IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. 786/88

BETWEEN	ENGLISH FUR REMODELLERS LIMITED	
	First Plaintiff	
AND	ROBERT WILLIAMS EDLIN	
	Second Plaintiff	
AND	NATIONAL WESTMINSTER FINANCE NEW ZEALAND LIMITED	
	Defendant	

Hearing: 12 May 1988

Counsel: E.F. Mills for plaintiff
S.P. Rennie for defendant

Judgment: 12 May 1988

(ORAL) JUDGMENT OF TOMPKINS J

The first and second plaintiffs have brought interlocutory applications for orders for interim injunctions to prevent the defendant from exercising its power of sale, under an instrument by way of security, over a boat owned by the first plaintiff and under a collateral mortgage over a house property owned by the second plaintiff.

On 16 May 1986 the first plaintiff and the defendant entered into an agreement whereby the defendant agreed to advance to the first plaintiff $200,000 which advance was to be secured by an instrument by way of security over a boat owned by the first plaintiff called "Xarisma" and a first mortgage over a New Lynn property owned by the second plaintiff

and his wife. The principal together with interest of $108,000 was to be paid by 23 payments of $4,500 each with a final payment of $204,500 on 16 May 1988. The instrument and mortgage were completed, the advance was made.

The first plaintiff paid three months instalments of interest on the date of the advance. The next payment was due on 16 September 1986. A cheque from the second plaintiff in payment of that instalment was dishonoured. No further payments have been made.

Mr Rose, the defendant's credit manager, deposes that almost immediately after the loan was made the defendant became concerned that a condition of the loan relating to the installation of certain equipment had not been carried out. By the end of September the defendant's concern had been increased by the dishonouring of the second plaintiff's cheque. When the next payment, due on 16 October 1986, was not made Mr Rose arranged for Mr Jackson, the northern regional manager of the defendant, who was then in Sydney to see the second plaintiff who was also in Sydney.

Mr Jackson and the second plaintiff both referred to an initial communication between them in Sydney early in October. There then occurred a meeting at the Wentworth Hotel that, according to Mr Price was about 24 October, according to the second plaintiff was 28 or 29 October 1986. Present at that meeting, in addition to the second plaintiff and Mr Jackson, was a Mr Phillip Bower, an associate of the second plaintiff's. There were also present a Mr and Mrs Brennan both of whom were solicitors, but their presence was on a personal not professional basis.

The claim now brought by the plaintiffs and their applications for interim injunctions hinge on

what occurred at that meeting. According to the second plaintiff, supported by Mr Bower, it was agreed between them and Mr Jackson that the defendant would defer taking any steps to seize the boat or otherwise enforce its security until the second plaintiff had returned to Auckland in about a week's time when the arrears of interest that then totalled $9,000 would be brought up to date.

Mr Jackson gives a different account. He says that he was told by Mr Bower that "Xarisma" had been sold for $A380,000 and that settlement was to be in two weeks. He says the second plaintiff undertook to obtain from this sale the amount necessary to bring the contract up to date. He denies that he entered into any commitment on behalf of the defendant not to exercise its rights of enforcement. On the contrary he relates certain other communications he had with the second plaintiff and a solicitor acting for the second plaintiff, concerning other possible courses, included a refinancing of the loan with AGC of Australia. As a result of these further proposals he says he became increasingly concerned about the second plaintiff's failure to make payments as promised and the conflicting stories he was receiving from the second plaintiff relating to repayment and/or refinancing.

On 30 October 1986 the defendant took "Xarisma" into its custody. I need not for present purposes relate in detail how this was done, Mr Rose deposing that the principal reasons for acting were the default in payments, the failure by the second plaintiff to send by telegraphic transfer from Australia the amount owing and the deteriorating condition in which he claims they found the boat to be. On that day the defendant wrote to the first plaintiff confirming the overdue instalments and advising that payment of the whole amount outstanding of $294,539.54 was demanded by

5 November 1986.

At a date not stated, but apparently early in November, the second plaintiff returned from Australia. He says he was in contact with the defendant upon his return, that the boat had already been seized by the defendant contrary to the assurances he said were given by Mr Jackson in Sydney and that various oral discussions with the defendant took place which did not resolve the matter.

On 8 December 1986 the defendant wrote to the first plaintiff recording the events that had occurred and urging either that there be a refinancing or a sale of the assets in order to clear the debt. By letter dated 22 December 1986 the first plaintiff replied to the defendant raising a number of matters including an assertion that the loan transaction may have transgressed the Credits Contract Act.

The defendant took no steps to enforce its security during 1987. Mr Rose says that this was because of various promises made by the second plaintiff relating to the possibility of a sale of "Xarisma" to the Kingdom of Tonga and to other possible purchasers. A notice under the Property Law Act 1952 had been given on 19 November 1986. Finally, a mortgagee sale was arranged to take place on 27 April 1988.

It was that development that prompted the lodging of these applications for interim injunction on the same day. The application by the second plaintiff to prevent the mortgagee sale came before me at 12.20pm that day when, following a short hearing in chambers, I issued an interim injunction that prevented the sale taking place at 2pm. The interim injunction was to lapse on 5 May unless it had by then been renewed. It was later renewed until today.

The essence of the plaintiff's case in support of the applications for interim injunction is that the second plaintiff and the defendant having entered into the agreement at the Wentworth Hotel at the end of October 1986 to which I have already referred, the defendant, in breach of that agreement, repossessed the boat.

It is the plaintiff's case that the defendant was well aware of the first plaintiff's intention to sell time shares in the boat, that the defendant was also aware that the first plaintiff was relying on the proceeds of those sales to meet its obligations under the instrument by way of security, and that the defendant was also aware that repossessing the boat would prevent the first plaintiff from effecting any such sale and therefore from meeting its obligations. The plaintiffs therefore claim that their inability to meet their obligations was directly due to the breach of the Wentworth agreement.

Mr Mills submits that if the plaintiffs have established an arguable case establishing the Wentworth agreement, the breach of it by the defendant, and the consequential loss by the plaintiffs then it is just that the injunction should issue to enable the plaintiffs' claims to be fully heard before the sale of "Xarisma" and of the New Lynn property.

The case for the defendant is that the evidence submitted fails to establish that the agreement relied upon by the plaintiff was made and that even if it were the balance of convenience is against the making of an interim injunction because of the plaintiff's delay in prosecuting their claim, because the plaintiff's indebtedness is substantially greater than the present value of the securities, and because, if the

agreement can be established and breaches proved, damages will be an adequate remedy. I return therefore to the Wentworth agreement.

It is well established that applications for interim injunctions such as the present are not an appropriate stage in the proceedings at which to resolve disputed matters of fact. But it is also now well established, see for instance the judgment of Somers J in Pemberton v Chappell [1987] 1 NZLR 1 relying upon a dicta in Eng Mee Yong v Letchumanan [1980] AC 331, 341, that if the Court considers on a careful review of the factual evidence that the plaintiffs assertions fail to cross the threshhold of credibility then relief should be refused despite any apparent evidentiary conflict.

In considering whether the plaintiffs first cross the threshhold in the present case I consider a number of factors. First there is the second plaintiff's evidence of what transpired in the meeting as set out in his affidavit. Then there is the evidence of Mr Bower in which he expressly states that following some discussion about the sale of time share units in "Xarisma" Mr Jackson on behalf of the defendant agreed that the defendant would refrain from taking any steps to seize "Xarisma" or otherwise to enforce its security under the agreement until the first plaintiff's return to Auckland, which was expected to be within the following two weeks.

Then there is Mr Jackson's denial that he entered into such an agreement. But it is significant to consider the events that followed. When the second plaintiff returned to Auckland he found that "Xarisma" had been repossessed. If the agreement that he says was made in fact had been made then such an action was in clear breach of it. In that event one would expect the second plaintiff strongly to protest to

the defendant at such a blatant breach, to tender the interest arrears and to demand the release of the boat. It appears from the evidence that he did not do so. He simply refers to discussions continuing, conduct which in my view is quite inconsistent with the agreement he now relies upon having been reached.

I have already referred to the second plaintiff's letter to the defendant of 22 December 1986 setting out what he describes as four points for discussion concerning the finance contract with the defendant. Nowhere in that letter does the second plaintiff make any reference to the Wentworth agreement. Further correspondence between the parties followed.

On 14 December 1987 some 14 months later solicitors instructed to act for the plaintiffs wrote to the defendant. After stating that they now act for the first plaintiff they advised that they are in the process of preparing proceedings to set aside the contract and to seek damages for loss occasioned to the first plaintiff through the defendant's allegedly wrongful repossession of the vessel. They sought an undertaking that the defendant would not proceed with a sale of the vessel. But other than a reference to proceedings to set aside the contract on grounds that are not stated they make no further allegations and in particular make no reference to the Wentworth agreement.

The defendant replied to the letter from the plaintiff's solicitors on 14 December 1987 setting out the history of the matter. But it was not until a letter from counsel for the plaintiffs dated 22 April 1988, five days before these proceedings were commenced, was the Wentworth agreement asserted on behalf of the plaintiffs. So a period of some 18 months elapsed

before it was ever asserted that an agreement on the basis now alleged had been reached at the Wentworth meeting. If such an agreement had in fact been reached then it is beyond belief that the plaintiffs and those advising them would not have sought to rely on that agreement immediately after "Xarisma" was repossessed and during all the negotiations and discussions that followed.

On these facts the conclusion that I have reached is that the plaintiffs have not crossed the threshhold of credibility in their assertion that the Wentworth agreement was made. I reached this conclusion not on the conflict of evidence between the second plaintiff and Mr Bower on the one hand and Mr Jackson on the other but rather on the events that occurred over the ensuing 18 months. It follows from this conclusion that the basis upon which the plaintiffs seek these interim injunctions has not been established and therefore the plaintiffs have failed to demonstrate an arguable case. It also follows that, looking at the matter broadly and having regard not only to that failure but all the other factors relating to the exercise of the Court's discretion, the overall justice of the case favours declining the making of the orders for interim injunctions. This conclusion does not of course prevent the plaintiffs, if they so choose, from pursuing their action based on the agreement. It simply means that the plaintiffs have failed to establish the necessary grounds for the making of the interim orders sought.

Mr Rennie seeks costs on behalf of the defendant. Mr Mills advises that the second plaintiff is in receipt of legal aid. Any issue of costs against the second plaintiff is therefore reserved. But the defendant is entitled to costs in respect of the application brought by the first plaintiff. There will

therefore be an order for costs in favour of the defendant against the first plaintiff in the sum of $1,250 plus disbursements to be fixed by the Registrar.

Solicitors:
Denholm, Reeves for plaintiffs
Kensington, Swan for defendant

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