IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-6193

BETWEEN	DORCHESTER FINANCE LIMITED Plaintiff
AND	CHRISTCHURCH FOODCOURTS LIMITED First Defendant
AND	TONY NG THIAM SOON Second Defendant

AND **CIV-2007-404-5811**

BETWEEN	TONY NG THIAM SOON AND BETTY GOH AS TRUSTEES OF GLOBAL TRUST Plaintiffs
AND	DORCHESTER FINANCE LIMITED Defendant

Hearing: 3 June 2009

Appearances: Mr McLellan and Ms E C Gellert for Dorchester Finance Limited
Mr A J Forbes QC and Ms S Rowe for other parties

Judgment: 8 June 2009 at at 4 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***08.06.09 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Date……………

Counsel:

Mr A J Forbes QC, Clarendon Chambers, P O Box 2929, Christchurch
Mr D McLellan, Barrister, Shortland Chambers, P O Box 4438, Auckland 1140

Background

[1] There are two sets of parties to these proceedings. The first parties are a Mr Ng and a Ms Goh who are trustees of the Global Trust. They are the plaintiffs in CIV 2007-404-5811. The other parties, whose position broadly equates with those plaintiffs just mentioned, are Christchurch Foodcourts Limited (CFL) and Mr Ng in person. They are the defendants in CIV 2005-404-6193. For ease of reference I shall call all of these parties the 'applicants'. The other side in the litigation is Dorchester Finance Limited to whom I shall refer as 'Dorchester'.

[2] The background to these proceedings does not need to be set out in any detail. Broadly stated, it is that a Mr Wuu and a trust associated with him, the Global Trust, wished to borrow money from Dorchester for the purpose of constructing a hotel.

[3] There were two parts to the arrangements Mr Wuu and the Global Trust entered into which have relevance to the present application. First, as part of the loan arrangements with Dorchester, it was necessary for Mr Wuu or the Global Trust to obtain the guarantee of an overseas bank. Second, Mr Wuu and the Global Trust sought the assistance of Mr Ng and his company, CFL, in advancing the financing arrangements. Mr Ng and his company were to assist in two ways. Firstly they would themselves raise a loan from Dorchester, the proceeds of which they would on-lend to Mr Wuu / Global Trust to meet fees and expenses, commission et cetera of raising the loan for the construction of the hotel. The loan that CFL was to raise was $785,000. That loan proceeded. Dorchester now seeks to recover the amount of the loan and interest. Second, Mr Ng and his company would guarantee part of the loan that Mr Wuu and the Global Trust obtained from Dorchester. The amount of the guarantee that was required was $2,081,020. CFL was required to, and did, provide a second mortgage over its Christchurch property as security for the $785,000 loan and the guarantee. Mr Ng gave a personal guarantee.

[4] In due course CFL was minded to sell the Christchurch property. Dorchester sought to enforce its mortgage and declined to grant a release unless CFL/Mr Ng met their obligations under the mortgage. The parties could not agree on terms, so CFL /

Mr Ng applied for a mandatory injunction to clear the mortgage from the title of the Christchurch property. Orders were made on that application by Chisholm J on 29 November 2005 directing Dorchester to provide a discharge of mortgage upon payment of a settlement statement furnished by Dorchester. This did not solve the problems and Dorchester declined to permit the removal of its security.

[5] The matter came back before Panckhurst J on 15 December 2005. He rescinded the order of 29 November 2005 and ordered that Dorchester was to provide a discharge of mortgage providing that CFL and Mr Ng met certain conditions. CFL and Mr Ng were required to pay the sum set out in a settlement statement which Panckhurst J referred to in his judgment, as well as make an additional payment of $200,000 to be applied to future litigation costs. I shall give a brief explanation of this latter aspect of the order further on in my judgment.

[6] The loan that Mr Wuu/Global Trust sought from Dorchester never proceeded. The loan to Mr Ng/CFL did. But the funds that Mr Ng/CFL raised were intended to assist Mr Wuu obtaining advances from Dorchester. That result was never achieved and so the funds borrowed by Mr Ng/CFL were, according to those parties, futilely expended.

[7] Litigation was then launched to determine what liability various parties had. Proceedings were issued in both the Christchurch and Auckland registries of this Court but they have now been consolidated into one set of proceedings in the Auckland registry.

[8] Global Trust has sued Dorchester for damages alleging that an employee of Dorchester made misrepresentations that resulted in Global Trust entering into various loan arrangements. Essentially the misrepresentations alleged relate to whether certain funds had been deposited into a bank account from which Global Trust was able to uplift the funds. It was an important term of the arrangements with the overseas bank that Global Trust would be able to provide an assurance to that bank that it was able to uplift the funds. Global Trust says that it was told that it could do this but in fact the funds at all times remained under the control of Dorchester. That alleged misrepresentation was made with regard to loan

agreements involving advances for $25,000,000, $16,750,000 and $1,280,000. In summary, the various loans that Global Trust tried to organise did not proceed because, it is alleged, funds held by Dorchester that they represented as available were not in fact available. The failure of the loans resulted in futile incurring of expenses by Global Trust. They now say that those costs and expenses represent damages, which they suffered as a result of misrepresentations by Dorchester to Global Trust. CFL and Mr Ng (as guarantor of CFL's obligation to Dorchester) claim that Dorchester similarly misrepresented the position to them about the availability of the funds and they too suffered losses as a result.

[9] A subsidiary dispute has been raised by the parties in the litigation that relates to the terms of the orders which Panckhurst J made in December 2005. CFL actually made the payment of $200,000 to Dorchester, which Panckhurst J had directed. The parties are in dispute however as to what Dorchester was entitled to do with that payment. CFL and Mr Ng contend that the payment was intended to meet any costs order that might ultimately be made in the proceedings against them. Dorchester takes a difficult view. It has in fact already applied the entire fund to meet its costs of the litigation. It considers that the fund was available to meet its solicitor/client costs and that there is no requirement that it wait until the Court has made any costs orders in the litigation. The parties are agreed that whether or not Dorchester was entitled to proceed in this way is a matter that will need to be determined as part of the resolution of the issues raised in the litigation between the parties. It is not necessary in the context of the present judgment to consider the arguments advanced on each side and to offer an opinion as to how the matter might ultimately be resolved. The parties emphasised various aspects of Panckhurst J's judgment. Paragraph 66 of that judgment may well be significant in any ultimate enquiry into just what was intended. That paragraph reads as follows:

> 66. With reference to a contingency fund, I apprehend that there is no longer objection to this being held by Dorchester's solicitors upon the terms that it is to be applied to future litigation costs, with any surplus refundable to the plaintiffs. The more difficult issue is the amount of the fund. It is difficult to assess the potential cost of the future litigation, the more so given that the question of venue is at large. However, it does not seem to me that $200,00 is excessive by way of a solicitor and client (or indemnity) provision. I am fortified in arriving at that figure on account of the acceptance that the construction of the charging clause may be determined as a

> preliminary issue, which would facilitate repayment of the fund if the plaintiffs' contentions were upheld. Further, it seems to me that either side should be able to seek resolution of that question (which might well be done at the same time as the strike out and/or consolidation/transfer hearing)

[10] Dorchester's position in summary is that the contingency fund was made available to meet any justified claim it might have for costs against CFL. It says it has, for example, power arising from clause 10 of the mortgage deed to recover its solicitors' costs on a solicitor-client basis for, *inter alia*, the exercise, attempted exercise, or enforcement of its rights under the mortgage. It says that this contractual entitlement exists quite independently of any costs order that might ultimately be made in the proceedings. The costs, which Dorchester was entitled to recover from the opposing party, were also secured by the mortgage and therefore, in Dorchester's submission the Judge, in taking steps to direct the removal of the mortgage, was conscious of the need to protect Dorchester's position. The function of the $200,000 fund was, in effect, a substitution for the mortgagee's right to decline to give a discharge of the mortgage until its entitlement to costs had been meet. Mr McLellan accepted that the contractual entitlement to costs is ultimately amenable to the supervision of, and review by, the Court. But for the moment, Dorchester says there is no doubting its entitlement to recover the costs that it has incurred in the litigation so far.

[11] CFL/Mr Ng's position is that it will not be known whether Dorchester is in fact entitled to any costs until after the conclusion of the litigation and any costs orders have been made. That factor means that it is unlikely that Panckhurst J would have expected the fund to be available to meet interim bills of costs rendered by Dorchester's solicitors at an earlier stage in the proceedings.

The form of the proposed issue for determination

[12] The application that I have heard was brought by Mr Ng/CFL, pursuant to Rule 10.15. It underwent refinement during the hearing and the issue that the applicants now seek to have determined as a separate question is stated as follows:

(a) Do the provisions of mortgagee 6036707.1 (and in particular clauses 2,8 and 10) create an obligation on either Christchurch Foodcourts Limited or the trustees of the Global Trust to pay solicitor-client costs that Dorchester has incurred in these proceedings, and in particular, where the costs have been incurred after the mortgage to Dorchester was discharged?

(b) If the answer to '(a)' is 'yes', are Christchurch Foodcourts Ltd or Global Trust's obligations under the mortgage dependent on whether or not Dorchester is ultimately successful in the proceeding?

Rule 10.15 and principles governing applications under that Rule

[13] R 10.15 provides:

> 10.15 Orders for decision
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for—
>
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[14] In *Innes v Ewing,* (1986) 4 PRNZ 10 at p 18 Eichelbaum J made the following remarks concerning the rule.

> The liberalising intent and effect of this section of the Rules was referred to by Barker J in *Westpac Merchant Finance Ltd v Hawkins* No A231/84 Auckland Registry, 25 March 1986. For present purposes the most pertinent aspects of the expanded nature of the procedure are that it applies to questions of fact, or mixed questions of fact and law, as well as to questions of law properly so described, and that it is available whether or not the decision will dispose of the proceeding. In *Westpac Merchant Finance Ltd v Hawkins* Barker J said (and I agree) that the new rules on this subject indicated a desire to move away from the restrictive attitude of earlier cases on points of law before trial. Clearly the underlying purpose is to expedite proceedings by limiting or defining the scope of the trial in advance or obviating the need for a trial altogether. However, a feature of the previous rules which has survived and to which counsel paid insufficient attention here is that a two-stage process is envisaged : the first, the decision to order the separate determination of a particular question; the second the determination of that question itself. The purport of the question may be plain, but it needs to be formally defined, an aspect to which the expression

> "the formulation of the question for decision" in Rule 418(b) refers. That statement or formulation of the question should be part of the first step.

[15] I intend to be guided by the above statement.

[16] I further consider that the following extract from *McGechan on Procedure* is an accurate summary of the state of the authorities:

> Criteria
>
> The following criteria, relevant to the exercise of the discretion, emerge from the case law, including *Innes v Ewing* (1986) 4 PRNZ 10; *Rio Beverages Ltd v The Golden Circle Cannery* 14/2/92, Barker J, HC Auckland CL30/91; *Westpac Merchant Finance v Hawkins* (1986) 5 PRNZ 561; *Levi Strauss & Co v Kimbyr Investments Ltd* (1992) 5 PRNZ 577*; Dobson Construction Co Ltd (in liq) v Dobson* (1993-94) 7 PRNZ 64:
>
> (a) The likelihood of delay in finally resolving the proceeding;
>
> (b) The probable length of the hearing of the separate question;
>
> (c) Whether a decision one way or the other on the separate question would end the litigation;
>
> (d) The impact on any subsequent hearing, and in particular whether it would be shortened by a decision on the separate question; and
>
> (e) A balancing of the advantages to the parties and the public interest in shortening litigation, as against any disadvantages asserted by any party or parties opposing an order under r 10.15. The principle criterion in striking the balance will be the objective set out in r 1.2: securing the just, speedy and inexpensive determination of the proceeding.

Relevant factors in this case

[17] In the course of his comprehensive submissions, Mr Forbes QC stressed that Pankhurst J apparently contemplated that it would be permissible for the procedure in r 10.15 to be invoked by Mr Ng/CFL in seeking a determination of whether Dorchester was entitled to deduct its solicitor/client costs from the $200,000 fund. The applicants apparently considered this gave strength to their case. I need to deal with this point at the outset.

[18] Mr Forbes QC referred me generally to the terms of Panckhurst J’s judgment but I think it is sufficient to refer back to his paragraph [66], which I have set out

earlier (see paragraph [9]) to obtain the flavour of what His Honour said. Mr Forbes QC drew attention to the fact that Panckhurst J made explicit reference to the possibility that Dorchester's claim to be entitled to costs pursuant to a charging clause in the mortgage could be determined as a separate question or, as he put it, a 'preliminary issue'. His Honour was apparently referring the procedure under r 10.15. It was counsel's contention that Panckhurst J's assumption that the issue could be decided as a separate question was a factor which inclined him to make the order directing Mr Ng / CFL to provide the $200,000 fund. As I understand it, the applicants' submission is that the Judge's expectation that the Rule 10.15 procedure could be used to resolve the scope of Dorchester's right to recover a matter which should favourably influence me in granting the present application. If I have correctly understood the submission, I am unable to accede to it.

[19] In the first place, to state the obvious, the Judge did not actually have before him such an application. It was not his obligation to determine that issue. It is true that he commented on the issue but it should have been obvious that his remarks were more in the nature of an assumption than a considered opinion. They were clearly made without having heard detailed submissions on the subject, without any detailed analysis in the judgment and were made in the context of a judgment issued in circumstances of urgency.

[20] It has now fallen to me to decide the point. In doing so I have to exercise my judgment independently and uninfluenced by expressions of opinion by other persons, instead confining myself to the evidence and counsels submissions. That said, I understand the point that Mr Forbes QC advances. My assessment, however, is that having received Panckhurst J's judgment it was for Mr Ng / CFL to decide whether they agreed with the Judge's assumption. If their legal advisors believed the assumption underlying his order was incorrect, they could have applied to have the order reviewed or filed an appeal against it. Alternatively they could have applied promptly for an order under Rule 10.15 and, if unsuccessful, then sought a review of the Judge's order. In my belief it is now too late to rescue the position. In the end Mr Ng / CFL had to make their own judgment about whether they could obtain a determination under Rule 10.15. It appears that they concluded it would be possible to achieve a favourable outcome by applying under Rule 10.15. The conclusion that

I have reached is to the contrary, for the reasons I set out below. In my view there is nothing unusual or unjust about this outcome. The law is not an exact science lending itself to cast-iron predictions. The Court ought not to rescue the parties from their predicament simply because another Judge - expressed a different view. To my mind the expression of opinion by Panckhurst J must, with all respect, be excluded from my consideration in this case.

[21] I now turn to what I see as being the relevant matters that I ought to take into account in this case.

[22] First, the hearing of the substantive proceeding has been scheduled for 10 days. The length of time that it would take to deal with the application for hearing the separate issue would be one day. In my estimate, it would be possible to obtain a one-day fixture for hearing the application to determine a separate issue under Rule 10.15 well in advance of the trial date in February 2010.

[23] There is some risk, albeit limited, that if an appeal was to be brought against the decision on that application, there might be difficulties in having that disposed of in adequate time to permit the trial to proceed.

[24] Secondly, it is my assessment that in the overall context of this litigation, the issue concerning costs is, whilst important, not a dominating aspect of the case. While it is of importance, particularly to the Mr Ng/CFL, it cannot be described as a key or central issue. Resolution of that issue is not likely to hold the key to a range of other disputes which will be consequentially resolved depending on the answer to the separate question.

[25] Thirdly, I am of the view that a decision either way on the hearing of the separate question would not end the litigation by enhancing the prospects of settlement.

[26] Fourthly, I consider that while there would be some shortening of the hearing of the substantive proceedings the impact on the duration of the trial would probably be to reduce it by one day at the most. That is the same time it would take to hear

the separate question. The result of making the order would not be to reduce the aggregate hearing time required to resolve the litigation.

[27] The fifth matter is that I consider that a consequence of making an order under r 10.15 would be duplication of preparation. That is to say, there will need to be two hearings to dispose of all the issues, as against one if the application was declined and no hearing of a separate question ordered.

[28] I do not consider that any particular advantage would flow from directing that a separate question be tried prior to the substantive trial. In my view, the applicant has not demonstrated that making the orders sought would be conducive to the efficient economical and just resolution of the dispute between the parties. Therefore, in terms of the approach outlined in *Innes v Ewing,* it is unnecessary for me to determine the question itself, as I am of the view that it would not be appropriate to try the question separately at all.

Interrogatories

[29] There was insufficient time to deal with the applicants' application for orders for interrogatories. The Registrar is to allocate a further half-day fixture before me for completion of that matter. The applicants are to advise the respondents within five working days what (if any) interrogatories they intend to proceed with. In addition, any further memorandum of submissions by the parties are to be filed within 10 working days and five working days respectively (applicants first, respondent second) of the hearing. The parties are agreeable to the matter being allocated a back-up fixture before me.

Conclusion

[30] The application for determination of the separate issue before trial is dismissed. The parties should confer on the issue of costs. If they are unable to agree, I will arrange time for a brief hearing to consider what costs orders ought to be made.

J.P. Doogue
Associate Judge