IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-008169

BETWEEN	IVO SUMICH Plaintiff
AND	KEVIN HAROLD PETERSON First Defendant
AND	ASB BANK LIMITED Second Defendant

Hearing: 14 December 2009

Appearances: C Bright for Plaintiff
B J Upton and A L Bowater for Second Defendant

Judgment: 14 December 2009

ORAL JUDGMENT OF VENNING J

Solicitors: Johnston Prichard Fee & Partners, Auckland
Simpson Grierson, Auckland

[1] The plaintiff seeks an interim injunction from this Court preventing the second defendant ASB Bank from proceeding to mortgagee sale of a property at 162 Titirangi Road, Titirangi this Wednesday.

[2] The plaintiff claims to be the beneficial owner of the property, which is registered in the name of the first defendant. The property was transferred out of the plaintiff's name and into the name of the first defendant in November 2000. At the time the ASB Bank provided funding to the first defendant and took a mortgage security over the property. The mortgage security was in standard form, providing amongst other things, for a priority amount of $630,000, that the indebtedness secured by the mortgage included indebtedness incurred by the mortgagor whether present or future, actual or contingent, secured or unsecured, joint or several, as principal surety or otherwise and a further clause pursuant to which the mortgagor represented and warranted that he was the sole legal and beneficial owner of the property.

[3] In essence the plaintiff says that in 2000 he was in financial difficulty and was induced by the first defendant, a person known to him and whom he trusted, to transfer the property to the first defendant to enable them to borrow sufficient moneys to refinance the plaintiff's commitments in relation to the property, the plaintiff at that time not being in a financial position to borrow the money himself. The plaintiff agreed and chose to keep that arrangement from the ASB Bank at the time.

[4] The plaintiff says that apart from the mortgage to secure the borrowing from the ASB Bank in the sum of about $336,000 in 2000 the first defendant agreed he would not further charge the property. The plaintiff says he has met the costs of borrowing.

[5] In short it is the plaintiff's case that while the property was transferred into the name of the first defendant, the first defendant held the property on trust for the plaintiff.

[6] The plaintiff then alleges that the ASB Bank was informed of the existence of the trust in April 2007 when he took steps to have the property transferred from the first defendant back into the name of his daughter and son.

[7] The plaintiff's evidence about that is that:

> In 2007, I told [the first defendant] that I wanted to make arrangements to have the property transferred back into my name and/or into the names of my two children by way of deed of nomination. [The first defendant] said that he would do what I wanted, but that I would have to arrange to repay the mortgage and he also wanted a further fee for having held the property for me up to that time.
>
> The refinancing of the mortgage was arranged through the ASB Bank who were made aware (at that time) of the trust basis on which the property was held by [the first defendant] for me. Replacement ASB Bank funding was arranged by my daughter to enable the existing mortgage to be repaid and the property transferred into the names of my son and my daughter, those arrangements being made by my daughter with the ASB Bank.

[8] In the event the re-transfer did not proceed. The plaintiff subsequently became concerned at disclosures made by the first defendant which led to him lodge a caveat against the title to the property on 4 April 2008.

[9] Apparently unbeknown to the plaintiff, the first defendant has used the property as security to obtain further advances from the ASB Bank unrelated to the property itself. The first defendant has used the property as security for borrowing by Coopers Beach Holdings Limited, a company owned and operated by the first defendant with the first defendant as guarantor. He has also used it as security for borrowings by Peterson Financial Mortgagelink Limited, again a company owned and operated by the first defendant. The loans made by the bank to that company were also guaranteed by the first defendant. There were also certain advances on credit cards made by the Bank to the first defendant and secured by the mortgage.

[10] The total sum secured by the mortgage over the Titirangi Road property and also another property at unit 2/10 Beaumount Street owned by Coopers Beach Holdings Limited is in excess of $960,000.

[11] When the first defendant fell into default the Bank issued Property Law Act notices, and also gave notice to the plaintiff as a caveator. A copy of the Property

Law Act notice was provided to the caveator in a letter dated 8 October 2009 from the ASB Bank's solicitors, Simpson Grierson to the solicitors for the plaintiff.

[12] In response the plaintiff's solicitors apparently advised the Bank, on or about 9 November, by email (confirmed in a letter on 12 November) that the plaintiff claimed an interest in the property as beneficial owner on the basis the first defendant held the property in trust for the plaintiff. The plaintiff's solicitors attached an authority from the first defendant confirming, amongst other things, that he held the property in trust for the plaintiff to the letter of 12 November to the Bank's solicitors.

[13] Against that background the plaintiff moved to injunct the mortgagee sale scheduled for this Wednesday alleging three causes of action against the Bank:

- unconscionability;
- breach of fiduciary duty; and
- negligence, being breach of duty of care said to be owed by the Bank to the plaintiff.

[14] Underlying all three causes of action was the pleading that as from April 2007 the ASB Bank had notice of the plaintiff's interest in the property. It is said that the Bank's failure to advise the plaintiff of the further advances and to make those further advances to the first defendant provided the basis for the causes of action.

[15] In particular, for example, under the first cause of action in unconscionability, it was pleaded that, notwithstanding the ASB Bank's knowledge from April 2007 that the property was held in trust for the plaintiff by the first defendant, the second defendant failed to disclose to the plaintiff the first defendant had made the property available as security and, further, notwithstanding that knowledge, the second defendant Bank continued to facilitate the use of the property by the first defendant to provide security for increased funding sought for companies

or entities in which the plaintiff had no interest or involvement and which borrowings were putting the equity held by the plaintiff in the property increasingly at risk. That then led to the pleading that had the Bank made the plaintiff aware in April 2007 of those matters the plaintiff would have insisted on proceeding with the transfer of the property at that time back in his name or to the name of his son or daughter.

[16] Similarly the breach of fiduciary cause of action is based on the pleading that the Bank owed a fiduciary duty to the plaintiff to disclose all approaches made or subsequently made by the first defendant to it for further and additional funding and owed a further duty not to permit the equity to be used as security for such further and additional funding without obtaining the informed consent of the plaintiff.

[17] Again, in relation to the cause of action in negligence it is pleaded that the knowledge of the Bank the property was held in trust, where the Bank had also agreed to provide funding to secure the transfer of the property back to the plaintiff's family, gave rise to a duty of care requiring the plaintiff to ensure amongst other things disclosure was made to the plaintiff that the first defendant was seeking to use the property as security for funding advances for the benefit of the first defendant and also to a duty to ensure that the Bank did not permit or allow additional liability to be incurred against the property directly or indirectly.

[18] As is apparent, underlying all of the causes of action pleaded against the Bank is the proposition that as from April 2007 the Bank was aware of the plaintiff's interest and should firstly have disclosed the first defendant's approaches to the Bank for further borrowing and secondly, and most importantly, should not have made further advances to the first defendant without the plaintiff's knowledge and consent.

[19] As an application for interim injunction the Court must first address whether the plaintiff's claim raises a serious question to be tried and, if so, where the balance of convenience lies.

[20] In the time permitted the Bank has not been able to file an affidavit in reply but counsel has filed a memorandum on behalf of the Bank. The memorandum

attaches copies of the loan agreements between the first defendant and the first defendant's entities and the Bank relating to the further advances the Bank says are secured by the mortgage over the property at Titirangi Road.

[21] The term loan agreement between the Bank and Coopers Beach Holdings Limited documentation confirms that the loan was made on 27 April 2006. It records the loan amount of $540,000. Peterson Financial Mortgagelink Limited has two loan agreements, both in the sum of $30,000 and both dated 6 June 2006.

[22] Counsel for the Bank submits that the plaintiff is unable to establish the claim he makes and that whatever claim the plaintiff has is against the first defendant rather than the Bank. Even if the plaintiff were able to establish an arguable or serious question to be tried it is also submitted for the Bank that the balance of convenience favours the Bank in this case.

[23] There are a number of difficulties for the plaintiff with the claims he seeks to advance. The first is the plaintiff's bare assertion that the Bank was aware in April 2007 of his interest in the property because at that time his daughter arranged a refinancing of the mortgage through the Bank. There are no particulars or details provided as to how it is said that the Bank was made aware of the trust at that time. There is simply the bare assertion that at the time it was made aware of the trust. But even on the plaintiff's evidence there is no reason for the Bank to have become aware of the matter at that time. On the plaintiff's case the refinancing was arranged by his daughter to enable the existing mortgage to be repaid and the property transferred into the names of his son and daughter. Those arrangements were made by his daughter with the Bank. There would have been no need for the Bank to have been advised at that time of the trust arrangement if, as the plaintiff says, all that was required was a refinancing, or borrowing of money by the plaintiff's daughter and perhaps son for a transfer of the property into their names from the first defendant.

[24] Further, it seems on the plaintiff's evidence that the arrangements were made by his daughter with the Bank but there is no affidavit from the daughter to confirm what it was she told the Bank at the time. The evidence from the plaintiff is

unsatisfactory and insufficient in itself to establish knowledge on the part of the Bank about the trust the plaintiff now relies on.

[25] In any event, and even if the Bank had been made aware of the trust in April 2007, by then it would have been too late. As is apparent from the documentation, the loan agreements supporting the further borrowing by the first defendant and secured against the property were made the previous year in 2006. There is no basis for the claims the plaintiff seeks to advance in his claim against the Bank given that the loan agreements and the advances made prior to April 2007 which, on the plaintiff's case, is the earliest that the Bank would have been made aware of his interest in the property.

[26] On the best possible case for the plaintiff on his claim there is simply no arguable cause of action disclosed on the papers before the Court. On that basis there is no serious question to be tried. It is unnecessary in the circumstances to consider the issue of whether, even if the Bank had been made aware in April 2007, the causes of action sought to be raised would be arguable in any event having regard to the provisions of the Property Law Act 2007. In the recent decision of the Supreme Court of *Cashmere Capital Limited v Carroll & Ors* [2009] NZSC 123 the Court confirmed for example, (albeit in a different context), the priority of a mortgagee's position in the absence of a fully informed consent to adverse interests, at [72] to [79].

[27] As I have found there is no serious question to be tried it is strictly unnecessary to consider the balance of convenience but in this case and for the avoidance of doubt I confirm the balance of convenience favours the Bank. The property is an investment property. It is not a property that the plaintiff lives in. The whole situation has arisen because of the initial arrangement made by the plaintiff and the first defendant. The arrangement was made by the plaintiff and at the time he made it in 2000, he deliberately chose not to disclose it to the Bank. The problem and situation that faces the plaintiff now has arisen because he has been let down by the first defendant. The problem is not of any making of the Bank. Nor is the Bank obliged to look to execute the alternative security before selling the property at Titirangi Road. There are, in this case, practical reasons why the Bank does not wish

to do that. Finally there must be a real question mark over the worth of the plaintiff's undertaking, given the background to the way the arrangement in this case developed.

[28] For all those reasons the application for interim injunction is dismissed. There will be an order for costs in the Bank's favour on a 2B basis for all steps taken to date, including today's appearance.

[29] That leaves the issue of the caveat over the property lodged by the plaintiff. As there is no application to have that caveat removed before the Court today I make no formal order in that regard. However I record, for the reasons set out above, that on the information presently before the Court there is no possible basis upon which that caveat can be sustained against the Bank's interest. If it is necessary for the Bank to take formal steps to have the caveat removed the plaintiff is on notice of that position which may well be relevant to the issue of whether solicitor/client costs would be awarded against the plaintiff if such an application was necessary.

_____

Venning J