IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-6618

	BETWEEN	TEA CUSTODIANS (BLUESTONE) LIMITED Plaintiff
	AND	SHANE PATRICK MCKENNA AND SONIA ELIZABETH BEGLEY Defendants

Hearing: 18 June 2009

Counsel: D A Wood for Plaintiff
S P McKenna In Person

Judgment: 18 June 2009

RESERVED JUDGMENT OF RONALD YOUNG J

Introduction

[1] On 5 February 2009 this Court gave judgment for the plaintiff against the defendants for $1,711,093.85 (plus interest and costs) and ordered the defendants vacate and deliver possession of a property at 5 Harsant Avenue, Hahei. Subsequently the plaintiff entered and took possession of the property and an auction of the property is to take place on 24 June 2009. No money has been paid subsequent to the summary judgment.

[2] On 9 June 2009 the defendants sought an interim injunction to stop the auction and for orders that the summary judgment and possession orders be set aside. The defendants' case appears to be based on the proposition that they did not owe

the plaintiff any money, that the mortgage was "void abinitio", and the possession order wrongly made.

[3] The affidavits filed in support of the summary judgment revealed that in December 2006 the plaintiff advanced jointly to the defendants $1,533,000. The advance was secured by first mortgage over the defendants' property in Hahei. Subsequently various interest rate variations were advised by the plaintiff to the defendant in terms of the loan agreement.

[4] In December 2007 the defendants failed to pay a monthly instalment and then failed to pay a further instalment in January 2008. By then the defendants were $29,673.37 in arrears under the mortgage.

[5] There were difficulties serving Property Law Act notices and summary judgment proceedings because the defendants were in Australia. Ultimately substituted service was approved by the Court.

[6] In terms of the service order the summary judgment documents were to be served by leaving them at the Hahei address, leaving them at Ms Begley's (one of the defendants) parents' home, asking they draw them to Ms Begley's attention, and publishing a copy of the interlocutory application for summary judgment in the New Zealand Herald newspaper.

[7] The summary judgment application had a court return date for 19 December 2008. On 19 December the Court made the following minute:

> [1] This application for summary judgment has been partially served in accordance with the order for substituted service. The papers have apparently come to the attention of the defendants in that they have sent a fax to the Court advising receipt of the papers.
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> [2] The application for summary judgment is adjourned to be called and dealt with at 2.15 p.m. on 5 February 2009.

[8] On 5 February 2009 the summary judgment application was called again. In his decision of 5 February regarding service the Associate Judge said:

> [4] The matter was not dealt with when called on 19 December 2008 in part due to the Court's concern as to whether or not an order for substituted service made on 8 December 2008 had been fully complied with. There was no doubt that the documents had come to the attention of the defendants. They sent a fax to the Court on 18 December 2008 requesting an adjournment. Two reasons were put forward in that fax. Firstly the documents (referred to as "paperwork regarding this hearing") were merely left on the front doorstop of 5 Harsant Avenue, Hahei. Secondly, a medical certificate was attached indicating that the defendant Shane McKenna was unwell and unable to attend Court on 19 December 2008. I note the certificate indicates that he would be well by 22 December 2008.

[9] The defendants had arranged for a Mr Tane Rakau to appear on their behalf. As to this the Court said:

> [2] At the commencement of this hearing a Mr Tane Rakau sought leave to be heard on behalf of the defendants. No notice of opposition has been filed. Mr Rakau is not a barrister and solicitor of the Court and has no automatic right of audience. He has produced a number of documents claiming entitlement to represent the interests of Nga Uri Whakatipurunga O Ngarae Inc. I have had a brief look at these documents but cannot see that they have any legal significance, particularly in relation to the present application for summary judgment which is in relation to money outstanding under a loan agreement.
>
> [3] I decline Mr Rakau's request to be heard. I have directed that the documents Mr Rakau sought to hand up to the Court be returned to him.

And, therefore, the Court observed:

> [5] Mr Wood wishes to proceed today on the basis that the documents have now been served in accordance with the order for substituted service and, although there is no affidavit of service on file, the defendants are clearly aware both of the proceeding, and of today's hearing. That is borne out by Mr Rakau's attendance today. Even if he is supposedly representing another party (Nga Uri Whakatipurunga O Ngarae Inc) he can only have obtained notice of this proceeding through the defendants.
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> [6] I propose allowing Mr Wood to proceed today on the basis that any order to be made is to lie in Court unsealed until an affidavit of service in accordance with the order for substituted service is filed.

[10] In an attempt to convince me a serious question be tried existed (*Klissers Farmhouse Bakeries Ltd* v *Harvest Bakeries* [1985] 2 NZLR 129) the defendant's claim they were never advanced the "money" equivalent of $1,533,000 being the amount secured by the mortgage to the plaintiff. The defendants claim the plaintiff has never claimed that the defendants owe them "money" under the mortgage.

[11] This assertion simply flies in the face of the loan documents signed by the defendants and annexed to the affidavits filed by the plaintiff detailing the transaction between the parties. The loan documents signed by the defendants make it clear that they were advanced the sum of $1,533,000 under the terms of the loan agreement on 18 December 2006.

[12] There is no explanation by the defendants as to how they came to acknowledge they had borrowed $1,533,000 when, if they are correct, they had not done so. Nor do they explain why they did not object when they received the interest rate reassessment notices from the plaintiffs that they had never borrowed any "money" from them. The suggestion the plaintiff has not claimed the defendants owe them "money" is wrong. The whole basis of the summary judgment application is an assertion the defendants owe the plaintiff over $1,500,000 in "money". Finally Mr Shane McKenna sent the plaintiff a facsimile dated 16 June 2009 which said he had arranged for settlement in full of the plaintiffs account but asked for a further one to two months to complete the arrangement. This facsimile obviously contradicts the defendants' claim they owe no "money" to the plaintiff.

[13] There is no evidence why the defendants did not file affidavits in response to the summary judgment application between 19 December 2008, when it was adjourned, and 5 February 2009 when it was heard. Nor do the defendants explain why they did nothing from 5 February 2009 until the filing of this application in early June 2009, to challenge the summary judgment.

[14] The defendants' claim, that they borrowed no money from the plaintiff is simply incredible and could not possibly be a reason to halt the auction of the Hahei property. There is no merit here, therefore, in the defendants application for an injunction to prevent the auction sale of the property, nor for any interim orders returning the possession of the property back to the defendants, nor setting aside the summary judgment.

[15] The applications, therefore, by the defendants are dismissed.

Costs

[16] The plaintiff is entitled to costs of $2,000 plus disbursements.

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Ronald Young J

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