

C1239

NZLR

**LOW  
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

27/5

CP.7/94

651

BETWEEN EVERARD FILMS  
DISTRIBUTORS LIMITED

Plaintiff

AND SBSA (NZ) LIMITED

Defendant

AND CP.168/94

BETWEEN SBSA (NZ) LIMITED

Plaintiff

AND EVERARD FILMS  
DISTRIBUTORS LIMITED

Defendant

Hearing: 19 May 1994

Counsel: W. N. Brandon and J. R.B. Kingston for Plaintiff in CP7/94  
and Defendant in CP168/94  
P. Davison and F. E. Baker for Defendant in CP7/94 and  
Plaintiff in CP168/94

Judgment: 20 May 1994

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JUDGMENT OF BLANCHARD, J.

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Solicitors: JRB Kingston & Co., Auckland for Plaintiff in CP7/94 and  
Defendant in CP168/94  
Rudd Watts & Stone, Auckland for Defendant in CP7/94 and  
Plaintiff in CP168/94

Last evening I refused a stay of execution in relation to my judgment delivered on 17 May. I undertook to record in very brief form, overnight, my reasons, as Everard has indicated that it wishes to appeal. The Court's discretion in a matter of this kind must pragmatically balance the four well known factors, namely:

- (a) If no stay is granted, will the right of appeal be rendered nugatory?
- (b) Will the successful party be injuriously affected by a stay?
- (c) Is there a *bona fide* intention by the appellant as to the prosecution of the appeal?
- (d) Is the question involved in the appeal novel and/or important for the Court?

I accept that there is a *bona fide* intention to prosecute the appeal. I have not been made aware of any novel and/or important point for the Court. That leaves the first two matters.

As to (a): If there is no stay and if the Court of Appeal is unable to deal with the matter urgently, Everard will have to vacate the premises next Wednesday. Should it later be successful in its appeal I accept that it may well be faced with a situation in which SBSA has transferred title to the property to Village Force. Everard may then be unable to recover possession of the St James Theatre Centre. However, the most that Everard claims to have is a lease continuing through until 21 January 1995, which is some eight months away. It seems, on the information available to me, unlikely that the lease has any significant value. Everard itself has stressed the difficult trading conditions caused by competition from multiplex cinema operations. So, presumably, Everard is not making much

money out of retaining the lease. It would have no sale value. If possession cannot be recovered, a damages claim can be made against SBSA.

It is argued for Everard, and I listened to Mr Kingston at some length on this question without being convinced, that Everard will lose the going concern value of the fixtures and fittings (and accompanying chattels) now present in the premises. But I have difficulty in seeing how any such going concern value (assuming in the depressed state of the premises that exists) is realisable by a party with only an eight month lease and nothing more to offer.

Mr Kingston alleged inappropriate behaviour on the part of SBSA. First, he said, it became a party to the transaction whereby the receivers sold Everard the business of Pacer Kerridge Cinemas Ltd, expressly including the theatre assets of the St James complex. SBSA held a 40 per cent interest in the banking syndicate which had appointed the receivers. Then, in December last year, SBSA sold the fee simple estate in the St James Theatre Centre to Village Force (a trade competitor of Everard) and purported to sell Village Force the same theatre assets - a mixture of tenants' fixtures and fittings and chattels. Accepting for the moment that that may be a valid criticism, I observe that I gave consideration to this factor in drafting the terms of the amendments to the preservation order. The intention underlying the terms recorded on pages 16 and 17 of my judgment (an intention which met with the approbation of Mr Davison yesterday) was to protect the position of Everard and to prevent it from being disadvantaged by the arrangements made by SBSA with Village Force.

I now record, to make the point abundantly clear, that SBSA has accepted an obligation (i.e. undertaken to the Court) to be responsible for

any loss suffered by Everard if it is determined (either by the referee or by anyone else who has to make the determination) that any item is one to which Everard has during the term of its lease been entitled, and that item is unable to be recovered in kind. In that circumstance the Court will require SBSA to pay reasonable compensation to Everard, whether the loss (being a loss occurring after Everard gives up possession) results from fire or another peril or from any transaction entered into by SBSA. This includes any loss resulting because title passes to Village Force. Reasonable compensation means the value of the item to Everard if it had been recovered from the premises in kind.

Mr Kingston sought to persuade me that I ought to make a declaration that compensation be at the level of the equivalent of the going concern value of the chattels and other items as a group, but I decline to define reasonable compensation any further than I have already done. I leave open the (theoretical) possibility that fixtures, fittings and chattels in situ in premises held under such a short term lease may command a "going concern" value. That is a matter for later determination. Everard will not be precluded from arguing to that effect nor from raising its estoppel argument. At worst, SBSA has accepted an obligation to compensate Everard for any loss of fixtures, fittings and chattels to which it is later proved that Everard had an entitlement. The compensation will be the market value of the items.

The other factor which is relevant is factor (b): whether SBSA will be injuriously affected by a stay. It seems to me that the balance here is heavily in favour of SBSA. It has an obligation to make title to what it has sold in favour of Village Force on 28 May. Village Force can cancel the contract if that is not done. It can elect to extend the period for obtaining

possession, but it does not have to do so. The price of \$7.5m is obviously a very substantial one. Everard now points to another potential purchaser, a Mr Gaze or a company connected with him and says that that purchaser is prepared to pay slightly more and so SBSA will not be disadvantaged if Village Force cancels its contract.

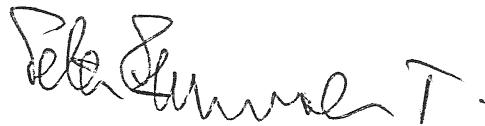
Village Force is a joint venture consisting of a large Australian company and one I understand to be a relatively significant New Zealand company, associated with Mr Peter Francis. Both of them have contractually committed themselves to SBSA under the existing agreement for sale and purchase. I know nothing of Mr Gaze and little or no information was provided about him. SBSA wishes to adhere to its obligations to Village Force. It believes Village Force wishes to complete the transaction. I can see no good reason for requiring SBSA to run the risk that, in the event that Village Force cancels the contract because possession is not available on 28 May, Mr Gaze and his company will duly complete a purchase. Nor should SBSA be forced to enter into a back-up agreement - a practice I have always regarded as fraught with perils.

In short, SBSA has a great deal to lose if a stay is granted and the Court has done its best to protect the position of Everard if it has to vacate the premises before issues involving the fixtures, fittings and chattels are resolved.

I make no comment on the continuing argument about responsibility for the delays which have occurred in resolving these issues since the beginning of the year. I also make no comment on the suggestion made by Mr Davison that Everard is intent on inducing withdrawal of Village Force so that it can negotiate a continuing long term lease. I add only that whilst

Everard may now find itself in a difficult situation it elected to purchase the business of Pacer Kerridge Cinemas on the basis of a short term lease of the premises. Whether "short term lease" means one year (as I have held) or two years (as Everard contends), at the end of that limited period Everard was inevitably going to face its current predicament. It, presumably, took the gamble that it would be able to negotiate a greater measure of security either by purchase or lease. That has not happened and it is has not been suggested that SBSA had any obligation to Everard of that kind.

The application for a stay was accordingly declined.

A handwritten signature in black ink, appearing to read "Peter J. Sumner T." with a period at the end. The signature is written in a cursive, somewhat stylized font.