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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CP. /86

914

UNDER the Declaratory Judgments Act 1908 and the Property Law Act 1952

IN THE MATTER of an application to restrain the sale of mortgaged land through the Registrar of the High Court at Wanganui

BETWEEN: EARLSTON FARM LIMITED a duly incorporated company having its registered office at Wanganui and carrying on business as a farmer

Plaintiff

A N D: TRUSTEEBANK WANGANUI a body corporate established under the Trustee Banks Act 1983

First Defendant

A N D: THE REGISTRAR OF THE HIGH COURT AT WANGANUI

Second Defendant

Hearing: 7 July 1986 (In Wellington)

Counsel: J.R. Wild for Plaintiff
D.H. Brown for First Defendant

Judgment: 7 July 1986

JUDGMENT OF JEFFRIES J.

Mr Wild appears on behalf of the plaintiff referred to in the intitulement and makes an oral application pursuant to R.245(a) of the High Court Rules for an interim injunction restraining the defendants from proceeding with the mortgagee sale, about to be described, until further order of this court. It is an oral application because it has come about in circumstances of urgency which I will outline in a moment. Further, it concerns a farmland within the Wanganui Registry and the urgency just mentioned required that it be heard in Wellington. However, Mr Wild acting as counsel for Hunterville solicitors, has assisted in placing before the court draft papers and an affidavit of John Alexander Chisholm, who is one of the directors and responsible for the plaintiff company. He also has had discussions with the solicitors acting for the first defendant, and Mr D.H. Brown of Wanganui has at extremely short notice, and I am sure some inconvenience to himself, appeared before me in chambers on Mr Wild's oral application.

The facts are as follows, and they are taken from the papers just mentioned and counsel's submissions. The plaintiff is a registered proprietor of two farm properties situated in the Hunterville District. The first defendant holds the first mortgage over the property in the sum of $375,000. The plaintiff company has been in serious financial difficulties, I am told, for up to 18 months to two years, and many discussions and negotiations have taken place in that period, so it cannot be said under any circumstances that the action taken by the first defendant of issuing a s.92 notice under the Property Law Act was precipitate. It is common ground that plaintiff company is in arrears in payment of interest and rates, and it is further common ground that there are no objectionable matters

concerning the legal steps taken to effect a mortgagee sale.

On 5 June 1986 the Registrar of the Wanganui High Court made orders for advertisement in several newspapers for a mortgagee's sale. He certainly, by his order, provided for wide coverage by advertisement of the sale of the property, and one of the newspapers nominated was the Dominion. An advertisement appeared in the Dominion of 21 June 1986 advertising the two blocks of land for sale, but in the context of the second block the advertisement that appeared in the Dominion stated that the 54.0805 hectares of flat land in rolling hills was capable of carrying 100 stock units. This clearly was a misdescription because the Registrar's approved advertisement contained a number of 1,000 stock units, not 100. Mr Brown informed the court that the error clearly was that of the Dominion newspaper for other advertisements had the correct stock figure in at 1,000.

It is on the basis of the error just mentioned that an application for an injunction is made to prevent the sale by auction which is due to take place at Marton on Wednesday 9 July 1986, that is the day after tomorrow, at 2.00 p.m. Mr Brown informs me that it was only on Friday 4 July 1986 that the error contained in the Dominion was brought to his client bank's notice, and immediate steps were taken to correct that error. In the Dominion of Saturday 5 July 1986, and this morning 7 July 1986, the figure appears as 1,000 not 100, and in both newspaper advertisements there is an unspecified notice that these advertisements are correcting previous advertisements. I say unspecified for there is no particular indication given to the precise error which was 100 on 21 June 1986, instead of 1,000 stock units.

Mr Wild, in support of his submissions, drew to the court's attention the principles relating to grant of interim injunctions and, in particular, the authority McHugh v Union Bank of Canada [1913] AC 299 PC, where Lord Moulton at 311 says as follows:

> "Their Lordships agree with the judgment of the Supreme Court of Canada on this point. It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold."

He also drew the court's attention to the fairly recent case in the Court of Appeal Alexandre v New Zealand Breweries [1974] 1 NZLR 497, and to a recent judgment of mine Dean v Leadenhall Superannuation Nominees Ltd (Wellington Registry CP. 133/86, Unreported, Judgment 22 April 1986), which contains some observations in support of Mr Wild's argument on the facts. Briefly Mr Wild submitted that the mis-description was a serious one which would give prospective buyers and other interested persons reading the incorrect advertisement, the impression that one of the farms was either undeveloped or either run-down and, therefore, an unattractive farming proposal. He further submitted that the advertisement, which was an error, appeared mid-June which was the vital time when prospective buyers would be making arrangements to finance a purchase at an auction on

9 July, and referred to certain dicta contained in the Dean v Leadenhall case in support of that submission. He also made the submission, which I think has some validity, that of the newspapers which contained the advertisement the most important one was the Dominion, but nevertheless the Wanganui papers, I am sure, would cover the particular District.

Mr Brown on behalf of the defendant stated that the misdescription was not the fault of the defendant bank, or its solicitors. He did not know of the error until approached by Mr Wild on behalf of the plaintiff company last Friday 4 July 1986, and then took the steps already mentioned earlier in this judgment. Mr Brown drew to the court's attention that the advertisement first appeared on 21 June and it must be assumed the plaintiff company was aware of the error and yet took no step until 4 July. The point is covered to an extent in Mr Chisholm's affidavit in which he said he was unable to take concrete steps, in effect, until he had some support, and one assumes financial backing from the Federated Farmers. I must say that the failure of the plaintiff company, or Mr Chisholm, to take action did give me pause on the balance of convenience issue, but I am satisfied that the eight or nine working days which elapsed is capable partly of the explanation he has given in regard to Federated Farmers, and partly because it must be a very distressing time for him, particularly in view of the parlous state of his finances which may have delayed prompt action. Courts are capable of taking judicial notice of the state of some farmers in the present economic environment, and under that heading I find the delay at least excusable.

In a formal way I think if this matter ultimately went to trial there would be an arguable case. Mr Brown, in his submissions, referred to the mistake as an omission, but I think it is more correctly stated as a misdescription which is itself of higher potential for being misleading than a simple omission. It may be, as Mr Brown said, that the advertisements read in the totality would alert a competent farmer that land of that nature would be capable of carrying a vastly greater number of stock units than 100. I think the answer to that submission is that an advertisement is basically an enticement to prospective buyers and no onus or duty such as is being put on the notice, should ever be placed upon them. A further matter is that the correction, which has earlier been referred to in this judgment, was an unspecified one and I have already mentioned that. It might have been different if the actual error had publicly been drawn to the notice of prospective buyers, but in fact it was not, and in the normal course of events people would not search with a spider's eye through such an advertisement to track down the actual error.

Lastly, weighing with the court in the balance of convenience is the ungraspable issue of how much such an error might affect prospective purchasers. The court states plainly it has no possible way of knowing, but in such circumstances reaches the conclusion that the justice of the case rests more heavily on the plaintiff's side that every possible avenue should be opened when a situation as desperate as that which I have described earlier, has been reached.

Therefore, for the foregoing reasons I allow the urgent application for the interim injunction and order

that the defendants be restrained from proceeding with the sale of the mortgaged farmland on Wednesday 9 July 1986 at 2.00 p.m., until the Registrar has fixed a new timetable for advertising. Leave is reserved to the parties to return to court.

Costs reserved.

Solicitors for Plaintiff: Flack Brown & Co. Hunterville

Solicitors for First Defendant: Horsley Brown & Co., Wanganui