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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. 2961/88

1653

BETWEEN JACQUES HARSVELD

Plaintiff

AND WALES AND MACKINLAY LIMITED & WALES AND MACKINLAY HOLDINGS LIMITED

Defendants

Hearing: 25 September, 1989

Counsel: J.H. Wiles for plaintiff
P.J. Wright for defendants

Judgment: 25 September, 1989

(ORAL) JUDGMENT OF BARKER J

The plaintiff commenced proceedings on 21 December 1988 against Wales and Mackinlay Limited, a company which has now changed its name to Wales Textiles Limited ('the defendant'). These proceedings sought damages for the alleged unlawful dismissal of the plaintiff by the defendant.

The plaintiff had been employed by the defendant for some 17 years; in September 1986 he was the manager of its fashion department and an associate director. According to correspondence exhibited in the affidavits, on 26 August 1986 he wrote to one of the executives of the

defendant indicating his wish to resign as associate director; by implication he, seems also to have resigned as manager of the fashion department; he offered to continue as a salesman, in which occupation it is apparently accepted that his strengths lay. The chairman of directors of the defendant wrote to the plaintiff on 18 September 1986 indicating that the defendant was not prepared to employ him as a salesman and that it accepted his resignations. It therefore required him to leave the defendant's premises immediately and hand over his company car; the defendant provided him with two months' ex gratia salary in view of his long service.

The plaintiff alleges that he was unlawfully dismissed. In his amended statement of claim, he seeks damages involving loss of salary, loss of bonus, loss of superannuation benefits and loss of the use of the company car over a period of 12 months, which period the plaintiff alleges was the proper period of notice he should have received. The plaintiff also seeks general damages, pursuant to S.9 of the Contractual Remedies Act 1979, for the suffering distress and anxiety caused by the alleged wrongful dismissal.

On 14 September 1984, the plaintiff and his wife (who is not a party to these proceedings) signed a mortgage in the sum of $30,000 in favour of Wales and Mackinlay Holdings Limited ('Holdings'), a company which is apparently a wholly owned subsidiary of the defendant. This mortgage,

as is often the case with mortgages to staff members, provided for a concessionary rate of interest of 8%; it contained the following clauses -

> "14. The mortgagor will pay the principal sum and interest to the mortgagee by equal calendar monthly payments of $350.00 each the first of which payments is to be due and payable on the 14th day of October 1984 and the mortgagor will on each of the interest dates specified in Schedule A hereof apply the said monthly payments first in payment of the interest then due and secondly in reduction of the principal sum.
>
> 15. The mortgagor Jack William Harsveld will in each year that he receives a payment by way of bonus from his employer Wales & Mackinlay Limited at Auckland commencing with the bonus received for the trading year ending 30th June 1985 and in each year thereafter pay one half of the net after tax amount received by him in respect of each such annual bonus to the mortgagee in reduction of the principal sum and such payments will be taken into account at the next quarterly interest date in accordance with the provisions of the preceding clause hereof.
>
> 16. Should the mortgagor the said Jack William Harsveld leave the employ of Wales & Mackinlay Limited at any time whilst any portion of the principal sum is still outstanding hereunder THEN IN SUCH EVENT the whole of the principal sum will immediately become due and payable without the necessity of any formal demand being made in respect thereof by the mortgagee AND notwithstanding anything herein otherwise provided the interest payable in respect of the principal sum outstanding at the date of termination of employment of the said Jack William Harsveld with Wales & Mackinlay Limited will immediately increase to the penalty interest rate provided in Schedule A hereof or to the rate at that time being charged in respect of advances secured by second mortgages of residential land made by private lenders through solicitors practising in Auckland."

Since the employee-employer relationship between the

parties was terminated some 3 years ago, the plaintiff has not paid any of the monthly payments due under the mortgage. It is not clear what is the substituted rate of interest to be charged under the description "of the rate being charged in respect of second mortgages of residential land made by private lenders through solicitors practising in Auckland".

Counsel for the plaintiff indicated that the plaintiff was prepared to pay all arrears of principal owing to date as a condition of any injunction. Correspondence was exhibited between the solicitors which does not really help with information as to the plaintiff's present financial position. All he says on this topic in his affidavit in support is -

> "Having been dismissed from employment, I was unable to continue to make any monthly payments for some time. I had started a business on my own account now but did not earn any appreciable monies or make any sort of a substantive living until about May or June 1987."

The plaintiff does not give any particulars of his present financial position nor of the value of the property.

It is commonplace in injunction applications of this nature to place before the Court some sympathy arousing statements, such as, if the mortgagee sale were to proceed, then the plaintiff and his family would be in danger of losing their home. There is no such indication in this case. As I pointed out the plaintiff's wife,

also a mortgagor, is not a party to the proceedings. The memorandum of mortgage indicates that this property has an area of some 4 hectares - equivalent to a 10 acre block; the mortgagee's notice says that the property is at Stillwater, somewhere near the Orewa district; but no information as to the present value of the property or to the existence or dimension of any other encumbrances is given.

It behoves a plaintiff seeking interim relief of this nature to make full disclosure of financial details for the reason (a) to assist the Court in deciding where the equities lie; and (b) to assist the Court in determining whether the plainiff's undertaking as to damages has any value.

On 15 September 1989, there was filed a "statement of claim in support of an application for interim injunction". This document named not only the existing defendant but also a mortgagee, Holdings. How this document was able to be filed is not clear. There had been no application to join Holdings. The Rules require that joinder of additional defendants requires the leave of the Court.

Least this be thought a technical problem, to prevent the consideration of the merits I merely note that this curious document which contains no prayer for relief alleges (a) it would be inequitable to allow a mortgagee

sale to proceed because of factual matters deposed by the plaintiff; (b) the enforcement of the mortgage would be harsh, oppressive and in contravention of reasonable standards of commercial practice in breach of the provisions of the Credit Contracts Act 1981; (c) any mortgage default by the plaintiff was caused by the defendant's wrongful termination of his employment.

This document does not specifically plead equitable set-off. I suppose that is to be discerned with some difficulty from the document. There can only be at any given time one statement of claim which alleges all the current causes of action alleged by a plaintiff against a defendant; in order to obtain an injunction against the mortgagee, that mortgagee would have to be joined as a defendant.

Mr Wright indicated that he would oppose such joinder. There having been no proper application before me, I am not willing to entertain a joinder application at this stage. That technicality would be the end of the present application by counsel and an injunction application must fail. However, I am proceeding to consider the merits least it be thought that the matter had been decided against the plaintiff purely on procedural technicalities.

The first question therefore, assumes that the mortgagee was properly joined. I note that the plaintiff (a) has not questioned the validity of the mortgage; (b) has not

in my view sufficiently set up a claim of equitable set-off against the mortgagee; (c) has not provided sufficient financial information about himself; and (d) has made no payments under the mortgage. I do not find that there is sufficient basis for a claim of equitable set-off nor a claim under the Credit Contracts Act as shown in Grant v NZMC Ltd [1989] 1 NZLR or the other cases cited by counsel.

In the unreported decision Stephens v Advance Underwriters Southland Ltd (C.P. 6/89, 20 April 1989, Invercargill Registry) Tipping J refused an injunction to a former employee against his former employer as a mortgagee on the basis of the equitable set-off; he upheld it on the basis of Credit Contracts Act oppression.

In my view, there is not sufficient information to make a similar determination, particularly in view of the following considerations (a) the mortgagee cannot be said to have acted precipitately. It is now 3 years since the plaintiff left the defendant's employ; (b) even if the plaintiff's assertions were correct (i.e. that he was improperly dismissed) he would have been entitled to one years' notice on his view of the matter; in which case, the mortgagee's rights could have been asserted after that one year. It is now 3 years since the plaintiff was dismissed.

Looking at clause 14 of the mortgage it appears the

principal sum becomes due and payable should the plaintiff leave the employ of the defendant at any time whilst any portion of the principal sum is still outstanding. One would have thought, on the plain meaning of the words, the clause covers the situation of the plaintiff leaving the defendant's employ for any reason; in view of those clear words, it seems that the mortgage is now properly payable. That is of course a matter to be fully argued at the substantive hearing.

Therefore I cannot find that there is a serious question to be tried. In case I am incorrect in this view, then damages is sufficient remedy; one cannot assume that the plaintiff's financial situation is parlous, because he has chosen to give no evidence about it.

In Coastal Shipping Limited v Reef Shipping Agencies Limited & The Auckland Harbour Board (A.260/82, 7 April 1982, Thorp J) indicated that where there is no evidence from an applicant for an injunction of financial stress caused by implementation of a mortgagee's rights, it is not for the Court to assume that stress. The learned Judge noted that there are some cases where an applicant for injunction asserts that, unless the respondent is prevented from pursuing a certain course, then the applicant will be put into bankruptcy or liquidation; in such cases the Courts, in their general equitable jurisdiction, may decide that the possibility that an applicant might not be able to meet an award of damages

against it should not deprive him of the right to a trial of the issues. In the Coastal Shipping case, there was no evidence that the applicants would be put into liquidation by the implementation of the respondent's procedures; the Court would not assume that that would happen.

There is also no evidence of the plaintiff's ability to support his undertaking as to damages. That failure in itself is enough to disentitle the plaintiff from an injunction in the absence of evidence of the sort mentioned by Thorp J in Coastal Shipping.

Finally, I mention a line of authority, such as Parry v Grace (1981) NZLR 273 and my own decision Meates & Ors v Taylor & Ors (1989), 4 NZCLC 65,127; the Court would normally require payment of some moneys into Court as a condition of an injunction where the validity of a mortgagee's powers have not been impeached.

One would have thought that some substantial payment, other than payment of arrears would normally have been offered. However, I do not think it necessary to refer further to this point, in view of my clear conclusion on the more fundamental grounds.

There is strictly no proper application for an interim injunction because of the attempt to enjoin a defendant (not already a party to the proceedings). I suppose it

could be said that because Holding is a subsidiary of the existing defendant an injunction could issue against the defendant to require it to direct its subsidiary not to enforce mortgagee sale proceedings. I am treating the application as being on that basis. However, there is no legal basis for issuing such an injunction and the application is therefore dismissed.

Costs reserved.

One hopes that the parties will now proceed with the action. If it is wished by the plaintiff to join Wales and Mackinlay Holdings Limited as a defendant, the application will have to be made in the proper way.

R. D. Barker J

Solicitors: Yolland & Romaniuk, Auckland, for plaintiff
Kensington Swan, Auckland, for defendants