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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

C.P. No.489/87

BETWEEN SIMON LYDALL SAVILL, LUCINDA MARY SAVILL, SKYLINE FINANCE (CHCH) LIMITED, ABIS PROPERTIES LIMITED and SKYLINE FINANCE LIMITED

Plaintiffs

A N D NZI FINANCE LIMITED, NZI SECURITIES LIMITED and NZI INTERNATIONAL ACCEPTANCES LIMITED and NZI BANK LIMITED

Defendants

Hearing: 18 December 1987

Counsel: J.F. Burn for Plaintiffs
T.C. Weston for Defendants

Judgment: 18 December 1987

ORAL JUDGMENT OF TIPPING, J.

There is before the Court an application for an interim injunction in proceedings in which the Plaintiffs are Mr S.L. Savill, his wife and various companies in which they have interests. I shall refer to the Plaintiffs globally for convenience as Mr Savill.

The Defendants are NZI Finance Ltd and a number of other companies with which that company is associated and I shall refer to the Defendants for convenience simply as NZI.

Mr Savill as Plaintiff, seeks to restrain

NZI from taking any steps under certain Property Law Act notices which have been given in respect of mortgages which Mr Savill has with NZI.

The relevant notices were given on 4 December 1987. There were some earlier ones which are not directly material to the issues which arise in this case. The NZI Property Law Act notices expire on 15 January 1988 and NZI will be entitled prima facie to exercise its securities after that date.

The relief sought by Mr Savill is that NZI be restrained from taking any such steps until a date one week after judgment is given by this Court in proceedings between Mr Savill and what I will call for short the Chase Companies.

Those proceedings are for specific performance of a contract entered into earlier in 1987. The transaction involved there is a complex one but it is sufficient for present purposes to say that in those proceedings Mr Savill, as he is seeking specific performance, must stand ready to transfer to the Chase Companies some of the properties over which NZI holds the securities, which are in issue in the matter presently before me.

After an application to this Court, which was coincidentally heard by myself, an exigency fixture was ordered for the litigation between Savill and Chase on 15 February 1988.

In essence what Savill now seeks is an order restraining NZI from exercising its rights until one week after judgment is given in his case against Chase.

Savill's statement of claim pleads three causes of action which can be called for short, implied term, joint venture, and oppression under the Credit Contracts Act 1981.

The implied term allegation is pleaded in the following way:-

> "that the Defendants [that is NZI] by relying for themselves upon the documents of contract, [that is the Chase contract documents] and by encouraging the Plaintiffs [that is Savill] to rely upon such documents as demonstrating a concluded contract with Chase, have acted so as to imply a term in the said transaction of borrowing that they would postpone any recovery against the Plaintiffs [that is Savill] until the latter have enforced the said contract [that is the Chase contract]."

Mr Burn referred me to the details of one of the transactions which Mr Savill has with NZI and which are relevant to this case. They are embodied in a letter dated 20 May 1986, a copy of which is exhibited to Mr Savill's affidavit.

On page 2 there are a number of references to the fact that the funds to repay the borrowing in that transaction, which was a substantial one of three million New Zealand dollars, were to come from the anticipated Chase settlement.

The implied term here pleaded is put by the Plaintiffs as being on the officious bystander basis rather than being necessary to give business efficacy to the transaction.

I am not persuaded that the Plaintiffs have demonstrated in the material before me an arguable case for an implied term as they plead.

Exigencies of time do not permit me to go into the matter in great detail, but one of the points which I

think makes the implied term argument difficult, if not impossible, is that the contention of the Plaintiffs is in direct contradiction, as Mr Burn accepted, of some of the express terms of the transaction.

Mr Burn's submission was that in the particular circumstances of this case there could be the implication of a term in direct contradiction of certain express terms.

Without wishing to go into the point as a matter of principle, I am not persuaded that is a valid proposition on the facts of this case.

Mr Burn also referred me to paragraph 6.4 of the affidavit of Timothy Simon Corcoran on behalf of NZI where Mr Corcoran says:-

> "NZI was prepared to lend finance to some or all of the Plaintiffs upon a short term basis only. The Plaintiffs did not have an ability to service the loan from a cashflow point of view on a long term basis. NZI saw the Chase contract as a means of ensuring it would be repaid."

That seems to me to be a long step from suggesting that there was an implied term in this contract that NZI would not exercise its rights until such time as the Savills had enforced the Chase contract.

As I have said, I am not persuaded that the Plaintiffs have an arguable case for an implied term.

The next plea, the joint venture plea, is put this way in the statement of claim. The Plaintiffs say:-

> "That by such conduct the Defendants have entered upon a joint venture with the Plaintffs in respect of the borrowing, the enforcement of the contract with Chase, and the repayment of such borrowing."

Quite how one could have a joint venture in respect of the repayment of the borrowing is a little hard to see but I do not base my view on that narrow ground.

Mr Burn relied on the same points as he had in relation to an implied term when contending that the Plaintiffs had demonstrated an arguable case to the effect that both parties had in effect formed a joint venture.

It is sufficient for present purposes for me to say that I am not persuaded that the evidence comes anywhere near establishing that there was a joint venture. I do not consider that an arguable case is made out in respect of this aspect of the matter.

The third head of the Plaintiffs' claim is pleaded in this way:-

> "The Plaintiffs claim that the Court will allow them relief under Section 10 of the Credit Contracts Act on the basis that the intended enforcement of the securities against them is oppressive, taking into account the said conduct of the Defendants at the time of borrowing."

I have been referred to s.10 and to the definition of the word oppressive in s.9. I do not propose to read from s.10 but I should note here the statutory definition of the term oppressive as meaning: "oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice."

Mr Burn's essential contention for the Plaintiffs here was that even if there were no implied term or joint venture it was clear from the facts that the borrowing from NZI was closely tied to the Chase transaction and that it would be unreasonable and oppressive for the Defendant NZI to

enforce their rights now when the Plaintiff's claim against Chase is due to be heard early in the New Year.

Mr Burn reinforced that essential submission by a point which seems to me to be one of some force, namely that to move now in respect of certain of the properties over which NZI has its security would run the risk of destroying the Plaintiffs right of action against Chase, which right of action was inherent in the borrowing between Savill and NZI in the first place.

That is the one aspect of the matter which troubles me and as I shall indicate in a little while, seems to me to be the one area where the Plaintiffs are entitled to limited relief.

I am of the view from a perusal of the evidence and having heard counsels' submissions, that the Plaintiffs do have an arguable case that to sell up those properties which are destined for Chase at this point would be or might be oppressive within the meaning of s.9.

It seems to me against the whole background of this matter that it cannot be said that the Plaintiffs have no arguable case that the exercise of the powers in such a way as to destroy the Plaintiffs chance of getting specific performance against Chase would be unjustly burdensome or in contravention of reasonable standards of commercial practice.

It is inherent in the powers given to a Court under s.10 and the following sections, that a person who has an undoubted legal right may in certain circumstances be regarded as exercising that right oppressively.

I am unable to say, after giving the matter anxious consideration, that the Plaintiff has no arguable case for restraint in this respect, in so far as the Defendants may later wish to take action in relation to the Chase destined properties.

Mr Weston in his helpful submissions referred me to the fact that all those involved in the present matter were commercial people and the buildings concerned were commercial buildings.

It was contended that this was a simple debtor/creditor relationship and to the extent that I have rejected the joint venture and implied term propositions, I accept that the relationship is one of debtor and creditor but that of course does not take away the possibility that relief could be available under the Credit Contracts Act.

Nor have I overlooked Mr Weston's point that the evidence suggests that the Defendants have at the moment no great margin of security.

Mr Weston further contended that the Chase contract and all the matters pertaining to it merely went to NZI having a means of satisfying itself that it was going to get paid and it was not tied into that contract in any greater way than that.

I was referred to the decision of this Court in Italia Holdings v. Lonsdale Holdings [1984] 2 N.Z.L.R. 1 and the unreported decision of Williamson, J. in Grose v. Development Finance Corporation of New Zealand C.P. No.341/86 Christchurch Registry, judgment 23/10/86.

The exigency fixture is due to be heard in mid February. It is scheduled to take about a week and the Judge will almost certainly wish to reserve his decision. The Defendants cannot exercise their securities until 15 January at the earliest, so one is facing a prospect of at least six weeks delay from the day upon which they can exercise their securities and the day until which Savill wishes to have them restrained.

Being mindful of the Defendants' point about its margin of security, rather than granting the restraining order, which I propose to grant, for a time limited, as the Plaintiffs' suggest, I propose to grant the order until the further order of the Court which will be somewhat more flexible from the Defendants point of view. On that basis the balance of convenience clearly favours the Plaintiffs.

I should not however be thought to be encouraging an application to this Court by the Defendants unless they can demonstrate some significant change of circumstances beyond those put before me today or, of course, and this is implicit in the way the Plaintiffs put the matter to me, some significant further delay in resolving the Chase position beyond the end of February.

Mr Weston drew to my attention the case of Parry v. Grace [1981] 2 N.Z.L.R. 273 which establishes that if there is no challenge to the validity of a mortgagee's powers and a mortgagee sale, or some like step is sought to be restrained for other reasons, it is normal to order the mortgagor to pay the money into Court.

I think Mr Burn had a valid point when he said that would largely in present circumstances defeat the whole object of the exercise and I accept the validity of the proposition that where an allegation of arguable case of oppression is made in circumstances such as these the normal rule should not necessarily follow.

I also accept the proposition that when the normal rule was evolved in earlier times the sort of powers which the Court has under the Credit Contracts Act would not have been taken into account because they did not then exist.

In relation to the question of oppression Mr Weston submitted that the Plaintiffs had not established an arguable case. He said that it was not enough for the Plaintiffs to show detriment or potential detriment, which he acknowledged they had shown, but that they must go on to show that the lender, NZI in this case, was actuated by some improper motive.

I am not entirely convinced of that proposition as being valid in law. The definition of oppressive, including as it does the expression unjustly burdensome and the expression in contravention of reasonable standards of commercial practice, suggests to me that it will not always be necessary to demonstrate that the financier is acting for an improper motive.

There can in my judgment be circumstances where oppression within the wide statutory definition can be found without the financier necessarily being fixed with an improper motive.

Mr Burn endeavoured to persuade me that the relief to which his clients were entitled should go beyond restraining NZI a propos the Chase destined properties. He suggested that all the non Chase destined properties, (and I understand there is only one of the properties that is not Chase destined, namely Epworth Chambers) should also be the subject of some restraining order.

I am not persuaded of that. It seems to me that the nub of the matter and the nub of the arguable oppression in this case is in the financier acting in such a way as to completely destroy the Plaintiffs rights in its action for specific performance.

If the Plaintiffs are right, contrary to my views, that there is an implied term or a joint venture or indeed if there is oppression in NZI exercising its powers as regards Epworth Chambers, then the Plaintiffs will have a case to claim damages against NZI should they suffer any loss following NZI's sale of Epworth Chambers.

It is not as if they would be without a remedy and I can see no reason on the balance of convenience or even on the residual matter which is the overall justice of the case, to restrain NZI beyond the point absolutely necessary to protect the Plaintiffs against losing any chance that they might have for specific performance in their action against Chase.

For these reasons which have of necessity been expressed in a rather compressed and no doubt inelegant way, I am of the view that the Court should make and it hereby makes the following orders:-

1. The Defendants and each of them are hereby restrained until the further order of the Court from taking any steps under their mortgages to sell by any means those properties secured to them which are the subject of the Plaintiffs' contract with the Chase Companies.
The precise form of the order, which should I think if possible refer to the properties in question more precisely by legal description, can no doubt be worked out between counsel before it is sealed.
The Registrar is authorised to seal an order in terms of any draft which is lodged with the endorsed approval of both counsel.
I do not imagine that there will be any difficulties in drafting the order but if there are the matter can be referred to me later in the day or early next week.

2. I have heard counsel on the question of costs and having considered what they have said all costs questions of and incidental to the hearing, the appliation and the order made are reserved.

A.C.J.