IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

5/7

CP 587/91

BETWEEN H.M.C. HOLDINGS LIMITED

Plaintiff

AND WESTPAC BANKING CORPORATION

Defendant

1160

AND CP 605/91

BETWEEN H.M.C. HOLDINGS LIMITED

First Plaintiff

AND H.M.C. FLUID POWER LIMITED and others

Second Plaintiffs

AND NZI BANKING LIMITED

First Defendant

AND NZI SECURITIES LIMITED

Second Defendants

AND CP 607/91

BETWEEN H.M.C. HOLDINGS LIMITED

First Plaintiff

AND H.M.C. FLUID POWER LIMITED and others

Second Plaintiffs

AND WESTPAC BANKING CORPORATION

Defendant

Hearing: 24 May 1991

Counsel: Woodhouse for Plaintiffs
Simpson and McLintock for NZI
Miss van Ryn for Westpac

Judgment: 24 May 1991

(ORAL) JUDGMENT OF THORP J

In two actions, CP605 and 607/91, commenced on 30 April 1991, H.M.C. Holdings Limited and associated companies ("HMC") challenged the validity of demands made against them by their financiers the NZI Banking Group and Westpac Banking Corporation. In those actions they sought injunctions constraining their bankers from enforcing securities. The immediate concern seems to have been that HMC might be placed in receivership.

Interlocutory applications were also made for interim relief. Those proceedings followed earlier proceedings and an ex parte application for interim relief filed under CP 587/91 brought by HMC Holdings Limited alone against Westpac.

The interim application in CP587/91 came before Anderson J twice on 26 April 1991 and was adjourned on terms including undertakings from Westpac to 2 May 1991.

On that date it came before Henry J with the interlocutory applications for CP's 605 and 607/91. It was adjourned to the duty judge's list on 8 May 1991 on the basis of an unsigned copy of an agreement between HMC, NZI and Westpac which was to be "executed forthwith". Under that agreement NZI and Westpac agreed not to enforce their securities before 8 May 1991 subject:

1. To HMC observing its undertakings in that agreement which in essence were to provide information to investigating accountants, not to dispose of assets otherwise than in the ordinary course of business and to pay all business receipts into a new account with Westpac: and
2. That there did not occur "any further event entitling the banks to enforce any of their securities".

On 8 May 1991 the applications came before Hillyer J. He recorded the following orders which I am told from the bar were made by consent:

> "As to 607/91 adjourned to Friday 10/5/91 at 10am - existing undertakings to continue. As to 605/91 adjourned sine die to date to be fixed by Registrar (1 day) undertakings to continue until conclusion of hearing on date allocated. Any further affidavits by defendants filed and served by Monday 13/5/91 any affidavits by plaintiffs in reply by Monday 20/5/91. 587/91 adjourned sine die 3 days. Costs reserved on 3 actions."

The adjournment of CP607/91 to 10 May resulted in appearances on that date by counsel who then by consent agreed to adjourn to the date to be fixed in CP605/91.

On Monday last 20 May 1991 all three proceedings were called for mention before me together with fresh applications by HMC for further interim relief, those applications being in 605 and 607/91 and made on the grounds that Westpac and NZI had given notice of claim that HMC had committed further defaults which relieved them from their obligations under the agreement on 2 May 1991. HMC denied that this was the case. It asserted that enforcement action would be in breach of its financiers' obligations under that agreement, and on this basis by fresh notice of interlocutory application for interim injunction sought injunctive relief against enforcement of the securities. There was insufficient time to deal with those applications

on 20 May, and they were accordingly adjourned for hearing to 9am today and it is those applications which have come on for hearing and have been heard.

Meantime all parties had filed affidavits. Some were directed to the question whether or not events had occurred which would have released the banks from the undertakings in the agreement, others to showing that HMC is insolvent and trading at a loss, this material being directed towards the question of balance of convenience if an arguable case were made out. Finally there was an affidavit by Mr Porus, a solicitor for HMC with special expertise in the commercial field, contending that it was possible, given further time, that HMC could trade out of its problems, and stating that receivership would result in a very large loss (he estimated approximately $4m) to Westpac and NZI under their securities, and arguing that they would probably do no worse than this if injunctive relief were granted.

One other aspect of the history of these proceedings which probably deserves mention is the fact that the Registrar allocated a date for the argument of the original interim relief applications in the week commencing 19 August. This drew a prompt request from Westpac's solicitor for an earlier date, they contending that the timetable fixed by Hillyer J was directed to a hearing soon after its completion not three months ahead.

When the matter came on last Monday I invited counsel to accept a fixture in June, indicating that one could be made available. I was advised by counsel for Westpac that her client was not content to accept that course, and accordingly offered the fixture this morning, being the first time available, and asked that counsel make available by last evening memoranda setting out the essence of their respective cases. I am grateful to counsel for the

way in which this was done, which has made it possible to get a fair appreciation of the essential issues involved and to deal with it in the time which has been available.

Technically the present application raises two questions: first, whether the applicants have shown an arguable case for relief against exercise of the respondents' powers under their securities having regard to the fact that the agreement of 2 May: secondly, if so, whether the balance of convenience favours the grant of relief.

Mr Woodhouse argued forcibly that the Court should in effect restrict its consideration of this application to the first question, and treat the matter solely as an application to govern the carrying out of the arrangements made on 2 May. I accept that, because his client's present application hinges on the question whether or not the defendants are released from their obligations under that agreement, the Court should take a substantial and not a technical view of the application, but I do not accept that the Court can regard the application as one in which balance of convenience can simply be put aside, or that it can be considered in a substantially different way from that which operates in the ordinary course of injunction applications.

I accept Mr Woodhouse' submissions that the arrangements made on 2 May 1991 must have intended that the mere continuance of existing defaults by HMC could not and should not be considered as constituting "further events" entitling the banks to enforce their securities. I have a great deal more difficulty accepting that that agreement intended that liabilities falling due after the date of the agreement or any agreed extensions of that agreement were automatically postponed. That does not seem to me to be either a necessary or natural construction of the agreement.

As to the question whether an arguable case has been made out for the occurrence of further events such as would release the banks there seems to me to be considerable force in the arguments put by Miss van Ryn that the demands on the bill facility for some $2m made on 17 May, which facility does not appear to have been called up previously, would have been "further events". But all in all there is in respect of each of the other matters put forward by the defendants on a "further event", in my view, at least an arguable case that the further event may not have occurred. On the issue of arguable case even the bill facility mentioned seems to me insufficiently plainly established by the defendants as something unrelated to liability at the dates of the 2 May agreement or its extensions to have justified my finding against the plaintiff/applicants on that head.

The position on balance of convenience however seems to me to be compellingly the other way.

The evidence from the investigating accountants is that HMC is and has been trading, and is continuing to trade at a loss. Their investigations, which they say are not complete, led them to express concern about HMC's solvency. Their evidence and other evidence from the defendants, indicates that the applicant has liabilities to the defendants under their securities of some $8m and something between $3m and $4m by way of liabilities to unsecured creditors.

The evidence of Mr Porus, which has been referred to briefly, seems to me to make it clear that in his view this group of companies is presently insolvent. While his view is that there is a reasonable prospect that current losses can be turned around in the relatively near future, he certainly does not contend that it is not still trading at a loss.

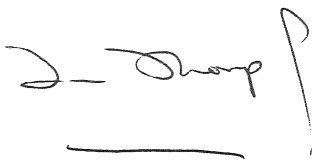
Mr Simpson's submissions refer to a series of cases, largely from this Registry, in which the public interest question whether or not injunctions should be granted to prevent the exercise of powers under securities when the borrower is insolvent have been considered, and in each case with the conclusion that this was a course which the Court should not lightly adopt. In addition there is the line of authority which I think started with Harvey v McWatters (1948) 47 SR NSE 173 and proceeded in this Court in such decisions as Development Consultant v Lion Breweries [1981] 2 NZLR 258, which has held that where it is apparent that an applicant for an injunction restraining the exercise of powers under a security is unable to cover the secured debt then relief should not be granted except on a condition for payment into Court of a sufficient sum to ensure that the grant of relief will not result in further loss to the creditors whose powers are postponed. It cannot realistically be suggested that if relief were granted on any such condition in this case it could be met.

Mr Woodhouse made and was entitled to make the submission that public interest is involved in the determination of the application before the Court, in that on the evidence before it a refusal of relief will almost certainly result in the company ceasing to exist as a trading entity. None of the cases which have looked into this area have however seen that factor as sufficiently weighty to overcome the other policy issues involved.

Here, beyond question in my view, the companies in the HMC Group are not only unable to meet any award of damages but equally unable to meet a normal condition upon the grant of relief. In my view it is not a proper function for this Court to determine for creditors whether it would be better for them to take the chance that losses on their securities might be reduced if their powers were postponed. That question must be a matter for the creditors' own

determination. It follows that, although the issues on arguable case could properly be determined in favour of the applicants, the remaining issues which the Court is required to consider point conclusively the other way, and that accordingly the applications must be declined.

The respondents will be allowed $750 costs in each case.



Solicitors:
Glaister, Ennor for Plaintiffs
Bell, Gully, Buddle, Weir for NZI
Miss van Ryn for Westpac