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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

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CP.503/88



BETWEEN:

SILVER FERN EXPORTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a supermarket

First Plaintiff

L2 183

AND

MICHAEL ANGELO ANTONIADIS of Auckland, Manager, a n d ANNETTE SANDRA ANTONIADIS his wife

Second Plaintiffs

UNIVERSITY OF  
23 JUN 1988  
LAW LIB.

A N D:

FOODSTUFFS (AUCKLAND) LIMITED a duly registered company having its registered office at Auckland and carrying on business as a Food Chain Operator

Defendant

Hearing: 15 April 1988

Counsel: R J Asher and A M Storey for plaintiffs  
G S A Macdonald for defendant

Judgment: 28 April 1988

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JUDGMENT OF HENRY, J.

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This is an application for a series of orders by way of interim relief relating to the First Plaintiff's operation of a business known as the Belmont New World Supermarket. The business was acquired pursuant to an agreement for sale and purchase dated 28 July 1986.

expressed as being between Blackman Holdings Limited (in receivership) as vendor and the Second Plaintiffs or their nominee as purchasers. The purchase price was \$325,000.00 comprising goodwill \$40,000.00, plant and fittings \$150,000.00 and stock-in-trade \$135,000.00 subject to adjustment. Settlement was effected on 8 August 1986 in the name of the First Plaintiff (Silver Fern) with the sum of \$135,000.00 being advanced by the Defendant (Foodstuffs) for that purpose, together with a trade credit of \$100,000.00, all advances secured by debenture. As with all businesses in the New World supermarket chain, this one was closely tied to Foodstuffs, which supplied the bulk of the groceries required and was also involved in providing accounting and budgeting services.

The business did not operate at the expected profit level and has experienced what appears to be quite serious financial difficulties. In particular Silver Fern became in default with payments due to Foodstuffs, and this led to a demand notice dated 22 March 1988 being issued pursuant to the terms of the debenture requiring payment of a total sum of \$369,154.68. It was served on the same day and then within a short time of service Foodstuffs appointed a receiver and manager of the property of Silver Fern charged by the debenture. Anticipating such a step, the Plaintiffs filed an application for an interim injunction which came before me

on short notice (given on my earlier direction on what had been an ex parte application) on 23 March 1988. Pending the full hearing of the application certain consent orders of a holding nature were made. The Plaintiffs now seek orders in the following terms :

1. Restraining the Defendant or its servants or agents from appointing a receiver for any breach of the debenture arising from the failure to pay any sum owed by the First Plaintiff to the Defendant
2. Restraining the Defendant from instructing a receiver or any other person appointed by them from preventing the Plaintiffs from occupying the Plaintiffs' premises at King Edward Avenue, Takapuna.
3. Restraining the Defendant or any other person appointed by them from preventing the Plaintiffs from occupying the premises and running the business of Belmont New World.
4. Restraining the Defendant from in any way restricting the supply of goods to the Plaintiffs, and from withdrawing the credit arrangements that existed on 22 March 1988, namely three weeks credit for goods supplied, provided:
  - (i) If there is any general change of credit arrangements for New World owners by the Defendant, the credit arrangements for the Plaintiffs may reflect that change.
  - (ii) This Order is conditional upon the Plaintiffs observing the three week credit payment arrangement for all goods supplied after the date of this order, and if the Plaintiffs

breach that payment arrangement, the Defendant's obligation to provide credit shall cease.

5. All cheques issued and payments made by the First Plaintiff shall be counter-signed and approved by the Defendant provided that such signature or approval shall not be unreasonably withheld.
6. A representative of the Defendant may be present at the First Plaintiff's premises at any time with the right to inspect all records of the First Plaintiff provided such representative does not unreasonably interfere in the running of the business.

The substantive claim is now formulated in the second amended statement of claim. The first cause of action is based on a series of misrepresentations, also said to be terms of an agreement which have been breached. The second cause of action alleges that any appointment of a receiver under the debenture would be oppressive in terms of the Credit Contracts Act 1981. The third cause of action contends that the appointment of a receiver on 22 March was invalid. In respect of these causes of action the Plaintiffs seek injunctions prohibiting Foodstuffs from appointing a receiver, restraining Foodstuffs from opening a New World supermarket at Devonport, and restraining Foodstuffs from restricting the supply of goods to Silver Fern and from withdrawing usual credit arrangements for those goods.

An enquiry into damages is also sought, together with an alternative claim for damages of \$286,000.00 if the restraining order in respect of the opening of the Devonport New World supermarket is not granted.

It is common ground that Silver Fern's present indebtedness to Foodstuffs is well in excess of \$400,000 and carries interest at 19% per annum, all of which is secured by the debenture.

1. Supply of goods and credit:

(para. (4) of application)

The pleading alleges that Foodstuffs "would provide credit for the provision of goods, and discounts and rebates on goods purchased through it". The evidence supporting the allegation comes from Mr Antoniadis in paragraph 5.3 of his third affidavit where he deposes "I was told when I purchased the business that the way Foodstuffs worked was that I did not have to pay for the goods supplied until I was invoiced". He makes no direct allegation of an obligation on the part of Foodstuffs to supply goods. Subsequent to the hearing and consequent upon an enquiry made of counsel during the course of argument, copies of the New World membership agreement between Silver Fern and Foodstuffs and of the head lease and sublease relating to the Belmont premises were produced as annexures to a further affidavit of Mr Antoniadis. The former document has attached to it a copy of the rules of what is known as the New World Supermarket Group.

As might be expected, the agreement and the rules and also the sublease contain provisions relevant to the operation of a chain of shops trading under the same style. Clause 7 (a) of the agreement requires Silver Fern to purchase its merchandise and supplies from Foodstuffs and its subsidiaries. It may be that on its true construction the agreement obliges Foodstuffs to supply Silver Fern's requirement, although that is not clear because of the absence of any such express provision. For present purposes I am prepared to accept that a construction in favour of Silver Fern in this regard is arguable. There was no documentation drawn to my attention which creates an obligation on Foodstuffs to provide credit for the general supply of goods, and the evidence of Mr Antoniadis does not provide a basis for the existence of any oral contract to that effect. The allegation is in conflict with clause 1.12 of Schedule A of the debenture which provides :

"1.12 Nothing contained herein shall be construed as obliging the Merchant to provide any Credit to the Customer from time to time or at any time and it is acknowledged and declared that although this debenture is drawn so that it secures and will secure (inter alia) any Credit provided by the Merchant to the Customer in the future it is not contemplated at the time this debenture is executed that any Credit will be provided other than in terms of any contract relating to the Credit referred to in recital 2 (2)."

It is also in conflict with normal commercial practice, and is denied by Mr Hayes, loans and securities manager for Foodstuffs, who deposed that a standard requirement is

that members in financial difficulties pay cash for goods supplied. I am satisfied that there is no arguable case to support the contention that Foodstuffs is presently under any legal obligation to provide credit to Silver Fern for goods supplied to it for its general trading purposes. It is therefore unnecessary to consider the difficulties surrounding the obtaining of an interim mandatory injunction. Suffice it to say that in my view there are major difficulties in the way of granting such relief, as was evidenced by the need to amend, on more than one occasion, the form of the order sought as the argument progressed. It is essential that a defendant know with certainty what actions are required of him by a mandatory injunction (Redland Bricks Ltd v Morris & Another [1969] 2 All ER 576, 580). There is also here an absence of special circumstances, such as those discussed in Locabail International Finance Ltd v Agroexport and Others, The Sea Hawk [1986] 1 All ER 901, 906, which are necessary to justify the making of a mandatory order of this nature.

2. Appointment of Receiver - arguable case

(paras. (1) (2) and (3) of application)

A number of grounds, including allegations of misrepresentation are relied upon by the Plaintiffs, which require separate consideration. The representations are also said to be terms of contract between Silver Fern and Foodstuffs which have been breached.

(a) Proposed Devonport New World Supermarket:

There is an existing New World Supermarket at Devonport, but Foodstuffs is presently putting into effect plans to construct in that suburb a new supermarket in the same chain.

There is a conflict of evidence as to what was said by the representatives of Foodstuffs as to this proposal and its implementation. What is now clear is that the development is to proceed, and that it will be a reasonably substantial business occupying some 25,000 square feet of space. It is expected to be operative by October 1988, and the inference to be drawn from the present evidence is that it is likely to have an adverse effect on the business carried out at Belmont by Silver Fern. The extent of that cannot be assessed, but it could well be substantial as alleged by Mr Antoniadis. There is also evidence that the development has resulted in the Belmont business now being unsaleable, but whether that is so in fact cannot be determined on the present application.

I read the pleading under this head as alleging the expression of an intention by Foodstuffs not to proceed with this project for six years, when that was not its true intention. I can see no basis in the evidence for a claim that there was any contractual term prohibiting Foodstuffs from proceeding with such a development.



As matters now stand however, I think the Plaintiffs have established an arguable case that there was a misrepresentation as to the existing intention of Foodstuffs in the timing of the Devonport Supermarket, but in so holding I make no finding even of a tentative nature on that question because it is dependent upon resolving a number of disputed facts, including the content of oral discussions between the parties. If established, that misrepresentation could lead to an entitlement to damages, but I am of the present view that it is highly unlikely any injunctive relief would be granted at the substantive hearing. The legal foundation for such relief would seem to be extremely doubtful.

(b) Budget forecasts:

Prior to making the decision to purchase the supermarket, Mr and Mrs Antoniadis were provided by Foodstuffs with what was described as a cash-flow forecast budgeting. This was forwarded to them with a letter dated 14 May 1986 and comprised four separate budgets based on differing premises. All include projected turnover and profit figures. Although the pleading on this issue is a little confused, I think it clear that the only basis upon which a claim could be founded is negligence in preparation. There is nothing in the present evidence to establish that the budgets were prepared other than bona fide, and no evidence of any substance to show they were prepared negligently.

The mere failure to achieve final profit projections, which seem to be the primary complaint levelled against the budgets, of itself establishes nothing. Also of significance is the fact that the budgets contain a disclaimer expressed in wide terms, which although it may not excuse liability for negligent preparation makes it clear the figures are only estimates and indicative of possible profit from an efficient business. I do not consider an arguable case based on the supply of the budgets is established on the present evidence.

(c) Overdraft Support:

It is pleaded that it was represented to the Plaintiffs that after a year Foodstuffs would "support them obtaining an overdraft". It is pleaded, as with the other alleged misrepresentations, that this was also a term of the contract between Silver Fern and Foodstuffs. It is difficult to see how the statement relied upon could constitute a misrepresentation. It does not refer to an existing fact, but only to an intention. It is not an express term of any contract between the parties, neither is there any room to imply such a term. In his first affidavit, Mr Antoniadis stated that he understood Foodstuffs would assist him to obtain an overdraft. That is quite insufficient to establish either a representation, even of existing intention, or a contractual term. Further, the appendix to the debenture refers expressly to possible guarantee of

Silver Fern's bank account, providing that Foodstuffs "may in its discretion" do so. That is quite inconsistent with any legal obligation to do so. It can also be observed that the pleading and the evidence is silent on such matters as the extent or duration of the guarantee, the terms upon which it would be provided, or any other particulars necessary to enable the obligation to be determined with certainty. It is also commercially inconceivable in my view that any open ended unrestricted undertaking to guarantee an operator's overdraft without regard to financial position, would be given. This head of claim is not arguable as matters now stand.

(d) Provision of financial reports and administration assistance:

It is pleaded, again as a representation and as a term of contract, that Foodstuffs would provide five-weekly financial reports and also assistance with administration and systems within the store. It is alleged that such representations were false, and being terms of the contract were breached. This pleading also raises the difficulty that the representation alleged is not as to an existing fact, and if it is relied upon as being an existing intention on the part of Foodstuffs, there is nothing to indicate that such was not an intention genuinely held. I am unaware of any express written contractual term to the effect pleaded, and I have been unable to discern from the affidavits any evidence to establish an oral undertaking sufficient to

establish such a legal obligation on the part of Foodstuffs. Reports were furnished by Foodstuffs, based on information supplied by Silver Fern, but there is nothing to indicate they did not accurately represent the information supplied nor that they were prepared carelessly. The question of the degree of assistance, and the operational and management activities of Mr Antoniadis, are matters in dispute which cannot be resolved on this application.

No arguable cause of action under this allegation is presently made out.

(e) Credit Contracts Act 1981:

It was submitted that to appoint a receiver would be the exercise of a power conferred by the debenture in an oppressive manner. The facts relied upon as establishing oppression are those which constitute the misrepresentations and breaches of contract set out in the earlier causes of action and discussed above. The only additional feature is the allegation that Silver Fern has not been given an adequate opportunity to run the business profitably, an allegation which on the evidence as it now stands has not been made out. I can see nothing arguably oppressive in Foodstuffs exercising its rights under the debenture at this time, Silver Fern probably being insolvent, and indebted to Foodstuffs in excess of \$400,000.00. Relief under this cause of action is therefore dependent upon the entire

pleaded misrepresentation and breaches of contract, and cannot of itself justify the interim orders sought if they are otherwise inappropriate.

3. Appointment of Receiver - balance of convenience

The only head of claim which could support an interim injunction is accordingly that based upon the allegation that Foodstuffs misrepresented its intentions as to the timing of the Devonport development. If established, damages, which are claimed at \$286,000.00, would appear to be the only appropriate remedy.

The issue is whether overall justice requires Foodstuffs to be prohibited from exercising its powers under the debenture for non-payment of monies admittedly due to it pending determination of that claim for damages.

Mr Asher for Silver Fern submitted that the doctrine of equitable set-off applied and that a restraining order was appropriate without any condition as to payment into Court. It is clear the Plaintiffs are financially unable to make a payment of the magnitude in question.

In my judgment, assuming there does arise here an equitable set-off such as is discussed in cases like Popular Homes Ltd v Circuit Developments Ltd [1979] 2 NZLR 642 and Parry v Grace [1981] 2 NZLR 273, there are a number of relevant factors which when taken in conjunction persuade me in the exercise of my overall discretion to refuse interim relief.

The primary matter urged upon me by Mr Asher was that the Plaintiffs will be deprived of their income and their control of the business, very probably on a permanent basis, and that this was a consequence of the (allegedly) wrongful act of Foodstuffs. It is in the light of that the other factors must be considered, they being :

1. Foodstuffs is able to pay any ultimate damages award.
2. The security afforded by the debenture is likely to diminish if Silver Fern continues to trade. Its assets are confined to the business operations and consist of plant, fittings, stock-in-trade, the sublease and such goodwill as may now remain.
3. Silver Fern's overall financial situation is bad, and it is probably insolvent.
4. The trading position of Silver Fern over the period of the coming months is quite uncertain, and there may well be a substantial and indeed rapid change in circumstances affecting the viability of the business and what its assets can realise. A day to day retail business such as this can be subject to a wide variety of influences, perhaps with sudden effect.

The charge effected by the debenture has as I understand it now crystallised, and despite Mr Antoniadis' hopes there must be a real risk the security will be further eroded. The conditions stipulated in what I have recorded as paragraphs 5 and 6 of the application are quite impractical for medium term purposes, and in themselves beg as many questions as they answer. The circumstances cannot be likened to a mortgage of land situation.

5. The real basis of the claim as I have isolated it for present purposes is that too much was paid for the business and thus borrowed from Foodstuffs.
6. No permanent injunctive relief of the kind now under consideration can result.
7. Plaintiffs are not able to meet any damages which may result from an interim injunction if Foodstuffs is substantially successful at trial.

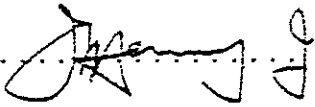
4. Appointment of Receiver on 22 March 1988:

The second amended Statement of Claim names a Second Defendant, erroneously it would appear because no order for joinder has been made. By the third cause of

action the Plaintiffs also seek additional relief restraining the named Second Defendant, being the chartered accountant appointed receiver on 22 March 1988, from acting as a receiver. This cause of action does not now require consideration, because Mr Macdonald acknowledged that the appointment made on that date has been effectively revoked and there is now no receivership operating. No consequential matters arise.

The application is therefore dismissed. The interim orders made on 15 April 1988 will consequently be discharged, but as from 14 days following delivery of this judgment.

Costs are reserved.

  
J S HENRY, J.

Solicitors:

Turner Hopkins & Co., Auckland, for plaintiffs  
McElroy Marriot Auckland, for defendant



