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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1058/84

1184

BETWEEN DYNASTY RESTAURANT LTD

Plaintiff

AND L.S.M. BRACK

First Defendant

AND SILVERWOODS HOLDINGS LTD

Second Defendant

M 1241/84

BETWEEN DYNASTY RESTAURANT LTD

Plaintiff

AND L.S.M. BRACK

First Defendant

AND OLIPHANT & BELL INVESTMENTS LTD

Second Respondent

Hearing: 26 September 1984

Counsel: Mr Littlewood for plaintiff
Mr R.S. Chambers for first defendant
Mr G. Hubble for second defendant

Judgment: 27 September 1984

(ORAL) JUDGMENT OF HILLYER J

There are before the Court two motions brought by Dynasty

Restaurants Ltd (Dynasty). One a motion for an order that a caveat should not lapse brought against Leonardus Stanislaus Maria Brack (Mr Brack) and Oliphant & Bell Investment Ltd (Oliphant & Bell), the other a motion for an interim injunction brought against Mr Brack and against Silverwood Holdings Ltd (Silverwoods).

In a decision that I gave on 1 August 1984 under No. M82/84 in the Whangarei Registry In the matter of an application by Prunella Ann Dick. I set out my view that the principles applicable to the right to an undertaking as to damages on a motion for an order that a caveat should not lapse were different from those applicable to interim injunctions. Apart from that however, the principles applicable to both types of motion are similar.

That was recognised as being the situation in the case of Eng Mee Yong v Letchumanam (1980) AC 311. At P.377 Lord Diplock delivering the decision of the House of Lords said:

> "Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any dispostion of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in section 327 (the equivalent of s.143 of the Land Transfer Act which provides for the Court

> removing a caveat) it is provided that 'the court ... may make such order on the application as it may think just." The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability' a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed"; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried; American Cyanamid Co. v Ethicon Ltd (1975) AC 396.
>
> This is the nature of the onus that lies upon the caveator in an application by the caveatee under S.327 for removal of a caveat; he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party."

In each motion therefore, the plaintiff or the applicant in the motions before me, must establish that there is a serious question to be tried, and that the balance of convenience favours the granting of an injunction or the extension of the caveat.

I therefore deal with both motions together. They were heard yesterday before me, and although the court had been advised that they would take an hour, they took very much longer than that. We started shortly after 10 am, but did not finish until just before 5 pm; a very inaccurate estimate of the length of time that the matters would take. It was too late at that time to deliver an

immediate judgment, but for the reasons that will appear, it is necessary for me to give this judgment this morning, although it will result in other counsel who have had matters set down for hearing, being kept waiting.

The plaintiff is a company which carries on a restaurant business in premises leased in Customs Street, Auckland. These premises are held by the first defendant, Mr Brack, as head lessee from the Auckland Harbour Board, and Dynasty has been in the premises with different head tenants since 1970. On 28 August 1974 it was granted a further lease for a period of 10 years with a right of renewal for a further 5 years. The existing lease therefore was due to expire on 30 September of this year, but the right of renewal would have given Dynasty a further term until 30 September 1989. Mr Brack and his wife purchased the head lease in May 1980 and they similarly recognised Dynasty's rights down to the present time.

In about February of this year, the manager of Dynasty Mr Hong Lai, entered into negotiations with Mr Brack for a new lease for as long a term as he could get. He wanted a term of 20 years, and that was agreed to in principle by Mr Brack. Mr Brack, however, wanted a premium of $5000 and an annual rental of $28,000 in lieu of the present rent of $11,832 per annum. Mr Lai on behalf of Dynasty agreed to these amounts. At that time the Rent Freeze

Regulations, 1983 were in force, and it was recognised that there might not be power to increase the rent to that extent.

Negotiations carried on, and the Rent Limitation Regulations were passed on 1 February 1984 to take effect from 1 April of this year. Those regulations were recognised by the parties as affecting the situation, but they were of the view as is evidenced by an exchange of letters between the solicitors, that the regulations did not prevent the payment of a goodwill sum of $5000, and a further sum of $20,000 as consideration for the granting of the renewed lease. Negotiations proceeded between the parties, with Mr Brack insisting on the payment of the premium that had been specified. That was, it had been suggested, to be paid by amounts of an immediate sum of $5000, and monthly payments of $1344.33 between April and October 1984 and $999.33 from October 1984 to October 1985.

Negotiations were still continuing when on 11 April Mr Brack telephoned Mr Lai. He said he was going overseas the following week, and that if the money was not paid before his departure, the whole deal was off. Mr Hong Lai therefore, when Mr Brack called at the restaurant that same evening, paid him a cheque for $6344.33, being the $5000 premium as demanded, plus he said, the $1344.33 being the first month's rent differential. It does seem possible, or indeed even likely however, that that amount

was the payment that had been contemplated in the correspondence between the parties as being the instalment of goodwill previously mentioned.

Following that payment, the agreement was signed by both parties. This agreement had been written out by Mr Hong Lai and is as follows:

> "15.3.84
>
> This serves to record an agreement made this 15th day of March 1984 between L. Brack, the landlord of Auckland on one part and Dynasty Restaurant Ltd, the tenant a registered company of Auckland on the other part. The agreed terms between the landlord and the tenant are as follows :
>
> 1. L. Brack - the landlord will give a new lease to Dynasty Restaurant Ltd for a term of (20) twenty years from 1 April 1984 with an initial rental of $28,000 per annum for the first three and a half years, thereafter to be reviewed every two years.
>
> 2. The new lease as mentioned in 1. above will include terms where the tenant will pay a proportion of rates, a proportion of fire insurance apportioned on an area basis, a proportion of ground rental apportioned on an area basis, but no other service or maintenance charge is to be paid by the tenant.
>
> 3. The existing lease between the landlord and tenant is to be cancelled simultaneously with the execution of the new lease.
>
> 4. The new lease apart from the above agreed terms will contain normal lease agreement terms as in present day use.
>
> Signed by L. Brack as landlord 'L. Brack'
> Signed by Dynasty Restaurant Ltd
> as tenant per secretary H. Lai 'H. Lai'"

This document obviously contemplated a formal lease being drawn up by solicitors for both parties and equally

clearly is a document drawn by commercial men with no legal training. As such the principle is that the court will seek to give what has been called "business efficacy" to the document. There are, as will appear, a number of problems relating to it.

Following the signing of that document on 11 April, negotiations proceeded between the parties. I should draw attention to the fact that the document is dated 15 March 1984. That was a date deliberately inserted by the parties as being the date on which they entered into the agreement, which was recorded by the written document I have set out.

Negotiations were proceeding between the parties in a somewhat leisurely fashion, and they were engaged through their solicitors in drawing up the formal lease that was contemplated, when on 30 August 1984 Mr Lai received a letter from a firm of solicitors saying that they were acting for Silverwoods, with whom Mr Brack had entered into an agreement to purchase the building.

Further negotiations took place but it became apparent that Silverwoods were not as prepared as Mr Brack had been to grant the new lease, and indeed suggestions were made that instead of the lease being for 20 years, there should be some term inserted whereby if the building was to be demolished the lease would come to an end. This did not

appeal to Dynasty, and the caveat, the subject of one of the motions, was lodged on behalf of Dynasty to protect the alleged interest that they had pursuant to the agreement entered into on 11 April 1984.

Time went on and it became obvious that it was the intention of Mr Brack to conclude his contract with Silverwoods. A mortgage was presented for registration by Oliphant & Bell which had the effect of causing the District Land Registrar to send out a notice to Dynasty as caveator, requiring Dynasty to obtain an order in terms of the motion that has been filed in the court, otherwise the caveat would lapse. In those circumstances the two motions were filed, and as I said were heard before me yesterday.

On behalf of Mr Brack and Silverwoods, Mr Chambers has put forward a number of reasons why the caveat should be permitted to lapse and the injunction should not be granted. His first and he opined most powerful point, was that the agreement to lease was illegal. He pointed to the Rent Limitation Regulations, 1984, and he said that the agreement had been entered into in breach of those regulations. The rent under the new lease was greatly in excess of the rent that was permitted under the regulations, and he pointed to the Economic Stabilisation Act, Ss 2 and 18 and said that under that Act also the agreement was illegal. He submitted that the effect of

entering into the agreement was that the applicant was even liable to imprisonment. I assume that he meant the manager of Dynasty, but it is curious to note that the pursuit of that argument logically would mean that his own client too would go to jail. He said however, that the payment of $5000 and the increased rent was illegal; that the whole transaction was a flagrant attempt to act contrary to the regulations, and as such should not be enforced by the court. He cheerfully admitted that his argument was uncluttered by merits, but nevertheless said that the court should not enforce such an agreement.

The Rent Limitation Regulations provided that no rent for any controlled property should be recoverable, that a tenant could recover any excess rent paid, that it would be an offence to determine the tenancy if a tenant refused to pay rent demanded in excess of the regulations, and in regulation 24 that no person should enter into any transaction purporting to contravene the provisions of the regulations. It does appear that both firms of solicitors were at one stage of the opinion that the regulations did not operate to prevent the payment of a premium in consideration of the lease being renewed. Schemes were being discussed of the nature of the lease being given to a dummy company at a rent which was in accordance with the Rent Limitation Regulations, but that dummy company would then assign, for a substantial consideration, the lease to Dynasty, there being, it was

thought, no prohibition on the payment of a consideration for the assignment of a lease.

It may be that there was some justification for the solicitors having this belief, but on 2 April 1984 the Rent Limitation Regulations, 1984 Amendment No.1 was passed. That provided that it would be an offence for a landlord to stipulate or demand from any outgoing or incoming tenant in consideration of the renewal of the tenancy of the controlled property, any premium in addition to the rent.

It may be that the passing of that regulation demonstrates that until that time it was not an offence, but it is to be noted that the regulation merely makes it an offence for the landlord. It does not make it an offence for the tenant to pay the premium. I appreciate that there may be arguments that in paying the premium the tenant was a party within the well known provisions of S.66 of the Crimes Act, in that the tenant was aiding and abetting; if not counselling and procuring, the offence. But in my view there would be a substantial argument on that point, and that the decision that would be given on such an argument is by no means clear. In other words, what I am saying is that if all the parties did was make a payment which might at some stage have been a premium, or paid in such a way that no offence was committed, there is a serious question to be argued within the meaning of the

American Cyanamid case Fellowes & Fisher and the other well known cases that deal with interim injunctions.

My attention was also drawn by Mr Littlewood on behalf of Dynasty, to the provisions of the Illegal Contracts Act 1970, whereby under S.7 the court may grant to any party to an illegal contract relief by way of variation or validation of the contract in whole or in part. Again, it is not a matter that I should attempt to determine in these proceedings, but in my view it is clear that it is at least possible that a court would grant relief under the Illegal Contracts Act, and that therefore there is a serious question to be argued as to whether the agreement recorded on 11 April which purports to refer to an agreement made on 15 March of this year, is a valid contract.

Mr Chambers also suggested that it was possible that the contract was illegal because it was an unauthorised subdivision under the Local Government Act 1974, and that therefore the contract should not be enforced. He put this forward on the basis that since the contract was for a term of 20 years, and there was less than that period left to run in the head lease, the contract was in effect an assignment, and S.271 refers to assignments and makes them illegal in certain circumstances.

The terms of S.307 however, of the Local Government Act

seem to be an answer to that submission in that under that section any agreement of that nature would be deemed to be subject to a condition that a plan be deposited, and in any event I have some doubts as will emerge, whether this was in fact an assignment.

It may also be that relief would be granted here under the Illegal Contracts Act. Again, I am of the view that in relation to that point there would be a serious question to be argued.

Mr Chambers then went on to submit that the agreement was unenforcable because since it purported to grant a term of 20 years, it was required to be in writing, and that there was no adequate description of the matter of the agreement, that is to say the premises. In the absence of a description, he said, of the subject matter, the memorandum was not a sufficient memorandum or note of the agreement. I am not prepared to accept this argument. In my view, it is perfectly clear from the document that the parties were talking about the premises that were occupied by the restaurant. There was reference to the previous lease, further there would at the very least be part performance of the contract, in that Dynasty occupied the premises and paid rent under the new agreement for a number of months, as is alleged in paragraph 4 of the statement of claim.

Mr Chambers then submitted that the head lease of Mr Brack from the Harbour Board would expire in 1990, and that the sublease provided for a 20 year term, which would not expire until the year 2004. He pointed out quite accurately, that a sublease must be for a lesser, shorter term than the head lease, otherwise it would operate as an assignment of the head lease. He said there is no evidence of the head lessor's consent to such an assignment, and that the caveat referred to a sublease and not to an assignment.

It would however, in my view, be absurd to suggest that the holder of a Harbour Board lease with a perpetual right of renewal would not renew his head lease as it became due. To give up such an advantage would be foolish and unthinkable. Clearly therefore Mr Brack, or whoever is going to hold the head lease, would go on holding it after the year 1990, because he would have given notice of renewal. It may be that when the solicitors came to draw up the lease that would have been recognised by a provision that the sublease was to be for the balance of the term of the head lease, and for such further period of any renewed head lease as would give the total period of 20 years. Whether this would be an implied term or whether it was a term that was in the contemplation of the parties, is not important. That last suggestion may be the case, from a perusal of the letters exchanged between the solicitors, but it does not in my view matter. Again

the court will strive to give business efficacy to this document, and it does seem to me that the intentions of the parties were perfectly clear. At the very least there is a serious question to be argued on that point.

Mr Chambers then submitted that the caveat was not supported by a document. He said that the caveat referred to a written agreement to sublease, and that the document I have mentioned, entered into on 11 April, purported to be an agreement to lease, not a sublease. He said that the caveat referred to an agreement made on 15 March, and the only agreement known of was an agreement made on 11 April. He said that the caveat related to an agreement to sublease the land described in the schedule, whereas the agreement produced did not refer to any land at all.

These arguments, in my view, not only have no merit, but they cannot stand, because it is clear that the purpose of the provision in the Act requiring the caveat to set out the basis of the claim, is so that proper notice will be given to the proprietor of the land. Cases that were cited to me by Mr Chambers in support of this proposition, Peyche's Caveat (1954) NZLR 285 and NZ Mortgage Guarantee Co v Pye (1979) 2 NZLR 188, were cases in which there was a real doubt as to the basis on which the caveator was claiming. Here in my view, there has been substantial compliance with the Act, and there would be no doubt in

the registered proprietor's mind as to what document was being referred to.

The only evidence as to the lodging of the caveat, Mr Chambers submitted, was hearsay, and there was no evidence of any kind that the caveat had been effectively lodged. Hearsay of course is permitted on an interlocutory application, and in my view, a person may give evidence of what his solicitor has done on his behalf. In any event exhibit I to Mr Lai's affidavit, which is the notice given by the Registrar requiring the caveator to produce an order within 28 days that the caveat should not lapse, refers specifically to the caveat and is clear evidence that the caveat had been lodged.

Mr Chambers then went on to submit that the caveator's rights were not affected, and that in those circumstances it was not necessary to leave the caveat on or to grant an interim injunction. He said that Dynasty would be quite happy to permit Oliphant & Bell to register a mortgage, and would lift the caveat for that purpose on condition of course, that it was reimposed after the mortgage had been registered. It does seem possible that the mortgage was registered as a way of at least in part, bringing the matter to a head and requiring Dynasty to justify the caveat.

To the same effect to some extent, were the submissions made by Mr Hubble who appeared for Silverwoods. Mr Hubble submitted that there was no need to grant an injunction against Silverwoods. He said that an injunction against Mr Brack would give all the relief that was necessary, and that it might inhibit Silverwoods in any action it might wish to take against Mr Brack, if an injunction were granted against it.

At the moment, Dynasty says it has an enforceable contract with Mr Brack. Even if Silverwoods have notice of Dynasty's rights under the agreement entered into on 11 April, it may be that Dynasty's rights against Silverwoods would not be exactly the same as their rights against Mr Brack. To rely upon an allegation of fraud against a third party which may or may not be successful, is a somewhat different proposition from relying on a written contract with the existing owner of the premises. An indication of the possible difficulties that may arise was given when during the course of the argument it was suggested to Mr Hubble that Silverwoods might be prepared to accept title, and complete the purchase, provided that it agreed that Dynasty would have against it the same rights as Dynasty had against Mr Brack. That suggestion was not acceptable.

In my view that is an indication that there is a difference between the rights that Dynasty may have at the

present time against Mr Brack, and the rights it may have against Silverwoods if the purchase was completed. It does seem necessary for the matter to be clarified before the agreement for sale between Mr Brack and Silverwoods is completed.

Mr Chambers made other submissions which were largely based upon inaccuracies, or even inelegancies of pleadings. It is the case that some criticism could be levelled at the pleadings which have been filed. It is however, equally the case that when documents have to be prepared in a hurry to meet an emergency of this nature, not everything that would be thought of in a more leisurely situation is covered in the documents. They do, however in my view, give sufficient notice of what Dynasty's case is, and I do not believe that the points of pleading that have been put forward by Mr Chambers were sufficient to prejudice him in his argument, or to prejudice Mr Brack or Oliphant & Bell, or Silverwoods.

It is clear that terms will have to be imposed which may not be in accordance with those sought in the motion, but I can deal with that at a later stage. I do not consider however, that there has been prejudice to the defendants in that regard.

It appears therefore, on what I have said, that in my view there is a serious question to be argued, and in those

circumstances I go on to consider the other principles laid down in American Cyanamid & Ethicon Ltd (1975) AC 396, Eng Mee Yong's case (supra) and Consolidated Traders Ltd v Downes 1981 2 NZLR.247 where our Court of Appeal approved the principles laid down in the American Cyanamid case. I must therefore consider whether the balance of convenience favours the granting of an interlocutory injunction, or ordering that the caveat should not lapse.

The first question is whether damages would be an adequate remedy. It may be that substantial loss will be suffered if the contract for sale does not proceed. There has, however, been filed not only an undertaking as to damages on behalf of the plaintiff company, but an affidavit by Mr Hong Lai who deposes that he has assets of the order of $200,000, and that he is prepared to stand behind the guarantee given by Dynasty. In those circumstances I am of the view that damages would be an adequate remedy if it appears that the injunction I propose to grant should not have been granted.

Equally, although as I have said, the same principles in my view do not apply where a caveat is ordered not to lapse, there would be on the part of Dynasty, backed by Mr Hong Lai's guarantee, the ability to meet damages in that case. If however, the sale proceeds and it appears that in that way Dynasty's ability to obtain a fresh lease has been prejudiced, it would be very difficult in my view,

for a court to assess what damages it may have suffered by being confined to a 5 year lease instead of a 20 year lease.

Further, the status quo is that at the moment Dynasty is occupying the premises. Mr Brack is the landlord of Dynasty. Mr Brack is the head lessee from the Harbour Board and the status quo would be maintained if an injunction should be granted.

I therefore consider the terms of the injunction, and any conditions that should be imposed on the order that the caveat should not lapse. The amended motion for the injunction asked in the alternative for an order restraining Mr Brack from transferring the property, other than by granting a registerable assignment. That referred to the suggestion that since the head lease was for a shorter period than the proposed sublease, what in effect was being obtained by Dynasty was the assignment of the head lease. That of course is quite wrong. It ignores the fact that the lessee has a right of renewal in perpetuity, and is not therefore passing to Dynasty the whole of its rights under the head lease. It is only in those circumstances that what purports to be a sublease will in fact amount to an assignment of a head lease.

I therefore make an order in terms of clause 1 of the amended notice of motion, that pending the further order

of the court, the first defendant be restrained from transferring or otherwise dealing with the property occupied by Dynasty, without first granting to Dynasty a lease giving effect to the agreement entered into on 11 April 1984. Such an agreement, of course would have to comply with the provisions of the Rent Limitation Regulations, 1984, for the period that they apply.

I further order that Silverwoods be restrained from purchasing the property until such lease as I have indicated should be granted, has been granted by the first defendant.

I reserve leave specifically to either party, to bring the matter back before the court if the plaintiff does not proceed with all diligence with the pursuit of the writ of summons that has been filed, because of course this order that I have made is an interim order and is intended to operate only until the substantive action has been heard, and the serious question of law that I have referred to is determined.

I have not determined that serious question of law; all I have done is say that the matter should be held as it is until the writ is heard. If there is delay on the part of Dynasty in proceeding with that writ, the matter can be brought back before the court and further dealt with. Equally, an order will be made under the motion that the

caveat does not lapse, with the further condition that the writ that has been filed be dealt with and proceeded with by the plaintiff with no delay. If there is delay, then again Mr Brack and Oliphant & Bell can move the court for further orders.

I further order that if it is desired to register the mortgage from Oliphant & Bell, they be permitted to do so, and that the offer made by the plaintiff that the caveat be lifted to enable the mortgage to be registered, be given effect to.

Costs will be reserved.

P.G. Hillyer J

Solicitors
Neumegen & Co for Plaintiff
T.J. Doole & Partners for first defendant
Holmden Horrocks & Co for Silverwood Holdings Ltd