Euro-National Corp v Petricevic Financial 23/6/89

5/7

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

[redacted]

RM
SET 3.

CP 1205/89

564

BETWEEN EURO-NATIONAL CORPORATION LTD

First Plaintiff

AND EURO-NATIONAL SECURITIES LTD

Second plaintiff

AND PETRICEVIC FINANCIAL SERVICES LTD

Defendant

CP 830/89

BETWEEN EURO-NATIONAL CORPORATION LTD

Plaintiff

AND RODNEY MICHAEL PETRICEVIC

Defendant

CP 1204/89

BETWEEN EURO-NATIONAL CORPORATION LTD

Plaintiff

AND RODNEY MICHAEL PETRICEVIC

Defendant

Hearing: 23 June 1989

Counsel: Mr Asher for plaintiffs
Mr Vickerman for defendants

Judgment: 23 June 1989

REASONS FOR JUDGMENT OF ROBERTSON J

On Friday 23 June I heard an application to discharge a Mareva Injunction which had been made ex parte on 9 June

1989 by Barker J.

Some time after 6 pm on 23 June 1989 at the conclusion of submissions I indicated that the order would be discharged and that I would give reasons at the earliest available opportunity.

An understanding of this matter requires me to return to the heady days of 1986. At that time Rodney Michael Petricevic, (hereinafter called Mr Petricevic) was the Chief Executive and Chairman of the Board of Directors of the plaintiff, Euro-National Corporation Ltd, (hereinafter called Euro-National.) On 15 October 1986 Euro-National decided to call an extraordinary general meeting of its members, for the purpose of obtaining shareholder approval for the issue of 8,000,000 ordinary 25¢ shares, to the directors of the company. The shares were to be issued at the price of $3.50 per share, which would be paid at 1¢ at the time of issue and the balance would be payable any time within two years. Mr Petricevic in terms of the proposal was entitled to 2,975,000 shares.

Approval for this scheme was obtained at an extraordinary general meeting held on 16 December 1986.

In accordance therewith the shares were allocated to the defendant on 16 March 1987, and the 1¢ per share was duly paid to the company on 9 April 1987.

Under the arrangement Mr Petricevic owed to the company $10,382,750 payable on or before 16 December 1988.

No-one makes any secret of the fact that at the time that arrangement was entered into it was anticipated that the rise in the share market would continue, and that some time within the two year period the directors, including Mr Petricevic, would be able to dispose of shares to pay the debt to the company and be left with the balance as a capital profit. It is clear that no-one anticipated that there was going to be a collapse of the sort that occurred. Certainly the arrangement did not contemplate it. The arrangement did not have as a term any provision to protect the Directors if the state of affairs which has developed was to arise.

On 14 December 1988 a formal demand for the outstanding balance was made.

There was in addition to this, an indebtedness by Petricevic Financial Services Ltd, a company effectively controlled by Mr Petricevic, of some $125,000. This related to an advance made in April and June 1987 by Euro-National Securities Limited, an interrelated company. There was some argument as to whether it was specifically tied to the acquisition of a Mercedes Benz motor vehicle in Australia. Whatever the position, in July 1988 Mr Petricevic personally acknowledged responsibility for that debt.

It is clear that from December 1988 down until May 1989 there were various discussions between Euro-National and Mr Petricevic to ascertain whether it was possible to obtain a commercial solution to the problem which had arisen.

The evidence before me suggests that although Mr Petricevic may have had a gross worth in excess of $50 million in the days before the sharemarket crash, his position today is very different. He contends that he was probably never worth as much as alleged because he had such a substantial parcel of Euro-National shares that he could not have realised them all at one time. That aside, he was a man with very considerable assets.

Apparently Euro-National shares are worth about 30¢ today, and Mr Petricevic makes no secret of the fact that he has nothing like $10 million to meet his contractual obligation.

There is nothing to suggest that there is any real or substantial challenge to the existence of the base debt.

There was a meeting on 5 May 1989 between Mr Petricevic and Mark Graham Chennells who is now the Chief Executive of Euro-National.

Mr Petricevic says that at that meeting an agreement was reached between himself and the company in respect of his indebtedness and that of Petricevic Financial Services Ltd.

That is denied by Mr Chennells.

Although there had been reasonable discussions between the parties prior to mid-May, any communication seems to have ceased, certainly after 25 May. It is not difficult to understand the reason for that. Mr Petricevic maintains that there had been a deal reached, the details of which I mention later in brief. Euro-National and its executives claimed that there had merely been a further round in discussions, and that no concluded arrangement had been reached between them.

No doubt because of the size and nature of the debt, a summary judgment application had been filed in this Court in respect of the personal indebtedness of Mr Petricevic on 26 April 1989, relating to the $10,382,750. A major supporting affidavit had been sworn on 20 March 1989.

Apparently while negotiations were proceeding to find a commercial solution the documents were not filed and even after filing, no attempt was made to serve.

By the end of May the circumstances between the parties and their legal advisers had reached the point of open

warfare. The exchange of correspondence between them was doing nothing to deal with the problem, and acerbic charge and countercharge was quite counterproductive.

The summary judgment application had a date of hearing of 15 June 1989. In terms of the rules it was necessary that that proceeding be served not less than 21 days before that date of hearing. Evidence available before me indicates that a concerted endeavour to obtain service began only about 31 May 1989. I will come back to the circumstances of that in due course. It is important to note merely that the failure to serve earlier meant that the summary judgment proceeding could not have been dealt with on 15 June.

No doubt as a result of frustrations in obtaining service which were an inevitable corollary of the internecine campaign going on between the solicitors, suspicion and intrigue was attached in every action.

On 9 June the plaintiffs sought ex parte a Mareva Injunction. At the same time a second summary judgment application was filed which related to the $125,000 debt. That proceeding was given a hearing date of 27 July 1989.

In support of the ex parte application for a Mareva Injunction there were two affidavits sworn by Mr Chennells, an affidavit by Richard Malcolm Sealy, who was

also a director of Euro-National, and an affidavit from a process server that endeavours from 31 May down to the time of that application to effect service of the summary judgment application had received a distinct lack of co-operation by Mr Petricevic. In the memorandum filed in support, the Court was invited to have regard not only to the application itself, but also the two summary judgment proceedings to which I have referred.

At the ex parte hearing it was contended that the claims against the defendants were strong on a prima facie basis. In essence the evidence then tendered indicated the history of the involvement between Mr Petricevic and Euro-National, and the fact that there was an acknowledgment of the indebtedness. It was then asserted that Mr Petricevic was following a deliberate policy of disposing of his assets and not accounting for the proceeds to his creditors. There was a passing reference to an indebtedness to the Bank of New Zealand over a property transaction in Australia, and an acknowledgment that there had been without prejudice settlement discussions between the parties. No detail was mentioned as to the quality or nature of those discussions.

The learned Judge was referred to the fact that Mareva Injunctions are now granted not only in respect of the removal of assets outside the jurisdiction. It was submitted that the test was whether the Court could infer

a danger of default because assets had been disposed of by the defendant within the jurisdiction. The classic statement by Lawton LJ in Third Chandris Shipping Corporation v Unimarine SA [1979] 2All ER 972 was referred to.

The order was grantedex parte.

The application to rescind was first called before me on Monday 19 June. There was not time for the duty Judge to dispose of the matter on that day, but I indicated that it was a matter which ought to be granted Court time during the week. I raised with counsel whether it was not more appropriate for the Court to assign the time which was available, to hearing the summary judgment applications. If summary judgment was granted, then the question of the Mareva became somewhat academic, because other means of enforcement could be used. If there was no basis for summary judgment then the court would be in a position to decide whether there was a need for Mareva protection until there could be a substantive hearing.

Mr Asher for Euro-National was keen to adopt such a course of action, but Mr Vickerman on behalf of Mr Petricevic strenuously opposed. Although the Court does have a power to determine the conduct of proceedings, it will only over-ride the clear time limits provided by the Rules in exceptional circumstances. I was unwilling to find the matter fell into that category.

It was accordingly adjourned until Friday 21st for the hearing of the application to rescind the Mareva Injunction.

Mr Asher properly conceded that the correct procedure on an application to rescind an order made ex parte, is to approach the matter de novo and to determine whether the plaintiff has sufficient grounds to justify the orders. See Carter Holt Holdings Ltd v Fletcher Holdings Ltd [1980] 2NZLR 80,84.

The parties were agreed that the test was whether there was a good arguable case on the substantive claim - that is something more than merely a serious question to be determined. On this and a number of other points I was specifically referred by Mr Asher to the recent decision of Gault J in Bank of New Zealand v A.R. Hawkins (CP383.89 Auckland Registry, 11 April 1989) which was most helpful.

There was no question but that Mr Petricevic did have assets within the jurisdiction which could be the subject of the releif sought. The real issue was whether there was a risk that the defendant would dissipate or dispose of his assets.

The relevant test is as noted by Gault J in the Hawkins case at 18:

> "While it is no longer confined to foreigners or to the risk of removal of assets beyond the jurisdiction, it must be reserved for those cases where the plaintiff can demonstrate a real risk that the defendant will dissipate or dispose of assets so as to render himself 'judgment proof'. It is, of course, important to preserve the flexibility of the remedy. In this respect it is instructive to bear in mind that was said by Lord Denning MR in the case from which the remedy derives, Mareva Compania Naviera SA v International Bulkcarriers SA (1975) 2 Ll.R. 509,510 -
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> > 'If it appears that the debt is due and owing - and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment - the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets.'"

In the evidence adduced before me, there was for the first time thrown into clear focus, the assertion that the meeting on 5 May 1989 had resulted in a concluded arrangement between Mr Petricevic and Euro-National. That Mr Petricevic alleged that such a deal had been made was not disclosed at the hearing on 9 June. Mr Asher is right when he says that all that he alleges exists is an oral and uncorroborated settlement. It however was alleged to exist on 5 May as evidenced by a letter faxed to counsel acting on behalf of Euro-National that day. That counsel was out of New Zealand at the time of this hearing, and I have not had the benefit of knowing what happened to the fax of 5 May sent by Mr Petricevic's solicitor. The solicitors acting for Euro-National wrote a letter on 15 May (which does not appear to have been received by Mr Petricevic's solicitors until 25 May,) which makes no reference to the communication of 5 May but addresses continuing negotiations towards settlement.

I reached the clear view that this different perception was a matter of overwhelming importance in assessing whether there was evidence that the defendant was dissipating or disposing of his assets.

Euro-National contend that there are a number of factors which are indicative of that intention. First there is a matrimonial property agreement which was entered into, I am told in October last year. I have expressed a degree of disquiet that it has not been exhibited because it is a matter of relevance in this proceeding. However, I am advised that as between counsel there has been a disclosure of its contents. In any event it was entered into in October 1988 and Mr Petricevic very realistically acknowledges that its effect on the plaintiff is at least arguable. I am unable to see that an action of that sort taken in October 1988 is a major indicator of an intention to dissipate assets in June 1989.

Complaint was made of a disposal of a property owned by Claret Estates Ltd. This company owned land on Waiheke Island. Mr Petricevic owns all but one of the shares in Claret Estates Ltd. The only thing which is an asset of his are those shares not the assets owned by the company, a separate legal entity. I am not unmindful of the veil of incorporation, but any commonsense robust reading of the matter leads me to conclude that Mr Petricevic had a ready ability to deal with the assets of that company as

if they were his own. I have no doubt that in legal and accounting terms anything received by Mr Petricevic would have to appear as an advance to him. However the long term value of the shares may well be affected by the course of action described in the papers. That however has never been made any secret and it is not a matter which evidences dissipation.

The triggering factor for the Mareva injunction was the disposal of a Mercedes Benz motor vehicle. This is the vehicle which was purchased with the funds in respect of which Mr Petricevic has acknowledged a personal liability. I heard a lot of fascinating, but not particularly helpful evidence as to what is a luxury car and what is not. Apparently Mr Petricevic sold down in the range of Mercedes which he found it necessary to have for his personal use. He used the funds which were released thereby partly to meet pressing indebtedness and a balance remains.

The significance of that sale can only be understood if it is realised that it takes place after 5 May. It is clear that from that date Mr Petricevic has taken the view that there was a "deal" struck between the parties. In broad terms his contention is that he was permitted total control of his assets and activities but that at any time within a period of 7 1/2 years he could be required to account to Euro-National for 60% of his then existing assets.

It is clear that it is considered that the entrepreneurial skills which took Mr Petricevic to the giddy heights which he reached in the mid-1980s are capable of exploitation again. No-one makes any secret of the fact that he does not have assets approaching anywhere near $10 million at the moment, but that given time it is possible that he will make some recovery.

The existence of such a deal is specifically denied by Euro-National, but Mr Petricevic, unless I am to conclude that there is a deliberate device to defeat his creditors, has a genuine and clear belief that he was free to do what he liked after 5 May. Selling his car in those circumstances is no evidence of any ulterior purpose, nor an endeavour to dissipate his assets. Rather he says, it was a move designed to free up some capital to provide seeding money so that his new enterprises could get underway. In similar vein one has to view his having made a trip to Los Angeles flying business class, which was bitterly complained of on behalf of Euro-National. If this man is to be believed, he had a grace period of up to 7 1/2 years. If that is so it is not surprising that he would be spending money and making plans to commence his salvage and recovery operation.

It is not necessary for me to determine whether a deal had been made. Mr Asher says that the terms alleged by the parties are so outrageous as to be incapable of belief.

Such a submission needs to be viewed against the history and background of this matter. It is undisputed that these parties were in October 1986, prepared to recommend and obtain the approval of their shareholders to an arrangement whereby the directors could purchase shares at their then market value by a payment of only 1¢ at the time, with a deferment of $3.49 for a period of up to two years. That may appear to an outsider to be a rather extraordinary arrangement, but it is clearly what happened.

In those circumstances I am not prepared to conclude that the arrangement of the sort contended for by Mr Petricevic could not have occurred. Whether it occurred or not, I am satisfied on the papers that Mr Petricevic has a genuine belief that it did. It may subsequently be concluded that it was a mistaken belief. However, his actions must be tested and weighed in light of that belief. The dealings which have been described in the last two months, viewed against that background, do not provide in my judgment, any evidence of an intention to dissipate or dispose so as to make himself judgment-proof in respect of the Euro-National indebtedness.

There were other matters which were averted to which I refer only in a peripheral way. First there was contention about a property at Orewa. When all the documentation is available it is clear that that property has never belonged beneficially to Mr Petricevic. The

property was owned by himself and his wife as trustees of a family trust which has existed over a substantial period of time.

Euro-National complains that there have been efforts to evade service. That there has been a lack of co-operation must be beyond question. I however, am prepared to accept that Mr Petricevic having believed that he had obtained a deal to conclude what must be the nightmarish situation of owing more than $10 million, was furious that Mr Chennells should suggest that there had not been a concluded agreement.

Feeling betrayed and let down, he thereafter became unresponsive. Again, when his lack of co-operation is viewed in context, it does not support the inferences which Euro-National endeavour to draw from it.

The other substantial complaint was that Mr Petricevic will not disclose not only his own financial circumstances, but those of his wife, his family trust and any related entities. Non-disclosure was a matter which weighed heavily with Gault J in Hawkins. The circumstances here are different. First because in December 1988 Mr Petricevic did set out his assets and secondly because of the alleged settlement. Certainly prior to judgment there can be no basis for suggesting that an alleged debtor must disclose his financial

position to a creditor. Even after judgment there will only be extraordinary circumstances where the finances of his wife, family and other related entities could be a matter of inquiry.

I am not so naive as to overlook the fact that it is clear that but for a settlement reached on 5 May, at least as the evidence currently stands, Mr Petricevic could not have any defence to the claims made against him. But whether for right or wrong, our law is predicated on the basis that unless it can be established that there is a course of action of disposition and dissipation which will make a person judgment-proof, the power of the court to intervene prior to judgment does not exist.

When all the information is placed before the court, I have no difficulty in reached the conclusion that there is not sufficient evidence to justify the inferences which Euro-National seeks to draw.

Because of a breakdown in communication following an unnecessarily aggressive and confrontational approach to the matter, the distrust generated created "a Red under every bed" syndrome. Upon an independent assessment of the situation from a sensible distance, such inferences cannot be justified. Accordingly I am of the view that no ground exists for a Mareva Injunction on the basis of the evidence adduced before me.

Mr Asher contended that there was no evidence that the continuation of the injunction would cause any substantial hardship, it being acknowledged that allowances for reasonable living expenses would be agreed to, or could be ordered by the court. I have no doubt that might be the case, but it is not the test. The onus is clearly on the plaintiff to prove the prerequisites for the order. The fact that the order may not cause any particular inconvenience is not a factor.

There is one other factor which must weigh in the exercise of the discretion, and that is the possibilities for abuse in a process such as this. Kerr LJ in Z Ltd v A-Z & AALL (1982) WLR 288 noted the need for the court to be vigilant to guard against this process being invoked, simply as a matter of course to obtain security before judgment, or as a means of exerting pressure on a defendant during the course of settlement negotiation. Although Mr Petricevic says that they have a deal and are beyond the negotiation point, Euro-National contends, the parties are still in a negotiating phase.

The need for circumspection is therefore high. It confirms my view that here is a situation in which Mr Petricevic is endeavouring to re-establish himself as he believes he is entitled to. He has done some spending as he seeks to find ways to rise phoenix-like from the ashes of his economic disaster.

That Mr Petricevic, who for a period of time resided in Australia, has now returned to live in New Zealand must also be noted . The cynic may say that is only because he lost the advantage and style of his $5 million Darling Point home. But a degree of robust cynicism may also excite the possibility that this man is of the view that a recovery operation is best achieved in the environment which he knows best rather than from foreign shores.

Using some of his meagre resources to try and rebuild his capital base, which he says he is committed to share with the plaintiff, is not in my judgment consistent with dissipation and disposing of assets.

There was also an argument between the parties about a property owned in Ruskin Street, over which Euro-National has a mortgage. It is clear that the defendant has invited Euro-National to re-enter and take possession under its mortgage. It has failed to do so. This again is evidence of the fact that although there are swift remedies available (and it may be that now a winding up proceeding has been commenced,) the default has existed for months. The evidence also discloses that because of unattended to repairs and general deferred maintenance, the tenants are not even paying full rent. Be that as it may, Euro-National has chosen not to enforce its rights.

For completeness I should indicate that the defendant contended that even if I had been satisfied that a Mareva Injunction was justified, the plaintiff should be denied the benefit of such relief because of delay in taking action, and more importantly material non-disclosure on the ex parte application.

As far as delay is concerned, there is some strength in that submission. The right to this recovery by Euro-national has existed in a clear and unequivocal form since December 1988. The problems over Ruskin Street existed earlier than that. Although the first summary judgment application was filed and the proceeding was available for service before the end of April, no steps were taken for at least a month. I am forced to conclude that this part of the process was embarked upon to increase the pressure on the defendant to agree to a commercial solution to the problem.

The more substantial issue however, is the question of the failure to disclose. As between counsel there was no dispute as to the applicable legal principle. It is conveniently summarised in McGechan at P.3-327.

> "(7) Review of ex parte interlocutory order
>
> (a) The applicant for an ex parte interlocutory order owes a duty of utmost good faith to the Court (uberrima fides). He must make the fullest disclosure to the Court of all matters relevant to the application known to him, whether or not he considers them of importance. In particular, he must

> disclose to the Court any defence to the proceedings concerned if known, and the facts upon which such defence may be based. This duty of utmost good faith has not been expressed in so many words in previous rules here or in England, and is not expressed in the present Code. It nevertheless is firmly established through judicial decision."

The matter as pertinent in this case, is summarised in Lloyds Bowmaker Ltd v Britannia Arrow plc (Lavens, third party) [1988] 3 AllER 178, where the English Court of Appeal repeated that:

> "An applicant who applies ex parte for a Mareva injunction is under a duty to the court to make the fullest disclosure of all material facts, including any defence he has reason to anticipate may be advanced. If he does not comply with that duty he will normally be deprived of the benefits of the order without consideration of the merits, and irrespective of whether the non-disclosure was innocent or deliberate or whether he would have obtained the order if he had made full disclosure."

Mr Vickerman produced a catalogue of some 10 matters which he contended were material failures to disclosure. They included detail about the original amount of the car loan, information about the Ruskin Street property, and the fact that Mr Petricevic's previous gross worth was asserted as if it were a net value. I doubt that I would have been prepared to see any of those as material facts.

The substantial issue is the failure to advise the court that Mr Petricevic contended that he had an absolute defence to the summary judgment claims, namely the concluded settlement of 5 May 1989.

Mr Asher argued persuasively that this was because all the correspondence about it was "without prejudice". I do not intend to make a full analysis of that evidence as it is not necessary in this judgment. I am of the view that the alleged settlement was a material factor. Bearing in mind that a plaintiff must disclose every material factor, whether it thinks they are of any merit or value, I can only conclude that there has been a relevant failure in this case. I do not find that it was deliberate. I have concluded that it was genuinely omitted, because of the "without prejudice" nature of other correspondence. The letter of 5 May from Mr Petricevic's solicitor to Euro-National's counsel was however not marked "without prejudice", and I cannot see how it was part of a series of correspondence which all needed to be treated as if they were without prejudice.

As is already apparent I have concluded that that assertion is fundamental to the understanding of this case. Whether it is eventually upheld is irrelevant. It appears to me that even if I had viewed the merits differently, I would have had seriously to consider whether the plaintiff was, in light of that failure, entitled to relief.

In accordance with the Lloyds Bowmaker decision and my finding that the non-disclosure was innocent, a second

injunction may in all the circumstances then have been justified.

I find however, that the circumstances to justify an order do not now exist, and that possibility is only of academic interest.

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J.B. Robertson J

Solicitors
Burns Hart & Sara for plaintiffs
Keegan Alexander Tedcastle & Friedlander for defendants

NZLR

No: CP 1205/89

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REASONS FOR JUDGMENT
OF ROBERTSON J
