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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1174/86

UNIVERSITY OF OTAGO
12 AUG 1987
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BETWEEN: LOCKWOOD BUILDINGS LIMITED and INITIAL HOMES LIMITED both duly incorporated companies having their registered offices at Rotorua

Plaintiffs

A N D: GRAEME HAYES LLOYD of Auckland, Company Director

First Defendant

AND JUDITH ANNE LLOYD of Auckland, married woman

Second Defendant

AND STATUS CONSTRUCTION LIMITED a duly incorporated company having its registered office at Kamo, In Liquidation

Third Defendant

AND WILLIAM HENRY COOKE of Whangarei, Chartered Accountant, a n d JOHN VAGUE of Auckland, Chartered Accountant (the joint liquidators of STATUS CONSTRUCTION LIMITED (IN LIQUIDATION))

Fourth Defendants

Hearing: 17 March 1987

Judgment: 24th March 1987

Counsel: J M Priestley and Wiles for Plaintiffs
A W Grove for First Defendant to oppose

JUDGMENT OF HENRY, J.

Application for summary judgment as against the First Defendant (Mr Lloyd). The Plaintiffs (Lockwood) and

the Third Defendant (Status) entered into a franchise agreement bearing date 15 February 1984, relating to Lockwood's business of erection of prefabricated houses. The franchise agreement contains provisions as to payment by Status for the sale to it of building components, payment being due on completion of manufacture plus interest in the event of default. Mr Lloyd is a signatory to the franchise agreement in a capacity which can be described in general terms as a guarantor. Status met some financial difficulties and on or about 5 July 1985 security documents were executed by Status, being a mortgage and a debenture, under both of which Mr Lloyd was again a guarantor. On the same day a further mortgage document was executed by Mr Lloyd and his wife the Second Defendant as mortgagors, under which Status was a guarantor.
Status has now into liquidation and Lockwood now seeks judgment against Mr Lloyd in the sum of $312,044.48 plus interest, that sum representing what is allegedly owing to Lockwood under the franchise agreement. A number of matters are raised by Mr Grove in support of Mr Lloyd's opposition to the application for summary judgment.

The state of the pleadings:

The Statement of Claim appears to rely separately on the four documents referred to as each founding liability - namely, the franchise agreement, the debenture, and the two mortgages. Each is referred to seriatim in the pleadings, and there then follows an allegation that the sum of $312,044.48 is owed by Status. The details given in support of that calculation actually total $317,104.48.

The relevant part of the pleading then contains what is designated paragraph 18 but which is in reality the prayer for relief, and reads :

> "18. PURSUANT to the indemnities given by the First and Third Defendants and pursuant to the security given the Plaintiffs by the First and Second Defendants claim the following relief :-
>
> 1. Judgment against the First, Second and Third Defendants jointly and severally in the sum of $334,077.48.
>
> 2. The costs of and incidental to this action.
>
> 3. Interest on the judgment pursuant to the Judicature Act 1998.
>
> 4. Such other and further relief as This Honourable Court thinks fit."

Reliance being placed on each of the four documents as founding a cause of action, it was incumbent on Lockwood to state those separately and clearly (R.181) and to specify separately the relief sought on each (R.114). The importance of proper pleadings is not to be overlooked, nor is criticism of a pleading merely to be shrugged off (Farrell v Secretary of State for Defence [1980] 1 All ER 173; Tripp v Guest [1984] 1 NZLR 74, 83). However, I would be reluctant to find against Lockwood purely on this ground because I think that overall the intent is clear and there is no confusion as to what is alleged against the Defendants. In addition when analysed, it seems to me that each of the so-called four causes of action has as its base the provisions of the franchise agreement and each appears to be dependent upon establishment of monies owing by Status under that, payment of which is guaranteed separately under each document. Although some possible defences

available under the franchise agreement may not be available in respect of the security documents, Mr Priestley for Lockwood was content if need be to rely on the franchise agreement alone, and I believe the application can be decided on that basis. Therefore, in accordance with R.5, I propose to consider the application on its merits despite non-compliance with the Rules.

A further difficulty occasioned by the pleading and by the affidavit evidence was raised by Mr Grove. The prayer for relief seeks judgment in the sum of $334,074.48. Paragraph 15 of the Statement of Claim alleges a sum of $312,044.48 to be owing, the particulars of which as I have said do not add up to that figure. The affidavit in support avers that the amount owing as at 29 October 1985 was $281,606.39, and annexes statements of account as at 29 October 1985 and as at 21 August 1986. The latter shows the compilation of the figure of $312,044.48 which is the amount for which judgment is now sought in the application. It was submitted that there is no positive assertion that this latter sum is in fact due and owing. Although perhaps not worded as precisely as it should have been (and again this highlights inaccurate drafting and lack of proper attention to the Rules and their importance) I think that there is sufficient identification of the sum now claimed and that there is just a sufficient averment of liability to overcome this objection.

<u>Liability under the franchise agreement</u>:

Reliance is placed on clause 32 of the agreement under which Mr Lloyd guaranteed and undertook that he would -

> "... abide by and observe or cause to be observed, all the terms covenants and conditions of the Agreement whether express or implied as a principal party thereto and ... be personally responsible to Lockwood and Initial if they are breached by the Contractor..."

Mr Grove submitted that this was no more than an undertaking to be responsible for breach by Status of its obligations, and that any claim against Mr Lloyd could not be in debt but only for damages resulting to Lockwood for any breach by Status. I do not think clause 32 is capable of that construction. There is an express undertaking to observe all covenants as a principal party, which must create a direct obligation on the guarantor to make payment of monies due under the agreement. There is also a reference in the body of the clause to "liability as a surety", and when looked at in context I think it clear that a direct obligation for responsibility of payment of monies due is spelt out.

Variation of the Franchise Agreement:

It was next submitted that by reason of an amendment to clause 4 the whole agreement became ineffective as the amendment rendered it an agreement to agree, which was never thereafter brought to conclusion. Clause 4 relates to the area of operation available to Status as a franchise holder, and following execution of the agreement a further provision to that clause was added, by agreement of all parties. It reads:

> "Clause 4:
> This clause is subject to mutual agreement to review due to the area involved as a resident occupiers living outside the area alloted. 3 mths from date of signing."

What the provision means is that the parties agree to review clause 4 after three months. It does not mean the parties have failed to reach agreement on a term which has still to be settled, but only that they will review the term already agreed upon. Whether or not the review envisaged has been carried out is not now relevant.

The Credit Contracts Act 1981:

Two issues are raised - the right to re-open under s.10 and non-disclosure as required by s.16 and s.20. In response, Mr Priestley submitted that the franchise agreement was not a credit contract within the meaning of the Act. Section 3(1) (a) is a definition provision, which brings in as a credit contract a contract "under which a person agrees to provide money's worth in consideration of a promise by another person to pay, in the future and in respect of the provision, a sum or sums of money exceeding in aggregate the amount of the money's worth".

Under this agreement, Status promises to pay in the future the purchase price of the components provided by Lockwood ("money's worth") on completion of manufacture and a further sum by way of interest in default of payment on the due date. On the clear construction of s.3 (1) (a) as it stands alone, such an agreement would seem to me to come squarely within that definition. As the purpose of the legislation is to bring under its purview contracts which have an underlying although perhaps hidden element of credit, such a definition was necessary.

Section 3 (3) (b) goes on, by subpara. (ii), to ameliorate the wide effect s.3 (1) (a) would otherwise have by providing that for definition purposes the moneys promised to be paid shall not include "any reasonable amount payable as a result of a default under the contract by the promisor". The default interest payable under the agreement is stipulated as three times the bank rate of the Bank of New Zealand, but not less than 24%. Prima facie such an interest charge, payable immediately upon default on a daily basis and amounting possibly to 60% or more, is not reasonable. Therefore it is arguable that this is a credit contract, liable for re-opening under s.10 as containing an oppressive term. Mr Priestley submitted next that regardless of that, re-opening could not be at the suit of Mr Lloyd in his capacity as guarantor, and he placed reliance on a decision of Wylie J. in UDC Finance Limited v Lloyd & Anor (CP.297/86, Auckland Registry, 10 September 1986). In that case it was held that the disclosure provisions of the Act did not apply to a guarantor, but the judgment did not deal with the present issue as to re-opening. Section 12 gives the right to seek a re-opening to any party to the contract; "party" is defined in s.2 and includes a guarantor. Mr Lloyd therefore in my view has the right to seek to re-open by virtue of that definition, and probably also by virtue of having been constituted a principal party to the agreement under clause 32.

The right to seek a re-opening is however not sufficient to defeat the present application. There must be some reasonable prospect that relief will be afforded, otherwise the absence of a defence remains.

The only complaint as to oppressiveness, and the only ground proffered as affording relief, is the default interest provision. It is prima facie unreasonably high, but in fact the interest actually charged and now sought to be recovered is 24% or less (apart from a calculation at 25.5% for one period), and I can see no reasonable prospect of that being held to be oppressive or a ground for granting relief under this agreement. Therefore in my judgment this allegation does not provide an arguable defence.

On the question of non-disclosure, Mr Lloyd has asserted merely that "no disclosures have been made". His affidavit is silent as to what provisions have not been met, and Mr Grove could do no more than point to the bare assertion. I think that is inadequate in the circumstances, and some positive assertion of a particular deficiency is required. Accordingly, an arguable defence based on the Credit Contracts Act 1981 has not been made out.

Variation of the obligations of Status:

In his affidavit in opposition, Mr Lloyd alleges that an arrangement was made and complied with whereby payments would be made by Status of $5000.00 per month, and that no variation of the guarantee or franchise agreement was made. No particulars of the agreement, whether as to date, or with whom it was reached, or how it became operative or was acted upon, have been given. The Lockwood representative, Mrs Coutts, simply deposed to being unaware of the existence of any such concluded arrangement.

I do not think the evidence is nearly sufficient to indicate a defence of variation of the head agreement so as to discharge the guarantor under it. In addition to that, as I have mentioned, clause 32 constitutes Mr Lloyd a principal party and as is common it also expressly provides that "no indulgence, granting of time, waiver, forbearance to sue or any other thing" was to affect liability or operate as a release. It is therefore of no present assistance to Mr Lloyd.

Conclusion on Issue of Liability:

I therefore find that the evidence adduced establishes that Mr Lloyd is liable to Lockwood for the amount presently due to it by Status under the franchise agreement, and I am satisfied that there is no defence to that claim.

Quantum:

The evidence as to the true amount due and owing is unsatisfactory. Contrary to the view I expressed during the course of argument, I think it proper to have regard to the accountant's summary annexed to Mr Lloyd's affidavit, which sets out a calculation showing a sum of $72,100.00 only as being due. Mrs Coutts, the representative for Lockwood, exhibited to her affidavit schedules referred to previously, and she also challenged some of the accountant's analysis such as the amount of payments made by Status and the right of Status to certain commissions.

Those are matters which cannot be resolved on this application. There is also the question of proceeds of

sale of mortgaged property received by the liquidators and not accounted for to Lockwood which may or may not need be taken into account. The whole position as to quantum is in a state of some uncertainty on the present evidence, and it would in my view be premature to enter judgment for any sum.

Judgment:

Pursuant to R.137, there will therefore be judgment for the Plaintiffs as against the First Defendant on the issue of liability, but on the express condition that the claim may not be amended to increase any interest component thereof over and above the presently constituted figure of $54,963.31.

I direct that trial of the issue of amount shall take place according to the normal course of proceedings, and that the First Defendant's statement of defence to that issue be filed and served within 21 days.

In all the circumstances it is appropriate that costs be reserved.

....
J S HENRY, J.

Solicitors:

Davys Burton Henderson, ROTORUA, for Plaintiffs
Grove Darlow & Partners, AUCKLAND, for defendants