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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY M 394/97

BETWEEN T.V.D. HELMICH AND L.H. TAYLOR AS TRUSTEES OF THE TWIN PINES TRUST AND OF THE RIMU TRUST

Plaintiffs

AND P.H. THORP AND T.S. STRATHDEE AS TRUSTEES OF THE STRYDE TRUST AND OF THE STRYDE TOO TRUST

Defendants

Hearing: 9 April 1997

Counsel: L.M.A. Robinson for Plaintiffs
P. Woodhouse for Defendants

Judgment: 9 April 1997

JUDGMENT OF FISHER J

Solicitors:

Wood Ruck & Co., P.O. Box 76014, Auckland for Plaintiffs
Bruce Maclean, P.O. Box 100-348, North Shore Mail Centre, Auckland for Defendants

Introduction

The plaintiffs seek an interim injunction restraining the defendant mortgagees from exercising their power of sale over the plaintiffs' property. The case concerns the way in which mortgage principals are described and paid - a question described in ***Wadsworth Norton Solicitors Nominee Co Ltd v Edmonds*** [1992] 1 NZLR 597, 598 as "a very important point of conveyancing practice". There are various ways of interpreting that decision but my own view is that conveyancers are legally free to recite and rely upon fictional hypotheses in their documents so long they go about it in the right way. The use of fictional recitals may be unwise in view of the false significance that a defaulting party might later seek to attach to them. However in principle there is nothing to stop the parties from deliberately inserting fictions in their documents as an artificial means of explaining the operative provisions which follow. So long as there is real consideration to support the underlying transaction, and so long as the parties did not intend that the recited facts were or would become reality, there is no problem. The parties can effectively say in their mortgage "this mortgagor is to be treated *as if* she had received $100,000 from the mortgagee". Whether she in fact received the money then becomes quite beside the point.

Factual background

The plaintiffs in this case are the trustees of the Twin Pines and Rimu Trusts ("Broome"). The defendants are the trustees of two Stryde family trusts ("Stryde"). Broome and Stryde each hold shares in Pacific Lithium Limited. That company was incorporated to manufacture lithium carbonate for use in batteries, principally by a novel process of extraction from seawater.

On 7 February 1996 Stryde agreed to sell Broome its shares in Pacific Lithium for $303,125. The agreement provided for settlement of the sale by 31 December 1996. At that point the whole of the purchase price was to be paid to Stryde in return for the shares. In the meantime Stryde's benefits and obligations with respect to the subscription for further shares in Pacific Lithium were to pass to Broome which would indemnify Stryde

for all costs, expenses or liabilities arising therefrom. The agreement went on to provide additional security for Broome's performance under the agreement in the following terms:

> "7.0 Security
>
> 7.1 To secure the obligation of Twin Pines and Rimu to settle purchase of the Shares in accordance with clauses 1 and 2 and to exercise the Rights in accordance with clause 3, Twin Pines and Rimu shall forthwith execute and register:
>
> 7.1.1 a second mortgage in appropriate form as accepted by Stryde, such acceptance not being unreasonably withheld, to be registered in the Land Transfer Registry, against the title of the property owned by Twin Pines and Rimu, located at 338 Redoubt Road, Manukau City, Auckland or such other property as the parties agree.
>
> 7.1.2 any documentation required to enable registration of a second mortgage as required by clause 7.1.1, such as a Deed of Priority of Mortgage.
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> 7.2 All costs of preparation of a second mortgage including valuations, bank costs in obtaining any Deed(s) of Priority of Mortgage, registration and all legal fees shall be met by Twin Pines and Rimu.
>
> 7.3 Upon execution of this agreement, the parties agree that Stryde shall be entitled to register a caveat against the title of the property over which the mortgage is to be granted until such time as the mortgage and other required documentation is recorded against the title of the property.
>
> 7.4 If Twin Pines and Rimu do not settle the purchase of the Shares in accordance with clauses 1 and 2, or exercise the Rights in accordance with clause 3, Stryde shall be entitled to exercise its power of sale under the second mortgage in order to recover the amount required to settle the purchase of the Share and the costs of such recovery and interest as provided for in the mortgage.
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> 7.5 If Stryde exercises its power of sale under the mortgage, Stryde shall, immediately upon completion of recovery of the purchase amount, subscription money in respect of the Rights, and costs and interest, pass signed transfers for each class of shares held by the respective Stryde Trust to Twin Pines and Rimu.
>
> 7.6 Stryde shall not be obliged to procure registration of any share transfer passed to Twin Pines and Rimu under clause 7.5 into the names of Twin Pines and Rimu."

Effect was given to the agreement on 28 February 1996 when Broome granted Stryde a second mortgage over its residential property at 338 Redoubt Road. The mortgage took the form of two documents. One was a memorandum lodged in the Land Transfer Office as the standard background document for Auckland District Law Society fixed sum mortgages. For present purposes there is nothing significant in that portion of the mortgage. It was supplemented by a schedule document specifically adapted to this occasion. After introductory references to the property and parties the schedule went on to state:

"Terms

Principal sum: $303,125.00		**Ordinary interest rate:** Nil	% per annum
"Interest commencement date: Nil		**Penalty interest rate:** Nil	% per annum
The principal sum shall be repaid:	To be repaid in one lump sum on 31 December 1996		
Interest dates: Nil			

Operative Clause

In consideration of the principal sum lent to the mortgagor by the mortgagee (the receipt of which is hereby acknowledged) the mortgagor and the covenantor (if one is included) hereby covenant and agree with the mortgagee so as to incorporate herein the provisions of Memorandum Number **1995/4003** registered in the Land Registry Office for the above district and the terms of any attached Annexure Schedule **AND** for the better securing to the mortgagee the payment of the principal sum, interest and other moneys payable under this mortgage and compliance with the terms of this mortgage the mortgagor hereby mortgages to the mortgagee all the mortgagor's estate and interest in the land in the above Certificate(s) of Title."

In due course the mortgage was registered in the Land Transfer Office. In further implementation of the agreement, in March and May 1996 Broome took up further share issues from Pacific Lithium associated with the shares due to pass under the agreement.

In September 1996 Broome defaulted under the first mortgage. Broome found it necessary to refinance with a new first mortgage but for a higher amount. As the price of its agreement to an increase in the first mortgage, Stryde required a variation to the original agreement for sale and purchase. The terms of the variation were contained in its solicitor's letter of 23 September 1996 as follows:

"1. payment of the sum of $50,000.00 by bank cheque in part payment of the purchase price described in 2 below; and

2. variation of the agreement in respect of Pacific Lithium Limited shares dated 7 February 1996 so that the total purchase amount described in the First Schedule is:

(a) increased to $328,125.00 in the event that settlement is completed on or before 21 October 1996.

(b) increased to $353,125.00 in the event that settlement occurs after 21 October 1996.

3. payment of our costs and disbursements in respect of this matter."

The variation offer was accepted by Broome and substitution of a fresh first mortgage followed.

The day for settlement of the sale of shares was 31 December 1996. It came and went without any tender of the purchase price from Broome, notwithstanding that Stryde was ready, willing and able to settle. Broome has remained in default of the agreement for sale and purchase down to the present. In consequence on 23 January 1997 Stryde served on Broome a notice under s 92 of the Property Law Act warning that it would exercise its power of sale if the default continued. In furtherance of the notice Stryde has now arranged for an auction of the Redoubt Road property on 16 April 1997. It is to forestall that auction that Broome today seeks an interim injunction.

The Issue

The first question is whether Broome has established a serious question to be tried. It is not contested that the agreement for sale and purchase of the shares is valid and binding; that that agreement created a binding obligation on the part of Broome to grant a second mortgage over the Redoubt Road property; that the purpose of such mortgage was to secure payment of the share purchase price on 31 December 1996; that Broome is in default under the agreement; and that if the second mortgage is a valid and binding one, Stryde would now be entitled to exercise its power of sale.

Broome's sole point arises from the assumption in the wording of the mortgage that Broome's obligation to pay flows from an advance by way of loan, as distinct from a liability to pay a purchase price. Broome points in particular to the statement in the operative clause of the mortgage "in consideration of the principal sum lent to the mortgagor by the mortgagee (the receipt of which is hereby acknowledged) ...". The loan assumption is said to be reinforced by further references to "principal sum" and the need for it to be "repaid" as distinct from "paid". Essentially Ms Robinson submits that to insert in an otherwise valid and binding mortgage a factually incorrect assumption as to the origins of the mortgagor's obligation is to invalidate the mortgage itself. Putting the matter another way, she contends that whenever a mortgage records a particular consideration for the mortgagor's obligations, and the mortgagor can show that that consideration was not the one in fact provided by the mortgagee, the mortgage is unenforceable. The question is whether that contention is sound.

The mortgage on its face

It is not contested that on its face this memorandum of mortgage is a valid and binding one. The document itself gives no clue that it is anything other than a standard printed form completed in a conventional fashion. The assumption it contains is that a principal sum was "lent to the mortgagor by the mortgagee" "the receipt of which sum is hereby acknowledged" by the mortgagor. It is accepted that failure to repay such a sum on due date would provide an entirely sound basis for the mortgagee to exercise its power of sale.

To mount its argument Broome is therefore forced to go behind the wording on the face of the document. It seeks to adduce extrinsic evidence that the factual assumption recited therein (loan advance received by the mortgagor) has no foundation in fact. I accept Mr Woodhouse's response that the very exercise of going behind the words contained in the document is precluded by estoppel by convention or, as it is more specifically applied in cases of this sort, estoppel by deed. At common law parties to a deed are prima facie estopped from seeking to assert that the facts do not accord with those recited in a deed: see Laws of New Zealand: Estoppel: paras 63-71 especially at 64; 16 Halsbury 4th edition paras 1018-1037 especially at 1019; Spencer Bower and Turner: Estoppel by Representation: 3rd edition: pp 157-177 especially at 171-177. There are exceptions to the common law rule in the case of fraud or illegality (see in that regard ***Greer v Kettle*** [1937] 4 All ER 396 at 404) but it is not suggested that either applies in the present case.

Essentially this is a formally recorded example of estoppel by convention. It is perfectly open to parties to a transaction to decide that a convenient formula for recording their bargain is to recite a set of hypothetical facts followed by a stated set of consequential rights and obligations. Whether the factual assumptions bear any relation to reality is beside the point. Their role is simply to provide a set of premises against which stated rights and obligations can be better understood. The recitals are thus an aid to construction, not an assertion of facts for their own sake. A deed is not an affidavit. It

may not be a wise drafting method to deliberately adopt fictional assumptions for this purpose but in principle there is nothing to prevent it. And of course nothing turns on the question whether the recited fact appears in that part of the document normally associated with operative provisions or in the "recitals" as that expression is commonly used by conveyancers.

The document is to be read as a whole. Its sole object is to define the parties' rights and obligations. If the intended effect of the document is clear when read as a whole, the parties have achieved their aim. The matter was helpfully summarised by Tipping J when he gave the judgment of the Court of Appeal in ***National Westminster Finance NZ Ltd v National Bank of NZ Ltd*** [1996] 1 NZLR 548 at p 550:

> "Put at its simplest, parties may for the purposes of a particular transaction agree either expressly or implicitly that black shall mean white and vice versa. Although both know that their assumption is, in truth, erroneous they will be held to it if the remaining indicia of convention estoppel are present. Knowledge of the falsity in fact of the assumption does not prevent the estoppel, if for their purposes the parties have nevertheless accepted the assumption as being true. A fortiori therefore the fact that one or both parties may have doubts about the correctness of the assumption will not of itself prevent an estoppel, provided always, of course that the parties have clearly accepted the assumption, for their purposes, as being true.
>
> The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):
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> (1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
>
> (2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
>
> (3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
>
> (4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true and binding.
>
> (5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.
>
> (6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption."

Applying those principles to the present case, the underlying assumptions of fact which the parties thought it convenient to adopt in their memorandum of mortgage were that Stryde had made an advance of $303,125 by way of loan and that Broome had

received that sum in cash. That no such sum in fact passed is immaterial. Broome was happy to sign the document in that form. By its conduct Stryde showed that it was happy to accept it in that form. It was simply a way of recording and securing the ultimate obligation under the agreement for sale and purchase: the obligation to pay $303,125 by 31 December 1996.

It so happens that in this case there is more detailed evidence as to the circumstances in which the document came to be executed in that form. Essentially the representative of Stryde had requested a mortgage in a form which would not have involved this unwise legal fiction. It was at the specific request of the solicitor for Broome that this particular form of mortgage was used instead. I do not see that the fact that that solicitor also happened to be the solicitor for the company affects the situation, namely that this was a drafting device specifically sought by Broome, not a factual misunderstanding.

As to the other factors identified by Tipping J, a document with this level of formality must of course be taken to have been intended to affect legal relations. Stryde was entitled to act in reliance upon the assumption that the parties would continue to stand by the factual assumptions they had assumed for the purposes of their document. It was because of this that Stryde refrained from exercising its contractual right to call for a mortgage which more directly reflected the basis of the security. If Broome were now permitted to resile from the factual assumptions used, Stryde would plainly suffer detriment. It would be unconscionable to allow Broome to now resile from the arrangement. At all times the parties were perfectly well aware of the agreed obligation to provide a mortgage; this was merely a means of satisfying that obligation. This is a classic case of estoppel by convention.

Going behind the deed

In some circumstances equity will allow a party to go behind the terms of a deed even in circumstances where the common law would not have so permitted. For example, in ***Greer v Kettle*** supra at 404 Lord Maugham said this:

> "Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies, and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal. The position in equity is, and was always, different in this respect, that, where there are proper grounds for rectifying a deed, e.g., because it is based upon a common mistake of fact, then, to the extent of the rectification, there can plainly be no estoppel based on the original form of instrument. It is at least equally clear that in equity a party to a deed could not set up an estoppel in reliance on a deed in relation to which there is an equitable right to rescission, nor in reliance on an untrue statement, nor an untrue recital induced by his own representation, whether innocent or otherwise, to the other party. Authority is scarcely needed for so clear a consequence of a rectification order, or an admitted or proved right to such an order. The well-known rule of the chancery courts in regard to a receipt clause in a deed not effecting an estoppel if the money has not in fact been paid is a good illustration of the equity view: see the cases cited in HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 10, pp 283-287."

It is well established in equity, for example, that the parties to a deed which rests upon the assumption that a certain payment has been made can go behind any recital in the deed as to receipt of the payment in order to establish that the payment was not in fact made. Ms Robinson contended that this is such a case. However, I do not think that this case falls into the receipt exception at all. The exception is confined to cases in which payment to the mortgagor does in truth underlie the transaction. It has nothing to do with cases in which the parties have deliberately adopted the fiction of an antecedent payment as a convenient formula for defining an executory obligation to make a real payment in the future. In a case of that sort it is pointless to inquire into the question whether the antecedent payment was in fact made. Of course it was not. It was never intended to be. It is nothing more than a fiction deliberately adopted as a means of defining future obligations.

Even if it had been appropriate to go behind the mortgage document in the present case it would not have availed Broome. An examination of extrinsic evidence in order to establish the factual matrix cannot be selective. One could not stop at the point that Stryde had not paid the principal to Broome. One would also have to consider the antecedent agreement for sale and purchase. Equity looks to the substance, not the form. The substance in the present case is that Broome had undertaken to pay a sum of money on 31 December 1996. It had agreed to provide the mortgage by way of security for that payment. The consideration will, of course, be the shares. So an examination of the extrinsic facts would not reveal any lack of underlying consideration for the mortgage.

Nor would an examination of the actual facts pose any difficulty under the Land Transfer Act. The definition of a mortgage in s 2 of the Land Transfer Act 1952 is as follows:

> "'Mortgage' means any charge on land created under the provisions of this Act for securing -
>
> (a) The repayment of a loan or satisfaction of an existing debt:
> (b) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise."

This mortgage is of course a charge on land and it is one securing the payment of a liability. The liability is the obligation to pay the $303,125 on 31 December 1996.

Ms Robinson relied heavily on ***Wadsworth Norton Solicitors Nominee Co Ltd v Edmonds*** referred to earlier. That was a decision in which the mortgage as executed recorded an obligation to repay money ostensibly advanced to the mortgagor, whereas in fact the funds had, by arrangement with the mortgagor, been advanced to third parties whose obligations would be merely guaranteed by the mortgagor. It was held that the failure to make the advance to the mortgagor personally removed any consideration for the mortgage and rendered it unenforceable.

Certain aspects of ***Wadsworth*** are unclear from the report. On the face of it one might have thought that the consideration provided by the mortgagee was the advance to the third parties at the mortgagor's request; and that it might have been a case of payment by direction. Arguably, the funds were *for present purposes* received by the mortgagor, albeit directed to a different destination as a matter of cash flow. Estoppel by convention (the parties effectively agreeing that the mortgagor would for legal purposes be treated as if he had received the funds himself) may not have been argued. Or the more detailed facts may have presented a different picture. I notice that in ***Laughton v Davies and Parks*** (Auckland CP 576/94, 6 November 1995) - with appropriate rectitude drawn to my attention by Ms Robinson - Blanchard J felt able to distinguish ***Wadsworth*** on facts which bear some resemblance to those which are now before me. At all events I think that ***Wadsworth*** can be distinguished in the present case. Here there is no question of any underlying intention that funds would actually pass from the mortgagee to the mortgagor.

The intention of the parties was that a mortgage would be provided as security for the payment of an independent sum in the future.

The other decision relied upon by Ms Robinson was ***Laing v Lanron Shelf Company No 56 Ltd*** [1994] 1 NZLR 562. In that case a plaintiff who agreed to provide one form of services as consideration for some land could not recover in reliance upon the provision of a different form of services. But it is trite law that a contract to provide one consideration is not performed by the provision of another. In the present case the consideration provided on the face of the document was a notional mortgage advance. It was not appropriate to go behind the document. But even if it had been appropriate to do so, it would be found that the consideration provided was exactly that which the parties had always intended - the promise to transfer shares in return for the purchase price.

Quantum

There is one complication but it concerns only the quantum which may properly be retained by Stryde following the exercise of its power of sale. It concerns the effect of the variation of the contract and the interim payment of $50,000 compared with the principal identified in the mortgage. That aspect was not traversed in this hearing and if necessary it could be dealt with later. However, it is clear that Broome faces no potential prejudice in that respect because I now record the following undertaking from Stryde as confirmed in Court by Mr Woodhouse:

> "If the mortgagee sale proceeds and realises a sum recoverable by the Stryde trusts, after payment of the first mortgagee and costs, in excess of $253,125, the excess sum up to a maximum of $50,000 will be held in trust by the solicitors for the Stryde Trusts on instructions to that effect, or as the Court may direct, pending determination of any claim by any party entitled to challenge the October deed, provided such a claim is filed and served within such time and upon such terms as the Court may consider reasonable."

Conclusions

I can find no foundation for an interim injunction. The plaintiffs have been unable to point to any serious question to be tried. Qualifications over quantum have been adequately addressed through an undertaking. The application is dismissed.

Normally these days we try to fix costs at the end of interlocutory hearings. In the present case Mr Woodhouse pointed out that there may be an independent contractual right to costs contained in the mortgage document. In those circumstances costs are reserved.

RL Fisher J