumstances it is not surprising to find the Defendant asserting that Telerad was in default under the previous arrangements, and Mr Hawkes' letter was entirely consistent with the version of events given by its officers.

As a result of further approaches by Mr Beric, the company agreed to re-schedule repayments over a period of 15 months, provided further security was offered. On 13th September he wrote to Mr Hamilton putting forward three security alternatives including a mortgage over their property, and he added:-

> "You are aware that we are repaying the existing Mortgage on our property and re-mortgaging it, and it is for this reason that we require time to satisfy the new mortgagor, the Bank, etc. before we can arrange one of the above proposals."

In his affidavits he traverses at some length the reality of the Defendant's concern for additional security and this was echoed in Mr Vickerman's submissions. However, on the affidavits filed by its officers I am satisfied it had genuine reason for this stipulation, especially having regard to the difficulties Mr Beric had already experienced and the action he had taken with the instalments.

On 27th October N.Z.I. Finance made a loan offer of $257,000 with three instalment options, subject to a number of special conditions, one of which read:-

> "Confirmation from prior mortgagees, the National Mutual and the Bank of New Zealand confirming their mortgages at $630,000 and $100,000 respectively."

Mr Beric replied on 31st October confirming a telephone discussion with Mr Russell accepting the repayment option of 15 months and dealing with other details. He also said:-

> "Due to the fact that currently we are at a most delicate stage of negotiations with our Bank regarding securities, etc. as we agreed at a meeting with Mike Hamilton, yourself, Mr Hawkes and Mr Thwaites present, we would be willing to offer a Caveat over the building, but not an actual Third Mortgage as such at the present time."

The response from N.Z.I. Finance was another offer on 1st November embodying these terms and stating that all

the other terms and conditions of the earlier letter were to remain. On 2nd November Mr Russell and Mr Stokes (Assistant Advances Manager) visited Mr Beric at Telerad and discussed this new offer. The former said that the special conditions had to be complied with and received assurances that this could be done, and that compliance with the limits under the prior securities would present no problems. They were satisfied that the offer had been accepted and instructed their solicitors to prepare the documents, as they were anxious to obtain the additional security as quickly as possible. There is no dispute that N.Z.I. Finance knew Telerad was changing its bank, but its officers deny they were ever told this would result in an increased mortgage to the new bank. In his first affidavit Mr Beric says that he was quite open with them that the Plaintiff was changing banks "and would be seeking additional finance and it could well be that the additional finance would be secured by way of second mortgage over the Galway Street property." In his second affidavit he said:-

> "Even if I had not told Mr Hamilton that an increased overdraft facility was being sought from the National Bank (and thus the security would be increased) and I did tell Mr Hamilton this on a number of occasions, it is tendentious to claim that he could be unappreciative of the reasons for the Plaintiff negotiating new bankers and the consequences of that."

By this he means that N.Z.I. Finance Limited must have known that the new bank mortgage would be for a greater amount.

Again, it is instructive to compare these assertions with the record of Mr Beric's conduct at the time. The Defendant's amended loan offer of 1st November was returned with the acceptance duly completed, subject to the deletion of three of the special conditions contained in the original loan offer - but not the one relating to the prior mortgage amounts. The deletion of those conditions was quite unexpected by and unacceptable to N.Z.I. Finance, which decided not to proceed with the transaction and the notice under s.218 of the Companies Act was served. Mr Russell deposed that Mr Beric telephoned on 10th November and indicated that he would

now accept two of the conditions, it being agreed that the third was inappropriate. A further loan offer was despatched to him on 11th November, its acceptance being duly signed and returned. It repeated the condition relating to the amount owing under the prior mortgages. On 15th November Mr Beric says he rang Mr Wells, the General Manager of the Defendant company about the s.218 notice. He said he did so because he was "so surprised at receiving it." Mr Johnston suggested that he waited long enough to take this action. He clearly must have received it some days previously, because in an earlier passage in his affidavit he said the Defendant was using the notice as a lever to procure his agreement to the earlier loan conditions. Be that as it may, he said Mr Wells told him that so long as the Plaintiff provided some security there would be no problem and that he would fix the 218 notice.

Mr Wells' affidavit contains a somewhat different version. As would be expected of the General Manager, he had no knowledge of the day-by-day running of this department; he simply told Mr Beric he would discuss the matter with his officers and made no promises about the notice. He then spoke to Mr Hamilton and as a result a letter was sent by Mr Hawkes on 16th November to the effect that no further action would be taken on the s.218 notice, provided that within ten days the accepted loan offer was fully documented to the Defendant's satisfaction; if not, it reserved its rights. A letter from Telerad's General Manager (Mr Thwaites) of 22nd November 1983 chose to interpret this as a statement that the Defendant had withdrawn the notice, and he went on to deal with the amount of the monthly instalments to be included in the documents, based on the total advance to Telerad outstanding. The following day N.Z.I. Finance replied with its own calculations and its monthly repayment figure was subsequently accepted as correct by the Plaintiff.

Defendant's solicitors prepared and forwarded the necessary documents to Telerad's solicitors on 18th November. At some stage there was a discussion between them about amendments. The latter were also preparing the documents

necessary for the transfer of the bank accounts, including a fresh mortgage to the National Bank. In spite of the fact that the securities sent to them by the solicitors for N.Z.I. Finance specifically mentioned the limits of the prior mortgages at $630,000 and $100,000 respectively, they said nothing at that stage about any increase in the new bank mortgage. On 24th November Mr Thwaites told the Defendant that the change-over in banks would take place on 30th November and thereafter they would complete the security documents, and this was confirmed by letter of the same date. Mr Hamilton said there was no mention of an increase of $700,000 in the new bank mortgage.

It was not until 5th December that the solicitors to N.Z.I. Finance were informed by Telerad's solicitor that he had prepared a bank mortgage for $800,000 over Galway Street in addition to the existing mortgage of $630,000. He accepted that this did not accord with the agreement set out in the Defendant's documents. When N.Z.I. Finance learnt of this it reacted promptly by confronting Mr Beric with his accepted loan offer of 11th November and insisted that he see the bank and arrange for the priority stipulated (para. 25 of Mr Russell's affidavit). He undertook to do so and told them the monies had not yet been advanced by the bank. In an attempt to secure the position Mr Russell instructed the solicitors to register a caveat against Galway Street and, as I have already said, this was too late because the bank had registered its mortgage earlier that day. Mr Stokes said that Telerad's solicitor concurred that the registration of this mortgage had "put a spanner in the works" and they doubted that the bank would agree to priority.

In the face of this firm and persistent requirement by N.Z.I. Finance about the mortgage limits, I find Mr Beric's interpretation of these events in para. 25 of his first affidavit surprising. He dismissed the Defendant's reaction in the sentence "Notwithstanding all the foregoing the Defendant kept on changing its mind as to whether or not it required a limitation to be placed on the second mortgage". He goes on to say that on 6th December he agreed to approach the

second mortgagee to see whether or not it would be agreeable to limiting its security and that he confirmed this discussion by a letter of the same date. I do not propose quoting it in full. It is sufficient to say that I find it self-serving and totally at variance with the versions in the sworn affidavits of the N.Z.I. Finance officers, and in my view the second paragraph is disingenuous. In it Mr Beric implies that the exclusion of the special conditions from his acceptance of the first offer affected the stipulation about confirmation of the prior mortgage amounts.

The detailed review I have made of the affidavit evidence and Counsel's submissions leads me firmly to the conclusion that Mr Beric's account of these transactions must be rejected wherever it conflicts with that given by the Defendant's officers and its solicitor. His letters confirm their version that the re-scheduling effected from August onwards was his own unilateral act, to which the Defendant made the clear response that it would agree only if the stipulated security were provided by means of the new advance on the conditions eventually accepted by Telerad. Its subsequent conduct becomes quite inexplicible if Mr Beric is correct in his assertion that he told its officers and they knew all along that there would be an increase in the new bank mortgage. He says he did nothing about deleting the prior mortgage clause from the loan conditions because he knew N.Z.I. Finance was aware of the position. This is certainly not borne out by the instructions it gave to its solicitors, nor by their immediate and hostile reaction when they discovered the amount secured under the new mortgage on 6th December. Nor, apparently, did Mr Beric see fit to take his own solicitor into his confidence, in spite of the fact that his company passed a special resolution to execute the documents securing $800,000 to the bank on 28th November. It must have been obvious that this made any further security over Galway Street worthless.

I therefore conclude that there was no agreement in August or afterwards to the re-scheduling undertaken by

Telerad. The condition on which it would have been acceptable to N.Z.I. Finance through the medium of the new advance offered - namely, limitation of the bank's prior mortgage to $100,000 - was not fulfilled and it is unrealistic to suggest that this was not a substantial matter going to the root of the loan transaction. The company was therefore entitled to treat the agreement evidenced by the accepted offer of 11th November as at an end. It was submitted by Mr Vickerman that the lodging of the caveat on 6th December amounted to an affirmation, but I am not persuaded by this argument. That instrument was lodged by N.Z.I. Finance in an effort to obtain the priority it was promised under the contract, but it was too late. The position could have been different had it known of the earlier registration that day.

The Defendant made it clear to Mr Beric that it reserved its rights under the s.218 notice if the loan transaction was not duly completed. Accordingly the defaults to which that notice refers are still current - less, of course, whatever amounts have been paid to date.

The Plaintiff has failed to satisfy me that there is a substantial dispute about the existence of the debt. There was a further question raised about the amount, but apart from Mr Beric's bald assertion that he did not agree with the Defendant's calculations, there is no evidence leading me to believe they are incorrect. On the contrary, the figures in its affidavits seem the result of painstaking and accurate calculations. N.Z.I. Finance is therefore a creditor and entitled to present a petition to wind the company up. There is no other reason for the Court to interfere at this stage; questions of the company's solvency and the discretion whether to make a winding-up order will be dealt with at the hearing of the petition in the normal way by the Court, exercising its jurisdiction under the Companies Act. As I have already indicated, I find no suggestion of bad faith or abuse of the Court's procedure in what is essentially an ordinary commercial situation. Telerad's motion for interim injunction must fail, but I will allow a further 14 days to enable it to arrange

payment of the sum now due. At the initial hearing before Thorp J. the Defendant indicated that it would be content not to file any petition until disposal of this motion. On this basis, I dismiss the motion but direct that the order lie in Court for 14 days after the date of this judgment. The Defendant will have costs of $1,500 plus disbursements.

M K Casey J

Solicitors:

C/- Keegan Alexander Tedcastle & Friedlander, Auckland, for Plaintiff
Buddle Weir & Co., Auckland, for Defendant