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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1281/87

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	BETWEEN	EUROSUN FINANCE LTD First Plaintiff
LR 439	AND	PACIFIC SUN HOTELS LTD Second Plaintiff
	AND	COUNTRY LODGE INNS LTD Third Plaintiff
	AND	THE DISTRICT LAND REGISTRAR, AUCKLAND First Defendant
	AND	PRIMEWEST ESTATES LIMITED and N.S. BLAIR Second Defendants
	AND	DEMERA PROPERTY HOLDINGS LIMITED Third Defendant

[redacted]

Hearing: 3 September 1987

Counsel: Mr Farmer QC and Mr Sorrell for Plaintiffs
Mr Matthews for defendants

Judgment: 3 September 1987

ORAL JUDGMENT OF HILLYER J

This is an application for an interim injunction. The principles on which such are granted are too well known for me to need to repeat them. I have considered questions of serious question to be argued, balance of convenience, compensation by damages, overall justice, etc.

The claim is brought by the plaintiffs against the defendants relating to the acquisition of what used to be known as the White Heron Hotel in St Stephens Avenue, Auckland. That hotel was owned by the third defendant, Demera Property Holdings Ltd (Demera). The shares in Demera were held by the second defendants Primewest Estates Ltd (Primewest) and N.S. Blair.

The first plaintiff, Eurosun Finance Ltd (Eurosun) entered into an agreement to buy the shares in Demera. That agreement was guaranteed by the second plaintiff, Pacific Sun Hotels Ltd, (Pacific Sun). An interim arrangement was made whereby the third plaintiff, Country Lodge Inns Limited, (Country Lodge) which is a wholly owned subsidiary of Pacific Sun had occupation and operation of the hotel pending final settlement of the transaction.

The first defendant, the District Land REgistrar in Auckland, advised through his counsel that the registers had been taken out of place and would remain out of place so that no dealings could be registered against them pending disposal of this application. In those circumstances he was given leave to withdraw, and the application continued with only the second and third defendants represented.

The rent payable by Country Lodge to Demera was based upon the cost to Demera of an advance made to it by the Bank of

New Zealand, of $12,813,500. The terms of the agreement for sale and purchase of the shares are set out in a contract, clause 23 of which is as follows :

> "23. The vendors shall procure the company to enter into a lease of the White Heron Regency Hotel with CLI as lessee in a form to be prepared by the solicitors for the vendor at the expense of the purchaser for a term commencing on 29 January 1987, (the possession date,) and expiring on the settlement date. Such lease is to provide for calendar monthly rental payments of $270,833 payable three monthly in arrears. From and after 29 April 1987 the lease rental shall be varied to reflect the actual outgoings under the Bank of New Zealand facility referred to in clause 13. In the event that the purchaser arranges alternative finance pursuant to clause 25 hereof the lease rental shall reduce to the holding costs of the company under the new facility. In addition to rent, the lessee is to pay all rates, insurance premiums for replacement insurance and loss of rents, GST, and any land tax payable by the lessor for the demised premises. Otherwise the lease shall contain all usual terms inserted in leases of licensed hotel premises by solicitors practising in Auckland, with any dispute as to such terms to be determined by the President for the time being of the Auckland District Law Society or his nominee."

The purchase price was to be paid in a number of instalments as follows :

1. $300,000 on 23.2.87 (the deposit date).
2. $300,000 on 23.3.87
3. $385,000 on 23.4.87
4. The balance of the purchase price, namely the sum of $3,854,706 was to be satisfied by Pacific Sun issuing to Primewest or its nominee 500,000 fully paid ordinary shares of $US50¢ each at a premium of 20¢ each, and paying the balance in cash on or before 16

August 1987. The value of the 500,000 shares was to be based on the selling rate for $US quoted by the Bank of New Zealand at 10 am on 16 August, the date of settlement.

This matter has already been the subject of disputes which were heard in Christchurch pursuant to an application for summary judgment under No. CP 145/87 in which Primewest sought summary judgment for the sum of $300,000 due on 23.3.87 together with interest thereon.

A preliminary point was raised seeking a stay of that application on the grounds that the matter should be referred to arbitration in accordance with the contract. That submission was the subject of a judgment by Williamson J, who held that the matter should not go to arbitration. Following that the matter came before Hardie-Boys J, and in a decision given on 30 July 1987 he gave judgment by way of summary judgment against the defendants. Those judgments have been put before me in the file which was sent up from Christchurch, and reference was made by counsel to affidavits on that file.

Clause 15(a) of the contract was as follows:

> "15 The vendor will contemporaneously on the deposit date:

(a) Deliver to the purchaser or his nominee an engineer's report in respect of the stability of the cliff face and the land upon which the villas are situated, it being expressly acknowledged that the vendor has valued the said villas for a sum considerably in excess of the valuation supplied to the purchasers in respect of such villas and accordingly such engineer's report shall not, in the opinion of the purchaser, be detrimental to the value accorded the villas by the vendors."

There was apparently some apprehension about the stability of the cliff face. The buildings which comprise what was known as the White Heron were the main hotel building and a number of villas, eleven or so, situated across the road from the main building. These villas were close to a cliff top and it was in relation to the stability of that cliff top that clause 15(a) was inserted. The clause is not easily understood, but it seems that the parties accepted that the engineer's report had to be such as would not diminish the value of the villas, as that value was indicated by the vendors.

This application substantially has been induced by the dispute between the parties, as to whether the engineer's report has been delivered in accordance with the contract. There have been put before me a number of reports which are clearly from engineers. On their faces, they appear also to be in respect of the stability of the cliff face and the land upon which the villas are situated.

The plaintiffs' contention as I understand it however, is that those reports are not proper reports because insufficient investigation has been carried out by the engineers, even accepting that one of the reports, exhibit S to the first affidavit of Ian William Redpath, was made by a Mr Luxford, who describes himself as a Geotechnical Engineering Director.

The plaintiffs say that before a proper report can be given, as I understand it, it would be necessary for bores to be made along the cliff face to determine the strata and its stability. The defendants say that the report is quite satisfactory, that the terms of the contract refer specifically only to the value of the villas and they say that the report says that the value of the villas is not diminished by the engineer's report. That is not a matter that I could or should determine on this application. It does seem however, that if as the plaintiffs allege, that report and the others which have been put forward by the defendants, are not the engineer's report to which they are entitled pursuant to clause 15(a) of the contract, they have a proper basis for alleging that there has been a breach of contract. If there has been a breach, they have the right either to rescind the contract or to affirm it and claim damages for the breach.

The problem arises, as I see it, because at the moment the plaintiffs are not prepared to do either. They say they

are entitled to an engineer's report so that they can determine the stability of the cliff face, and that in the absence of a proper one from the defendants, they are obtaining one themselves. They say it will take another few weeks before such a report is obtained, and that the defendants should be at least restrained for that period from taking action, pursuant to any alleged breach of contract, to re-enter on the premises or to sell the shares to some other person.

It is clear that there has been a dispute between the parties for some months as to whether a proper engineer's report has been obtained, and it seems clear also that the defendants are not prepared to give any further report. The absence of what the plaintiffs say is a proper report was one of the bases on which the matter was argued before Hardie-Boys J, and I am of the view that the plaintiffs could and should have obtained their engineer's report by now.

Nevertheless, again it may be that this is a matter which I should not determine finally in these proceedings, and I have come to the conclusion on this aspect of the matter that the plaintiffs should be given some limited time on conditions, to complete such further investigations as they may desire.

The plaintiffs say that they have problems in raising the necessary finance without a proper engineer's report, and that therefore until they have obtained that report they are unable to determine whether they can complete.

The matter has been complicated by the fact that apparently the plaintiffs were in a hurry to get into possession of the premises. This is why the arrangement was made whereby Country Lodge was given the lease of the premises. In effect the total purchase price was something of the order of $17m with $12m odd raised by way of a loan from the Bank of New Zealand and $4m odd to be paid in the way I have set out.

The plaintiffs have the right to arrange alternative finance, pursuant to clause 25 of the contract, and I was given some figures by counsel for the plaintiffs as to a facility which they said could be available whereby the necessary funds could be borrowed in Swiss francs at a rate of approximately 5 1/2% instead of 20 1/2 - 19 1/2% currently being charged by the Bank of New Zealand. Whatever may be the situation in that regard, it seems to me that it is necessary for the plaintiffs to make up their minds whether they are going to proceed with the contract and claim damages for such breach as they may be able to establish, or whether they are going to rescind the contract and run the risk of a claim against them for damages.

I should say it was submitted on behalf of the plaintiffs that the defendants were in default also in relation to a subdivision of the property. Clause 24 of the contract is as follows:

> "24 The vendors shall prior to the settlement date complete a subdivision of the land in Certificates of Title 163/134 and 515/114 in accordance with the sketch plan annexed hereto marked 'A', and shall procure the company to transfer to the vendor or its nominee those areas of land shown hatched in red on the said plan ('the cliff face'). The vendors hereby agree that any development of the cliff faces shall be compatible with the existing and proposed use and development of the balance of the land by the purchaser and, that the vendor's development shall not detract from the amenities now sited on the said balance of land or from the purchaser's proposed developments on the said balance of the land."

It appears that the idea was that the defendants would subdivide off part of the land occupied by the villas across the road from the main hotel building, and would develop that area. It was envisaged, I understand, that such development would enhance the stability of the cliff face. The defendants have not proceeded with the subdivision and therefore may be in default under that clause.

Mr Matthews on behalf of the defendants submitted that that clause was one for the benefit of the defendants, that they could therefore abandon their rights under that clause, and were prepared to do so. Mr Farmer QC and Mr Sorrell for the plaintiffs, submitted that the clause was not one entirely for the benefit of the defendants, since

the plaintiffs would get an advantage from having the land developed, and the stability of the cliff face enhanced.

Again however, it seems to me that either this is a breach of contract or it is not. If it is the plaintiffs must make up their minds whether they are going to affirm the contract and claim damages for the breach, or rescind the contract on that basis.

I do not consider that that matter is one which need concern me in this application made by the plaintiffs to any greater extent than the allegation made by the plaintiffs in relation to the engineer's report. The two are clearly complementary.

Mr Matthews pointed to a formal notice which had been given by the defendants, requiring the plaintiffs to settle by 10 September. He offered, in response to an inquiry from me, to give an undertaking that the defendants would not re-enter on the premises or take other steps prior to 10 September, and said that the defendants would be prepared to settle on that date. He accepted that that postulated the plaintiffs would be able to raise the whole of the purchase price, either by taking over the Bank of New Zealand financial facility, or raising other funds together with the balance by that date. He said that although there was only a week within which that could be done, nevertheless the defendants had

known the situation for many months and should not be able to postpone settlement any longer.

There was some discussion on the question of the usual undertaking as to damages that is normally given in applications for an interim injunction, and Mr Matthews from the bar undertook on behalf of Primewest Corporation that it would pay any damages which would be found due if an interim injunction should have been granted for any longer period.

Equally the plaintiffs have given undertakings as to damages, if it appears when the matter is concluded than an injunction should not have been granted. Both parties would be able to meet such damages as may be found due.

I am not prepared to say that there is no serious question to be argued, but on the balance of convenience, I consider that a modified order is necessary.

I am therefore prepared to grant, and hereby grant an injunction for a period of 5 weeks from today's date, restraining the defendants in terms of the application, from dealing with or in any way alienating, selling or otherwise disposing of shares in Demera Property Holdings Ltd, or the land and buildings situated at 133 and 138 St Stephens Avenue, Parnell, more particularly described in the application, and a further order restraining the first

defendant from entering against the title of the land any entry by way of transfer, caveat or lease which has the effect of alienating the fee simple or leasehold estate.

Such injunction will be granted on condition that rental is to be paid in accordance with clause 23 of the contract, save that the rental is to be payable monthly in arrear and not three monthly in arrear. The rental is to be brought up to 29 August 1987 within one week of today's date. It is again to be brought up to date on 29 September 1987.

There will be the further condition that on 29 September 1987 interest will be paid on such portion of the purchase price as was due under the agreement, in accordance with clause 27(c) of the contract, from the date that portion of the purchase price became due until 29 September 1987, and thereafter each month until settlement of the transaction.

The defendants will further be restrained on the same conditions, from rescinding the agreement for any default which may have occurred prior to 8 October 1987, which is the end of the five week period pending the hearing of the main action. This is on the basis of the undertaking that has been given to the Court by Primewest Corporation to pay such damages as may be found due, arising out of this injunction when the matter is concluded, if it is found that the injunction should not have been granted.

The question of costs will be reserved.

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P.G. Hillyer J

Solicitors
Nicholson Gribbin for plaintiffs
White Fox & Jones, Chrstchurch for defendants