

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CP 303/96

NZLR  
NOT  
RECOMMENDED

BETWEEN ANDREW NICHOLAS HOLDGATE

Plaintiff

A N D SIMON ANTHONY HOLDGATE

First Defendant

A N D NEVILLE JOAN HOLDGATE

Second Defendant

Hearing: 16 August 1996

Counsel: G. Bogiatto for Plaintiff  
P. Mills for First Defendant

Judgment: 16 August 1996

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ORAL JUDGMENT OF ANDERSON J

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SOLICITORS

George Bogiatto (Auckland) for Plaintiff  
Fraser Powrie (Auckland) for First Defendant

This matter comes before the Court as an interlocutory application for interim injunction in terms of the plaintiff's application dated 22 July 1996. That application notes that the plaintiff is seeking an order for interim injunction restraining the first and second defendants from exercising any powers of sale as mortgagees pursuant to memoranda of mortgage registered over 74 Stratford Road, Auckland and 4 Bassant Avenue, Auckland whereby the plaintiff is the mortgagor and first and second defendants are the mortgagees. The application also seeks an order for mandatory injunction requiring the first defendant to deliver to the plaintiff a partial discharge of mortgage registered over CT 63B/423 at 74 Stratford Road upon such terms and conditions as the Court deems just. Although not specifically applied for in writing, the plaintiff is entitled to apply orally for other relief and the Court has power to grant other relief to meet the exigencies of the case.

This decision is being dictated rather late on a duty day and I am obliged to counsel and their clients for their patience in waiting all day and for their sensible attention, if I may say so with respect, to the question of finding some areas of consensus for resolution. Unfortunately the matter has not been capable of complete resolution, even at an interlocutory level, and there are still serious questions between the plaintiff and first defendant, who are brothers, now estranged in the wake of unfortunate business dealings between them and by them as a partnership in relation to others.

The facts involve the granting of mortgage or mortgages by the plaintiff over properties he owns, such mortgages being in favour of the first defendant to secure certain obligations. It is not disputed by the plaintiff that these obligations include the obligation to pay principal and interest in respect of each of two term loans entered into between the brothers. The first relates to the Stratford Road property and was entered into on 26 May 1992. The second relates to the Bassant Avenue property and was entered into on 13 May 1992. The principal in respect of

Stratford Road is \$59,218.01 and in respect of Bassant Avenue \$40,000. There is a further debt due by the plaintiff to the first defendant. In terms of the law relating to the subrogated rights of guarantors who meet obligations of a guaranteed party the plaintiff cannot really dispute that the first defendant is entitled to \$20,000 as a guarantor pursuant to subrogated rights in connection with the Auckland Savings Bank. Thus the plaintiff cannot effectively dispute that he owes the following sums, at least, to the first defendant:-

1. \$59,218.01 by way of principal together with interest thereon from 25 May 1996 to payment.
2. \$40,000 by way of principal in respect of the Bassant Avenue term loan together with interest thereon as aforesaid.
3. \$20,000 payable in respect of the rights obtained by subrogation by the first defendant concerning the ASB transactions.

The total of those amounts excluding interest is \$119,218.01.

The first defendant claims that further sums are payable by the plaintiff in connection with partnership dealings and other transactions in which the brothers were involved. Generally speaking the amount claimed in that respect is about \$85,000, the exact amount for the purposes of this judgment being immaterial.

The plaintiff has given a mortgage over the Stratford Road and Bassant Avenue properties as I have mentioned. The form of the mortgage is an all obligations mortgage which, if enforceable according to its tenor, gives the first defendant security for all sums properly due to him by his brother. The plaintiff, however, contends that although the form of the mortgage might be all obligations, it was not intended that a mortgage so extensive in its scope should be granted. The substantive proceedings are directed to a rectification of his contract with his

brother with the consequential variation of the terms of any mortgage from all obligations to some lesser degree of obligation. That is the critical issue in relation to the enforceability of the mortgages in question and the extent to which they may properly provide security. It is not a question which can be resolved at an interlocutory level.

The plaintiff brings the present proceedings because he has entered into a conditional contract for the sale of the Stratford Road property. This contract is conditional upon his obtaining a discharge of the first defendant's mortgage thereon by next Tuesday. Thus the matter comes before the Court under some urgency and in circumstances where a sale ultimately beneficial to all parties may be lost because of the consequences of the dispute.

As in all cases where an interim injunction is sought, the Court must act in the most just way possible in the circumstances. This usually requires an attempt and a response directed to synthesising competing concerns as far as possible and following the path of least risk in all the circumstances. It is often possible to find a formula which adequately, if not perfectly, meets the competing concerns of the parties. I am of the view that there is a formula in this case and I intend to grant a mandatory injunction upon certain important conditions which will preserve the security which the first defendant claims whilst at the same time allowing the plaintiff to take the benefit of the conditional contract to at least the extent of the undisputed surplus which would arise from the sale.

Because it is now a late hour and the scope of the facts, law and differences have been carefully presented and examined by learned counsel, I will not expatiate further upon the reasons for the order I will make. Its justification ought be self evident after a consideration of all of the file. I make an order for mandatory injunction requiring the first defendant to deliver to an agent of the Court, whom I

will name, a partial discharge of mortgage registered over CT 63B/423 at 74 Stratford Road and a partial discharge also in respect of 4 Bassant Avenue on certain terms and conditions. The agent of the Court for the receipt and handling of the discharge will be Mr Bogiatto, a solicitor of this Court. His obligation, of course, is to be conditioned by his status as an agent of the Court. I say that for clarity, certainty and for his protection so that he may apply to the Court for further directions in the event, albeit unexpectedly, that some difficulty concerning possible conflicts of interest might arise. I do not anticipate there will be any. It is a condition of this mandatory injunction that the plaintiff pay to the first defendant's solicitors upon delivery of the discharge of mortgage hereinbefore referred to the sum of \$59,218.01, being the principal at the present time outstanding on Stratford Road.

It is a further condition of the grant of the mandatory injunction and a direction to Mr Bogiatto that upon any settlement of the conditional agreement referred to in this interlocutory application and due for settlement on or before 20 September 1996, that the net proceeds of sale after the deduction of any legal costs and real estate agent's commission should be paid to the solicitors for the first defendant who shall hold the net proceeds upon the following trusts:-

1. To pay thereout to the first defendant in his capacity as mortgagee of Stratford Road and Bassant Avenue the sum of \$40,000, being the principal owing under the term loan in respect of Bassant Avenue entered into on 13 May 1992.
2. To pay thereout to the said mortgagee interest to the date of such receipt in respect of the principal owing on Stratford Road and on Bassant Avenue.
3. To pay thereout to the first defendant in satisfaction of his subrogated rights in connection with the ASB transaction aforesaid the sum of \$20,000.


4. To pay into Court for the respective rights and interests of the plaintiff and first defendant in connection with all transactions and the subject matter of the litigation and disputes between them the sum of \$100,000 which takes account of possible costs and interest, to abide any further order of the Court and in the meantime to be invested upon a reasonable interest bearing basis by the Registrar.
5. To pay the balance then remaining to the plaintiff as his undisputed entitlement.

Leave is reserved to the plaintiff and the first defendant or either of them to apply to the Court at any time for such further order or directions as may be necessary or expedient in connection with the proceedings.

Costs on the application are reserved.

I conclude, perhaps superfluously, with the direction that Mr Bogiatto of course holds the discharge in his capacity as agent and in escrow for the protection of the first defendant's interests therein.

I would like to monitor the progress of this file and accordingly direct that it be placed before me in Chambers on Monday 26 August 1996 at 9.15 a.m.



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NC Anderson J