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NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC 137/96

BETWEEN DONALD KEITH CATCHPOLE, ROBERT SIMON CORBETT and ANTHONY DONALD CATCHPOLE

Appellants

A N D NEW LAND ENTERPRISES LIMITED

Respondent

Hearing: 24 February 1997

Counsel: D D Patel for Appellants
P L Rice for Respondent

Judgment: 24 February 1997

ORAL JUDGMENT OF ROBERTSON J

Solicitors
D D Patel, PO Box 47-796, Ponsonby for Appellants
Glaister Ennor, DX CX 10236, Auckland for Respondent

This is an appeal against an order for summary judgment made by Judge Buckton in the District Court at North Shore on 15 August 1965.

Judgment was entered for $103,390.51 against the three appellants on the basis of their liability as guarantors under a deed of lease between Glenmore Securities Limited and Dart Holdings Limited. The respondents obtained an assignment of the interest of Glenmore. Dart Holdings Ltd is in liquidation and not worth powder and shot. The liability of Dart Holdings came to haunt the three guarantors.

I have had the benefit of very extensive submissions from Mr Patel on behalf of the appellants. It seems to me that with the degree of sophistication and refinement which has now been reached in this proceeding, that the starting point of any consideration from a legal point of view must be that deed of lease which was executed on 29 June 1993.

The sale of the relevant freehold property took place on 1 September 1994. It is common ground that the day before that an arrangement was entered into between Glenmore Securities Ltd, Dart Holdings and these three appellants with regard to sums of money which were then due and owing.

The learned District Court Judge considered at length the background circumstances and some activities between Glenmore Holdings Ltd and advisers to them (a Mr Bishop and a Mr Wackrow) in June 1993. He considered issues with regard to an unconscionable contract having been entered into at that time, duress on two of the appellants, undue

influence on all of them, the lack of independent legal advice and alleged misrepresentations made. In a nutshell, Mr Rice for the respondents says I do not need to look at the validity or otherwise of those complaints because there is no evidence to suggest any connection to or involvement with anything that happened in June 1993 and the present respondent. He says that the proper approach is to treat this as a case of a bona fide purchaser for value without notice having acquired an interest as landlord under a lease and that anything that had occurred before was irrelevant.

The learned District Court Judge did not deal with the case on that basis. He looked at the reality of the complaints which were made and concluded that they were without foundation. He held that the landlord had established that no defence was available on any of those grounds complained of.

I am not satisfied that conclusion is necessarily so. Having been overturned by the Court of Appeal in *ASB v Harlick* (M 541/94, Auckland Registry, 1 February 1995) (on the basis that I knew the law but was a little bit of a "soft touch" on its application to a particular fact situation) I am conscious of the high standard which must be reached before parties can get behind the clear obligations revealed by the documentation in a circumstance such as this. But as Mr Patel forcibly points out, there is absolutely no evidentiary material in opposition to anything said by each of the three appellants in their extensive affidavits. For myself I would have been satisfied that the landlord had not excluded the possibility of success on one or other of these variations on the theme.

However, Mr Rice has persuaded me that that is not the issue in this case at all. I accept Mr Patel's submission that there is no evidence that New Land Enterprises Ltd was a bona fide purchaser for value without notice, but there is no evidentiary suggestion to the contrary. In my judgment if persons in the position of the appellants wished to implicate this party which became the owner of the freehold and obtained the landlord's interest under the lease, the obligation on it to disprove knowledge and/or involvement could only arise if the matter were put in issue.

In other words, I take the starting point in the absence of any material to the contrary that it was a legitimate transaction. Although Mr Patel was not accepting of my analysis he agrees that if that is the position then there was no evidence to displace that position in any way.

If one looks at the cases of summary judgment which are so helpfully summarised by Mr Patel, it is clear that a plaintiff applying does not have to cover any conceivable defence which the ingenuity of counsel might subsequently find unless and until that matter is placed in issue in some meaningful way.

I am not satisfied that that has occurred in the circumstances of this case. Accordingly for reasons very different from those which were attractive to the District Court Judge, summary judgment was properly entered in this case.

For completeness I should note that Mr Rice had a back-up position which I have not heard Mr Patel on at length (although at first blush it appears to create some real problems for him) namely, that the

appellants now want to complain about the legitimacy of the dealings in June 1993. But on 31 August 1994 they affirmed and confirmed in the most telling way the validity of that transaction when they joined in an acknowledgement of debt in respect of unmet obligations under the June 1993 deed of lease which had already arisen prior to 31 August 1994.

I accept that Mr Patel would want to say that the same influences, impediments and deficiencies which had existed in June 1993 continued down to that point. But even on the evidence as it stands, it seems to me that may be a difficult position to maintain. However it is only of theoretical importance as against the major issue which Mr Rice now argues. He tells me he made the same point in the District Court (and just like I did not recognise it until well into this hearing) it may be that the District Court Judge did not appreciate the significance of what was being contended for either.

I do not overlook Mr Patel's final plea from the heart as to the realities in economic terms as to what may occur. When I say to him that this proceeding does not preclude the possibility of some action which the appellants may have against Mr Wackrow and Mr Bishop, that should not be interpreted as my being satisfied that it would be successful or that it would even be prudent. He reminds me there are bankruptcy petitions which are awaiting hearing and it may be too late by the time any action can be taken. Whether the possibility of such action would be a reason to postpone any action is not a matter which is before me. On an appeal I cannot see that I am entitled to take into account such factors.

Accordingly I am satisfied, albeit for rather different reasons, that the respondent was entitled to summary judgment and the appeal is accordingly dismissed.

Mr Rice has made an application for costs. The rule is that costs follow the event unless there is some particular reason why they should not. In my view an appropriate award in a case such as this would be $1050 and I make an order accordingly.