NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1431/87

BETWEEN FIRST CITY CORPORATION LIMITED

Plaintiff

LOW PRIORITY

A N D DOWNSVIEW NOMINEES LIMITED

First Defendant

A N D J.G. RUSSELL

Second Defendant

A N D GLEN EDEN MOTORS LIMITED (IN RECEIVERSHIP)

Third Defendant

Date of Hearing: 20 April 1988

Date of Judgment: 21 April 1988

Counsel: Mr Harrison on 20.4.88 and Miss Clark on 21.4.88 for Plaintiff
Mr Bogiatto for First and Second Defendants
Mr Chamley for Third Defendant

---

**[ORAL] JUDGMENT OF SMELLIE J**

---

Ideally the application that I have to rule upon this morning should have been dealt with by Thorp J who has been seized of this matter since before Christmas. But he is on sabbatical leave and the matter appears to me to require immediate resolution. On that basis when argument completed at about 6 pm last evening I indicated I would give an oral judgment this morning. But of course that has not allowed time for me to conduct my own researches into some of the legal aspects of the matter, not all of which were traversed in sufficient depth in the submissions made to me by Counsel.

Thorp J has already delivered three judgments in this matter dated respectively 11th January 1988, 2nd March 1988 and 22nd March 1988. In each of those judgments he reserved leave for further applications to be made for the purpose of implementing his orders. And the Plaintiff has brought this application pursuant to such leave granted in the third judgment.

In a nutshall the first judgment of 11th January 1988 held that the Plaintiff (FCC) as holder of the second debenture was entitled to call for assignment of the first debenture held by the First Defendant (Downsview) upon payment or satisfaction of what was owing thereunder. That judgment involved a ruling on a point of law related to the interpretation and application of ss 82 and 83 of the Property Law Act 1952. The judgment allowed the First and Second Defendants 21 days to file full and complete particulars of the amount claimed and that of course included amounts claimed by the Second Defendant (Russell) in connection with his services and expenses incurred by him, pursuant to the exercise of his office as Receiver.

The second judgment of 2nd March 1988 was brought by FCC, Downsview and/or Russell having failed to comply with the direction to give full and complete particulars of what was claimed. In those circumstances Thorp J ordered certain payments to be made and indemnities to be given to satisfy what was clearly owing and to protect Russell against potential liabilities and to secure his costs. The package of protection which His Honour worked out in that second judgment involved an immediate payment of $130,000 to Downsview being the amount estimated as likely to be owing to the First Defendant plus indemnities and undertakings under seal to cover any overruns in either the amount owing or alternatively the possible debts payable by Russell. In addition to cover those debts a payment of $170,000 into Court or into a Trust Account approved by the parties was ordered.

The third judgment on 22nd March 1988 settled the form of the assignment of the debenture from Downsview to FCC.

The competing provisions advanced by either party are set out in the judgment and indicate clearly enough that Downsview and Russell wanted a more unqualified and open ended approach to the amount to be paid than FCC was prepared to agree to. In settling the form of the assignment Thorp J, at p 3 of his judgment said of that form:-

> "This would leave the determination of the sums properly claimable as part of the expenses of the Debenture holder through the exercise by it of the power to appoint a Receiver as part of the unresolved question of the actual amount secured by the Debenture."

The moneys ordered to be paid were duly provided, the assignment was executed and thereafter FCC sent a Receiver to take over the undertaking of the Third Defendant. All Defendants joined in refusing to relinquish control to the Plaintiff's agent. Russell, despite Thorp J's judgments, required a further payment of $329,000 odd in cash before he would step aside. He acknowledged, nonetheless, that FCC had dismissed him and indicated that he would depart when paid. In para 15 of his affidavit sworn in opposition to this application he said:-

> "I have always been and am now willing to cease to act as receiver under the Westpac debenture provided that the Plaintiff pays the amounts required in terms of my notice of appointment."

It is noteworthy that in advancing Russell's case Mr Bogiatto was not prepared to support the claim for $329,000. At the very least Counsel was obliged to acknowledge that $175,000 of the amount claimed was in the nature of a contingent liability in respect of which no payment or indeed security can be required. The Third Defendant's objection is based upon more complex grounds and the fact that it has a substantial counterclaim against the Plaintiff and I will advert to its position later in this judgment.

It is clear from Thorp J's judgments (especially the second judgment) that he was satisfied that the Third Defendant's position was rapidly deteriorating. That quite clearly is still the position. Both debentures are now due and no interest or principal payments are being made in

respect of either of them. The last payments appear to have been made some time prior to September of last year. The indebtedness under the debentures is rising at between $20,000 and $30,000 per month. Accordingly FCC, by a combination of Thorp J's judgments and the second debenture, now has to recover a sum in excess of $1,300,000 and understandably is concerned that the debt will soon exceed what is recoverable from the Company, if indeed that is not already the case.

In my view it is clear that Thorp J, in making the orders he did, envisaged that control of the Third Defendant would go hand in hand with the assignment of the Westpac debenture from Downsview to FCC. In a passage on p 7 of his second judgment this matter is referred to. The passage also incidentally adverts to the paucity of information supplied by Downsview and Russell, a position which in my view still applies. The passage reads as follows:-

> "I have found these applications difficult, not because of the complexity of the principles to be applied, but because of lack of adequate definition of the actual facts of the situation. The process of assignment of the debenture cannot be realistically considered on its own, and the transfer of the control of a business in the situation of Gemco necessarily involves risks and problems about which I should have liked to be better informed. However, the absence of this information must lie at the door of the first and second defendants and perhaps to a lesser extent, the third defendant." (Emphasis added)

The appropriateness of FCC applying to remove Russell pursuant to the leave granted was raised by the Defendants. In my view, however, considering the general thrust and purport of the judgments of Thorp J this application has been properly brought pursuant to the leave reserved. I found Mr Bogiatto's submissions to the contrary technical and unattractive.

On a consideration of some of the affidavit evidence filed in the earlier proceedings and particularly the affidavits of Mr Russell dated 23rd December 1987 and 26th February 1988 (both of which Mr Bogiatto invited me to consider) I am satisfied that the orders made by Thorp J for

the payment of $130,000 direct to Downsview and the securing of a further $170,000 were based upon the evidence in those affidavits. (I interpolate to observe that the question of the amount to be available to satisfy Mr Russell's debts and pay his remuneration is envisaged by the judgments as something to be resolved at a later stage. Leave is reserved in Thorp J's judgments to the First and Second Defendants to apply for payment out from the fund of $170,000 of those amounts ultimately established as valid. In my view the issue as to whether the notice given by Downsview to Russell appointing him as Receiver upon which Russell relies will have to be considered at that stage and a decision made then as to which is correct, the wider recovery which he contends for under that notice or the more narrow one which FCC contends for pursuant to the provisions of the Westpac mortgage). In this application, however, by way of a letter (exhibit "A" of Mr Simpson's affidavit of 8.4.88) which Russell sent to FCC's Solicitors a claim is made for payment of a very much larger sum - the total is $629,773 and the payments of $130,000 and $170,000 are acknowledged in part satisfaction but the balance of $329,770 odd is sought in cash. This letter and its contents are not elaborated upon in Mr Russell's affidavit in opposition and indeed the figures are not directly confirmed by him on oath. During argument I asked Mr Bogiatto to reconcile the figures in this letter with the information in the earlier affidavits. Mr Bogiatto was not able to provide an explanation despite the fact that he had the opportunity to refer to Mr Russell during the luncheon adjournment.

On behalf of the Second Defendant Mr Bogiatto submitted that Russell is entitled to payment of the amounts claimed (or at least of a further amount - because of course Counsel recognised the contingency feature of the sum of $175,000 earlier referred to). Also Mr Bogiatto claimed that his client had a lien and he argued that before Russell was obliged to depart he should have payment of some further sum.

I reject those submissions of Mr Bogiatto's. Mr Russell is certainly entitled to be protected but in my view the payments already made, the payments into Court, the

indemnity and the undertaking already provided substantially provide that protection. Mr Bogiatto relied upon Hill v Venning 4 ACLR 555. This is a judgment of Connelly J in the Supreme Court of Queensland but it is a decision on an interlocutory application and His Honour specifically said that he was not making any final ruling either on the facts or the law in the case. Nonetheless there is a helpful passage on p 557 of the report which reads as follows:-

> "The judgment of the Master of the Rolls does not appear to draw any distinction between receivers and managers. In the case of Davis v Hueber (1923) 32 CLR 583 it was said by Knox CJ and Starke J at 588 that it was immaterial whether the right of the agent be called an indemnity, a lien or a charge but that it was certainly enforceable in a court of equity. The 15th ed of Kerr on Receivers at 356 cites Foxcraft v Wood as authority for the proposition that having regard to the personal liability imposed upon receivers by statute in respect of their own contracts ... a receiver who has been removed will like any other agent who has properly made himself liable in respect of his principal's contract have a lien on the assets in his hands against all such liabilities personally incurred by him. To similar effect is a passage in Palmers Company Precedents (16th Ed) p 408"

The underlined passage is the significant one in the above quote. In my view what the Receiver is entitled to is protection and it matters not whether it is in the form of an indemnity, a lien or a charge. In this case both the First and Second Defendants have that protection in the form of a charge against the sum of $170,000 and the indemnity and undertaking which have been provided pursuant to the orders of the Court.

I also reject Mr Bogiatto's submissions on the factual, as opposed to legal, issues. The information placed before me to justify the stand taken by Mr Russell in demanding the $329,000 odd in addition to what the Court had ordered is totally unsatisfactory. The judgments of Thorp J contain the clearest expression of dissatisfaction at an earlier stage and place the responsibility for inadequate information squarely at the feet of the First and Second Defendants. I have no confidence in the figures in Mr Russell's letter. Some are plainly inaccurate and others I regard with

considerable suspicion. They differ from what was said in the earlier affidavits. There appears to be a cavalier disregard of Thorp J's analysis of what is owing under the Westpac debenture and there is an absence of any substantiation of the figures. The probability is that the orders already in place provide sufficient protection but out of an abundance of caution I propose in the orders I shall make shortly to add a further $20,000 to the $170,000 already secured in order to protect the fees which may have been earned or other disbursements expended by Mr Russell during his period as Receiver. I indicated that this might be the course I would take to Mr Harrison during argument. He submitted that further provision was not necessary and indicated that he was unable to consent to such a course and indeed must formally oppose it. He, nonetheless, indicated that if I saw fit to exercise my discretion in that way it would still be preferable to FCC being further prevented from taking control and implementing steps to recover its large and increasing debt.

Turning now to the position of the Third Defendant. With respect to Mr Chamley's persuasive argument I nonetheless felt that what was said was a recapitulation of the arguments that were earlier addressed to Thorp J and that I was being asked to trench upon what had already been decided in the earlier judgments. Mr Chamley's plea, as I understood it, was that it would be wrong and unjust for the Court to take the next step of ousting Mr Russell. But in my judgment for the Court not to take the step of putting FCC in charge would halt the process already well advanced and clearly anticipated, certainly by Thorp J when the orders were made, and I would have thought by all the parties also. Mr Chamley's submission was that, with due deference to Thorp J, His Honour had gone too far and that the orders sought in this application would jeopardise any relief that might be available under the counterclaim that has been launched. In addition, Mr Chamley expressed on his client's behalf the fear that once in control FCC's Receiver would promptly sell. Conversely, although there is nothing in the papers before me to substantiate this, he indicated that his client understood that Mr Russell would not sell. I observe in

passing that, irrespective of who the Receiver is, he owes a duty to the debenture holder and the Company and that the decision as to whether he sells or not or how he deals with the assets placed in his care must depend upon what is best for those to whom he owes those duties. I am not persuaded by Mr Chamley's argument and I am not prepared to stay the Court's hand in taking this further step. Some of the factors that weigh with me besides those that I have already mentioned are the following:-

(a) The judgment of 11th January 1988 is under appeal but the Third Defendant it seems is not a party to that appeal and will have to seek standing from the Court of Appeal before it is able to join in the argument there. Although the Third Defendant technically appears not to be in a position to expedite the hearing of that appeal it seems to me that it is not being prosecuted with diligence.

(b) A stay of the order in the first judgment has been refused and the Third Defendant was heard on that issue. The reasons why Thorp J refused the stay are in my respectful view compelling. And it seems to me that if I refused on the grounds advanced by Mr Chamley to grant the present applications then the unsatisfactory position which compelled Thorp J to refuse the stay would, by another means, be continued.

(c) The counterclaim which is the foundation for Mr Chamley's submissions was not filed until after the first judgment, that is some nine or ten months after the cause of action upon which the counterclaim is based arose.

(d) There has been an absence of action in prosecuting the counterclaim. Mr Chamley acknowledged that his client is in default in respect of both the provision of particulars and discovery and he further advised that the claim itself is being reassessed. I appreciate the difficulties under which the Third Defendant is labouring in preparing and presenting its counterclaim

but that must be weighed against the adverse position which FCC faces.

(e) Mr Chamley recognises furthermore that the proper procedure for the protection of the Third Defendant's position in relation to its counterclaim is to seek an Interim Injunction preventing FCC or its Receiver from taking any steps which may render any remedy ultimately granted pursuant to the counterclaim nugatory. Mr Chamley advised that he had decided that he must apply for an Interim Injunction and I should have thought it followed from that that he must also take the other outstanding steps in connection with the counterclaim before that Injunction is presented to the Court.

A Judge should be careful before he reaches conclusions which are adverse to parties in litigation before him. But in this case I feel bound to observe that Mr Russell's attitude on this application appears to be rather obtuse and bordering upon trifling with the earlier orders made by the Court. And I have formed the view, albeit less firmly than in relation to Mr Russell, that the Third Defendant is adopting a somewhat unrealistic attitude in expecting to prevent FCC, in the position that it now occupies, from making the decisions in respect of the Third Defendant.

In view of the conclusions I have reached I propose to make certain orders subject however to a short period of delay and certain steps being taken. The orders I make are as follows:-

1. The Second Defendant is to cease forthwith from acting or purporting to act in the office of Receiver of the Third Defendant.

2. The Second and/or Third Defendants are to vacate and surrender up possession of the Third Defendant's assets, undertaking and premises to such Receiver or Receivers as the Plaintiffs may appoint pursuant to the assigned debenture from Westpac and/or the subsequent debenture granted directly to the Plaintiff.

3. The Second Defendant is to deliver up to such Receiver or Receivers as the Plaintiffs may appoint pursuant to the assigned debenture from Westpac and/or the subsequent debenture granted directly to the Plaintiff all books, records, papers and other documents relating to the Third Defendant.

The above orders, however, are subject to the following qualifications. The order is not to be sealed before midday tomorrow and further is not to be sealed before, first, an additional $20,000 has been deposited to lift the fund of $170,000 to $190,000, and secondly, until FCC appoints Receivers under one or other or both debentures.

In addition, however, leave is reserved to FCC to apply orally again tomorrow afternoon or at any stage next week after the order has been sealed if Mr Russell does not vacate and the other orders of the Court are not complied with. Counsel for the Defendants will appreciate from what I have said, and will no doubt inform their clients, that it is my intention that the clear thrust and intention of Thorp J's orders are not to be frustrated. And I will take a serious view of any further prevarication.

Whether costs will be payable on this application may depend on the outcome of the appeal. If the judgment of Thorp J of 11th January 1988 is overturned then all that has followed since then will be reversed in all probability. But had it not been for the appeal and had there been no further matters to follow I would have been prepared on this application to award costs in favour of the Plaintiff against the First and Second Defendants of $1000 and against the Third Defendant of $500. I have recorded these costs details in my judgment so that at a later stage the Judge who finally resolves the substantive matters herein may be assisted.

Addendum

Having delivered my oral judgment and inquired of Counsel whether there was any matter which they considered remained outstanding Mr Chamley drew my attention to the

challenge in the affidavits to the validity of the appointment of the Receivers of FCC at an earlier stage in March of 1987. I have deliberately refrained from expressing any view on the validity or otherwise of that appointment. I have structured my orders in such a way that whether under the Westpac debenture or the second debenture to FCC fresh appointments are to be made by FCC so that there is no room for challenge to the right of the Receivers to take control. The leave I have granted to apply orally either tomorrow afternoon or next week is for the purpose of resolving rapidly any challenge that may be made to the validity of the appointments which I envisage. No doubt FCC will make sure that all is done according to the book and if there is any challenge the Defendants will have to be in a position to fully substantiate the challenge if it is to have any prospect of being taken seriously.

Robert Smellie J

.....

Solicitors:
Brandon, Brookfield for Plaintiff
Grove, Darlow & Partners for First and Second Defendants
Thorne, Thorne, White & Clark-Walker for Third Defendant