IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-006619

	BETWEEN	TEA CUSTODIANS (BLUESTONE) LIMITED Plaintiff
	AND	EASTVIEW CONSTRUCTIONS (ALBANY) LIMITED First Defendant
	AND	DAVID PAUL BUCKLEY Second Defendant

Hearing: 27 February 2009

Appearances: D A Wood for Plaintiff
Second Defendant in Person

Judgment: 27 February 2009

ORAL JUDGMENT OF VENNING J

Solicitors: Sanderson Weir, Auckland
Copy to: D A Wood, Auckland
D P Buckley, Auckland

Introduction

[1] On 19 December last year this Court entered summary judgment against Eastview Construction (Albany) Limited and David Paul Buckley. In addition it made an order that the company as landowner vacate and deliver up possession of a property at 7 Wades Road, Whitford contained and described in certificate of title NA 109D/685 (North Auckland Registry).

[2] Mr Buckley has now filed papers before this Court seeking a stay of execution of the judgment pending appeal. Mr Buckley clarified at the outset of the hearing that he does not seek to challenge the entry of the monetary judgment but seeks a stay of the order requiring Eastview as landowner to vacate and deliver up possession.

Preliminary matter

[3] The judgment referred to a property at 7 Wades Road. That is an incorrect address. The correct address is 11 Wades Road, Whitford. That error arose out of a misdescription of the physical address in the documentation before the Court. The correct legal address was as recorded by the Court. I make an order in accordance with r 11.10 confirming an amendment to the earlier Court order to record the physical address as 11 Wades Road, Whitford.

Procedural issues

[4] There are two other procedural matters which the papers raise. The appeal to the Court of Appeal was filed out of time. If Mr Buckley is to pursue an appeal to that Court he will have to obtain the leave of that Court to appeal out of time. This Court has no jurisdiction in that regard.

[5] The other procedural issue is whether an appeal to the Court of Appeal (if leave for such an appeal was granted) is the appropriate way for Mr Buckley to seek to set aside the judgment entered on 19 December.

[6] On 19 December Mr Buckley appeared in person to seek an adjournment of the summary judgment application. No papers had been filed in opposition to the application for summary judgment and Mr Buckley frankly admitted that the money was owing. However, he sought an adjournment for the reasons recorded in the judgment. The adjournment was declined. Given the authorities of *Stainton v King House Removals (Southland) Ltd* (1999) 13 PRNZ 202 and *Erwood v Glasgow Harley* (2001) 15 PRNZ 451 the Court may well treat the matter as a judgment entered without a formal appearance and on that basis the appropriate way for Mr Buckley to pursue the matter would be to apply to set aside the judgment in accordance with r 12.14. However that is a matter for Mr Buckley to consider. He should take advice about it.

Stay of execution

[7] Given the rather confused procedural state of this matter it is not entirely clear whether the stay of execution is sought pending appeal in accordance with r 12 of the Court of Appeal Rules or as a general stay of execution of judgment under High Court Rules r 7.19. If the stay is sought under r 12 of the Court of Appeal Rules then the factors the Court may consider are as outlined in the decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48. Essentially it involves the Court balancing the competing rights of the successful party being deprived of the benefit of the judgment against the need to preserve an appellant's position against the event of an appeal succeeding: *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA).

[8] A slightly different approach is taken under r 17.29. In that case the party seeking stay must satisfy the Court that a substantial miscarriage of justice would be likely to result if the judgment were enforced.

[9] However, it matters not which approach is adopted in the present case. In my judgment the answer must be the same.

[10] The essence of Mr Buckley's application for stay is that he wants to have the judgment set aside and the matter reheard by this Court with the Court being aware

of an unregistered lease that was granted by Eastview to Mr Buckley and his wife in relation to the property. That unregistered lease was not brought to the attention of the Court on 19 December. Mr Buckley seeks to have the Court consider the impact of that unregistered lease on the order that Eastview deliver up vacant possession of the land.

[11] As identified by Mr Wood there are a number of procedural difficulties facing Mr Buckley in relation to that proposition. The first is that the appeal Mr Buckley seeks to pursue before the Court of Appeal (if leave is granted) is directed at having this Court rehear the matter. But there is no pleading before this Court dealing with that particular issue or raising it in a justiciable way. What would be required are separate proceedings by Mr and Mrs Buckley as lessees against Tea Custodians (Bluestone) if they could identify a cause of action against it, or possibly a claim against Eastview – which realistically would be of no practical value.

[12] The second procedural difficulty for Mr Buckley is that the purported appeal is in his name alone and, as I understood it, he was not purporting to pursue the appeal on behalf of the partnership. Indeed the partnership has no standing to appeal as it was not a party to the earlier proceedings.

[13] However, rather than deal with the matter on those rather limited and technical procedural difficulties I prefer to deal with the application for stay on its merits.

[14] As I have noted the application for stay is based on the existence of an agreement to lease between Eastview and the partnership of Mr Buckley and his wife, Ms Payne. To confirm the existence of that lease both have sworn affidavits. They have also arranged for affidavits to be sworn by Mr Wilson, a former tenant of the property and Mr Payne, a chef who is working at the property at the business operated by Ms Payne. The agreement to lease is dated 1 April 2007, which was before the mortgage documentation was completed and before the mortgage advance was made. Ms Payne's evidence is that:

> The agreement was faxed to Bluestone shortly after my return home on the afternoon of 1st April 2007.

[15] Mr Wood submits there are real issues whether that lease was made on 1 April 2007 at all. In any event he submits it was never drawn to the attention of Tea Custodians (Bluestone) Limited. He refers to the affidavit of Ms Robertson, a partner in Sanderson Weir who has acted at all material times for the mortgagee. She has confirmed that her client had no notice of the lease, and that there was no note of it in any manner on Tea Custodian's file dealing with this mortgage advance. Nor is there any record of the lease on her firm's separate file for the mortgage advance. She notes that at the time of the advance the solicitors for Eastview provided a solicitors certificate, including an undertaking that confirmed there was no unregistered charge or interest likely to prejudice the mortgagee. Further, the mortgage terms included a covenant against leasing (clause 5.1.(a)(ii)). Both Eastview and Mr Buckley executed the document to confirm that.

[16] Mr Wood also refers to the fact that shortly after the judgment was entered on 19 December 2008 Mr Buckley apparently sought advice from a firm of solicitors Daniel Overton and Goulding. That firm wrote to Ms Robertson on 22 December seeking to deal with the matter practically. In that letter there was no reference to the lease which Mr Buckley now refers to. Indeed the letter records that Mr Buckley and Ms Payne:

> would like to stay on in the property and would undertake to assist in any presentation and marketing of the property for sale whilst, at the same time, continuing with the Invercargill project which when completed would net more than sufficient to clear their outstanding debts.
>
> Should the property be sold at a price acceptable to your client, then they undertake to cooperate in vacating the property in time for settlement.

The suggestion they would vacate is not consistent with the matters Mr Buckley now raises.

[17] Finally, there is the practical effect of the unusual terms of the lease. The lease records that it is for a period of five years with two rights of renewal of five years each, finally expiring in 2022. The annual rent was recorded at $50,000 but there was a clause included recording that:

> 8. The landlord and tenants agree that in recognition of advances made by the tennants *(sic)* to the landlord to enable the landlord to

> purchase the property (ie deposit $1,264,000.00) and that the tennants *(sic)* agree to maintain and improve the property, all rent and deposit due shall be accepted as paid at the rate stated in the first schedule of this agreement for the term of the lease (including renewals).

[18] It is frankly inherently unlikely that a commercial lender, even in the heady days of 2007 would, with knowledge of such a lease provision, advance the substantial sum of money that was advanced to Eastview and Mr Buckley.

[19] That material on balance leads me to conclude that the lease, if it was in existence, was not drawn to the attention of Tea Custodians (Bluestone). But even putting all of that to one side, on the evidence before the Court the case advanced by Mr Buckley must fail for the following additional reasons.

[20] First, s 119 of the Land Transfer Act provides:

> No lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto.

[21] At its highest, Mr Buckley's argument is based on the proposition that a copy of the lease document was faxed through to Tea Custodians (Bluestone) at some time in early April, prior to the documentation being completed and the mortgage advanced. There is no evidence that Tea Custodians (Bluestone) received that faxed lease let alone consented to it. Faxing the document through is simply not sufficient to establish consent by Tea Custodians (Bluestone) to it.

[22] Further, as Tea Custodians (Bluestone) had advanced the moneys and registered the mortgage against the property, s 62 of the Land Transfer Act applies, the relevant provisions of which are that:

> ... the registered proprietor of ... an estate or interest in land ... shall, except in case of fraud, hold the same ... absolutely free from all other ... estates, or interests whatsoever,— ...

[23] The Privy Council have confirmed that fraud in this context requires that the act must be dishonest and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, 106-107.

[24] Again, at best from Mr Buckley's point of view, is the fact a lease document was faxed through to Tea Custodians (Bluestone) in early April 2007. But subsequently, Eastview and Mr Buckley completed documentation recording that there was no such unregistered interest affecting the land and, what is more, their solicitor gave a certificate to that effect. In relying on the documentation and the solicitors certificate it could not possibly be argued that Tea Custodians (Bluestone) was acting fraudulently or in a fraudulent way to defeat the interest of the tenants. It was entitled to rely on the documentation and to take its registered interest free of any unregistered interest. There is simply no prospect of Mr Buckley or the partnership which holds the lease from Eastview successfully advancing a claim against Tea Custodians (Bluestone) Limited on the information before the Court.

[25] Against that Tea Custodians (Bluestone) wishes to execute the judgment. On the evidence it has and will continue to experience difficulties in exercising its rights as mortgagee while Mr Buckley and Ms Payne remain in possession of the property. In terms of its mortgage documentation and the judgment of 19 December Tea Custodians is entitled to vacant possession of that property.

[26] It cannot be said that there would be a substantial miscarriage of justice if Tea Custodians was entitled to exercise contractual rights which Eastview and Mr Buckley confirmed it had by entering the documentation.

[27] Balancing the interests of the parties before the Court and even having regard to the interests of the partnership as lessees under the claimed lease the balance falls heavily in favour of the mortgagee Tea Custodians (Bluestone) being able to exercise its rights.

Result

[28] The application for stay is dismissed. The order is effective immediately.

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Venning J