IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1281/87

BETWEEN	EUROSUN FINANCE LIMITED First Plaintiff
A N D	PACIFIC SUN HOTELS LIMITED Second Plaintiff
A N D	COUNTRY LODGE INNS LIMITED Third Plaintiff
A N D	THE DISTRICT LAND REGISTRAR, AUCKLAND First Defendant
A N D	PRIMEWEST ESTATES LIMITED and N. S. BLAIR of Christchurch, Company Director Second Defendant
A N D	DEMERA PROPERTY HOLDINGS LIMITED Third Defendant

Hearing 18th November 1987

Counsel A. C. Sorrell for plaintiffs
H. C. Matthews for defendants

Judgment 18th November 1987

ORAL JUDGMENT OF TOMPKINS J

The plaintiffs have moved for an interim injunction to restrain the second defendant from advertising or in any other way proceeding with the petition for the winding up of the plaintiffs' companies.

Background

The matters at issue between the parties have their origin in an agreement that is undated but was entered into on 26th July 1987. It is an agreement for the sale of shares in the third defendant ("Demera"), the second defendant ("Primewest") and Mr Blair, being the vendors and the first plaintiff ("Eurosun") being the purchaser. The obligations of Eurosun under the agreement were guaranteed by the second plaintiff ("Pacific Sun"). In effect, the agreement was to achieve the sale and purchase of the White Heron Hotel and ancillary properties situated at Parnell, Auckland. The third plaintiff ("Country Lodge") was to become the lessee of these premises.

Under the terms of the agreement the purchase price for the shares was $4,839,706. It was payable by a deposit of $300,000 on 23rd February 1987, $300,000 on 23rd March 1987, $385,000 on 23rd April 1987 and the balance on 16th August 1987. The first payment was made on due date, the second payment was paid as the result of Primewest and Mr Blair obtaining summary judgment in respect of it, the third payment and the balance have not been paid.

By clause 23 of the agreement Primewest and Mr Blair were to procure Demera to enter into a lease with Country Lodge to enable Country Lodge to take possession of the hotel pending settlement. The amount to be paid in consideration of that lease was to be

the amount determined according to the actual outgoings on a Bank of New Zealand facility to Demera. The agreement contained a further provision that has been the prime cause of the controversy between the parties. It is clause 15(a). It provides

> "15. THE The Vendor will contemporareously on the deposit date
>
> (a) Deliver to the Purchaser or his nominee an engineers 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 engineers report shall not, in the opinion of the Purchaser, be detrimental to the value accorded the villas by the Vendors."

The plaintiffs commenced their proceedings on 19th August 1987. In a statement of claim then filed it pleaded that Primewest and Mr Blair failed to supply an engineer's report of the kind required by clause 15(a). They sought judgment for an order for specific performance of Primewest and Mr Blair's obligations. They also sought an injunction to restrain Primewest, Mr Blair and Demera from in any way alienating, selling or otherwise disposing of the shares in Demera or the land and buildings making up the hotel. They also sought an interim injunction in terms of the permanent injunction sought.

The interim injunction of 3rd September 1987

The application for interim injunction came before Hillyer J in this Court on 3rd September 1987. After hearing submissions

and referring to the differences between the parties and in particular the contention advanced by Primewest and Mr Blair that clause 15(a) had been complied with and the contention advanced on behalf of the plaintiffs that it had not, he considered that there should be time to enable the plaintiffs to obtain their own further engineer's report which had at that time been set in train but the final report not received. In the result he granted an interim injunction for five weeks from 3rd September 1987 in the terms sought but subject to two conditions.

The first was that rental was to be paid in accordance with clause 23 of the contract, save that the rental was to be payable monthly in arrear and not three monthly in arrear, the rental was to be brought up to 29th August 1987 within one week of 3rd September and it was again to be brought up to date on 29th September. The second condition was that on 29th September 1987 interest would be paid on such portion of the purchase price as was due under the agreement in accordance with clause 27(c) from the date that portion of the purchase price became due until 29th September 1987 and thereafter each month until settlement of the transaction.

The events after the injunction of 3rd September

In accordance with the injunction, Primewest and Mr Blair took no further steps to endeavour to obtain possession of the hotel. Country Lodge remained in possession and operated it.

The rental payable pursuant to clause 23 up to 29th August 1987 was paid. On 29th September 1987 the solicitors acting for the plaintiffs wrote to the solicitors acting for Primewest and Mr Blair, cancelling the agreement. This cancellation was on the basis that the report that the plaintiffs had by then received was to the effect that there had not been compliance with the requirement of clause 15(a). On that day Country Lodge vacated the hotel and villa premises and Primewest and Mr Blair resumed possession. On 2nd October 1987 there was served on the plaintiffs a notice pursuant to s 218 of the Companies Act 1955 demanding payment of $376,729.32. That is the amount that would be payable on 29th September 1987 calculated in accordance with clause 23 plus the interest that would be payable pursuant to the second condition imposed by Hillyer J. The amount of the calculation is not disputed.

On 29th October 1987 the plaintiffs filed a first amended statement of claim. In addition to referring to clause 15(a) of the agreement, they alleged that there was a representation by Primewest and Mr Blair that the cliff face and the land upon which the buildings are situated was stable and that an engineer's report would confirm the value of the property. They alleged that that representation was false. They claim that as a result they paid sums to Primewest and Mr Blair by way of the holding costs pursuant to clause 23, and $600,000 on account of purchase price. They accept that Primewest and Mr Blair is entitled to a fair rental for the premises for the period during which Country Lodge was in possession, namely from 27th February

1987 to 29th September 1987. They claim damages of $1,659,470 being amounts that the plaintiffs have paid less a fair market rental of $606,219.17. Primewest and Mr Blair have filed petitions for orders to wind up Pacific Sun and Country Lodge. Those petitions have at present a date for hearing on 9th December 1987. They have not been served or advertised.

The present application for interim injunction

It is in those circumstances that the plaintiffs seek an order to restrain Primewest and Mr Blair from proceeding further with the petitions they have issued.

Mr Matthews for Primewest and Mr Blair and Demera, was prepared to accept, for the purposes of the present application, that the plaintiffs' claim as set out in the first amended statement of claim discloses a triable claim but it is his submission that the amount in respect of which the notice has been issued and the petitions founded is a claim that cannot, in the circumstances, be disputed. More particularly, he submits that those amounts are amounts that have been correctly assessed and are payable in accordance with the two conditions imposed by Hillyer J on 3rd September 1987. He submits that the plaintiffs having accepted the injunction on the conditions stated, is bound to comply with those conditions. He points out correctly that the payment that was due on 29th September was for one month in

arrear and hence covered the period up to the date upon which Country Lodge vacated.

It was submitted by Mr Sorrell that the amount, the subject matter of the notice and upon which the petitions are founded, is disputed. This is based on the contention as set out in the amended statement of claim that having regard to the breach of clause 15(a) and the breach of the representation to which I have referred, the plaintiffs are, during the period Country Lodge occupied the hotel, liable only to pay a fair market rental, not the greater amounts payable pursuant to clause 23.

Mr Sorrell recognised that the amount in the notice has been calculated on the basis of the conditions imposed by Hillyer J but contended that the effect of those conditions were that if they were complied with the injunction remained in force for the period of five weeks stated, but if they were not complied with then the injunction lapsed. It was his submission that the conditions did not themselves render the amounts indisputably payable.

I agree with Mr Matthews' submission that the crux of the matter is whether it can properly be said that the amounts claimed in the notice constitute a debt that cannot be disputed. The fact that the plaintiffs may otherwise have a claim against Primewest and Mr Blair for an amount substantially in excess of the amount claimed in the notice is not a reason for granting an interim injunction at this stage. That, in my view, is made

clear by the judgment of the Court of Appeal in Anglian Sales Ltd v Southern Pacific Manufacturing Co. Ltd [1984] 2 NZLR 249. As was pointed out by McMullin J delivering the judgment of the President and himself at p 259, to prevent a creditor from lodging and bringing to a hearing his petition would be refusing to give effect to the very right which the statute has conferred upon the creditor to have the petition itself considered. The proper approach in those circumstances is for the petition to proceed for a hearing. It would still remain open for the debtor to seek an order that the petition be stayed subject to appropriate conditions on the grounds that the debtor has a claim against the creditor that exceeds the creditor's claim.

So the issue that will determine the present application is whether the claim for the amount in the notice is one that cannot be disputed, or rather to put it in the way it was put by the Court of Appeal in Bateman TV Ltd v Coleridge Finance Co. Ltd [1969] NZLR 794, where the plaintiffs have established a prima facie case which satisfied the Court there there is something that ought to be tried in relation to their liability to meet the claimed amount.

I have reached the conclusion that the plaintiffs have so satisfied me. Their first amended statement of claim sets out allegations which if they were established, may well justify their assertion that the terms of the agreement having been breached, they should not be liable to make the payments required

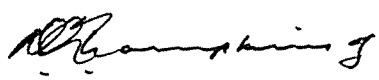
to be made by clause 23, and I am inclined to the view that the conditions imposed by Hillyer J were, as Mr Sorrell submitted, conditions the compliance with which was required for the injunction to remain in effect. I do not consider that it must necessarily follow from the terms of those conditions that the amounts payable under them were indisputably payable. In fact the plaintiffs failed to comply with the condition of 29th September so that the injunction granted by Hillyer J lapsed on that day, but I consider the non compliance with the condition has only that effect.

Having thus reached the conclusion that there is a prima facie dispute in respect of the amount claimed under the Companies Act notice, I conclude that it is appropriate that the interim injunction sought should be granted. There will therefore be an order that an injunction be issued until further order of the Court restraining Primewest and Mr Blair from advertising or any other way proceeding with the petitions for the winding up of Pacific Sun and Country Lodge.

Costs on this application will be reserved. I consider it appropriate that I fix what I would regard as reasonable party and party costs, which I do in the sum of $1,500. It is my present view that the party liable to pay those costs should be determined when the substantive action is heard. If, for example, it should be determined that the plaintiffs are liable to pay the amounts claimed in the Companies Act notice, then the order for costs should be in the plaintiffs' favour.

The plaintiffs must prosecute their action as promptly as is reasonably practicable. If Primewest and Mr Blair consider that the plaintiffs are not doing so they can apply to have the injunction I have granted discharged.

I further record that the plaintiffs have already discontinued against the first defendant. Mr Sorrell has indicated that the plaintiffs will now consider whether they should also discontinue against the third defendant.



Solicitors

Messrs Nicholson Gribbin, Auckland for plaintiffs
Messrs White Fox & Jones, Christchurch for defendants.