IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-155
[2020] NZHC 755

BETWEEN	GARY DOUGLAS MANN Plaintiff
AND	JOHN MARSHALL SCUTTER Defendant

Hearing: 16 April 2020

Appearances: C LaHatte for the Plaintiff
K P Sullivan for the Defendant

Judgment: 17 April 2020

JUDGMENT OF COOKE J
(Interim injunction application)

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[1] By interlocutory application dated 8 April 2020 the plaintiff has applied for the following order:

> … an order by way of injunction restraining the defendant receiver from taking steps to exercise any power under the Deed of Appointment of receiver and under the security documents, to sell the property.

[2] The relevant property is in Port Underwood Road in Picton. It is used by the plaintiff and his family as their home. It is, however, owned by the plaintiff's company Silo Solutions New Zealand Ltd (Silo), which had granted security over the property in support of a loan. Silo is in default, a receiver has been appointed (the defendant), and the receiver is in the process of selling the property.

[3] The application was first referred to me in my capacity as Duty Judge. The application was made without notice, but it was able to proceed on a "Pickwick" basis with informal notice being given to the defendant. I scheduled a telephone conference

on 9 April 2020, and after hearing from counsel for both parties set the application down for hearing on 16 April, with directions given for the filing of submissions. I was satisfied at that stage that there was no material prejudice to the plaintiff in delaying the hearing of the application until 16 April.

[4] The hearing before me proceeded by way of VMR in accordance with the procedures followed during the level 4 COVID-19 lockdown as set out in the Protocols released by the Chief High Court Judge, and s 24 of the Epidemic Preparedness Act 2006.

[5] At the conclusion of the hearing I dismissed the application for an injunction, and indicated that my reasons would follow in writing. These are my reasons.

Background

[6] Mr Mann's company, Silo, was engaged in the business of supplying large silos used as storage for various materials stored in bulk, including crops and cement. The customers needed silos for storage, and the company would arrange construction/delivery. The company operated from Mr Mann's home. That property was a leasehold estate under a lease with the Marlborough District Council. The initial purchase of the property by Silo was financed by a private lender, Isso Holdings Ltd (Isso) who took a general security agreement over Silo's assets, including the leasehold interest, as well as personal guarantees from Mr and Mrs Mann.

[7] In recent times Silo and Mr Mann have faced business difficulties. There has been a dispute with one of the purchasers, LaFarge Holcim Ltd (Holcim) who purchased a silo for installation on the wharfs at Wellington. Holcim did not pay an amount that was expected — Mr Mann has explained in his evidence that there was a short payment of approximately $380,000. Silo fell into arrears with Isso in an amount of approximately $220,000. There is also evidence of other debts, including a deficiency on the lease payment to the Marlborough District Council of approximately $14,500, a further amount of approximately $312,000 owed to Johang Ltd, and Mr Sullivan also indicated during his submissions that the first liquidator's report recently filed for Silo suggests that there are unsecured creditors of approximately $402,000.

[8] In December 2019 there were bankruptcy proceedings before the Wellington High Court involving Mr and Mrs Mann. At that stage Mr Mann had hoped to have those proceedings adjourned on the basis that Silo was in mediation with Holcim, and might be able to secure a settlement.

[9] Events then took an unexpected turn. Mr Mann had been in communication with his next door neighbour, Mr Dave Wilson. Mr Mann had advised Mr Wilson of the financial difficulties he was facing, and he hoped that Mr Wilson may be able to help him out. Mr Wilson had also been in some discussions with Mr Mann's son.

[10] Somewhat to Mr Mann's surprise, in December Mr Wilson came to an agreement with Isso to purchase Silo's indebtedness to Isso then amounting to $222,430.71. On 17 December 2019 a Deed of Assignment was entered between Isso and Mr Wilson's company, Wilson Properties and Accounting Ltd. That Deed assigned the interests in the loan between Iso and Silo, as well as the security interests.

[11] The defendant was then appointed receiver over Silo's assets in accordance with the loan and security agreements. The receiver has placed the property on the market at open tender. What is apparent is that Mr Wilson had wanted to acquire the property. At the time Mr Mann first made this application for an injunction to effectively prevent the sale proceeding tenders had not yet closed. At the date of the hearing, and my decision to dismiss the application, the tenders remained open, but I understood the receiver had not yet accepted any offer. The receiver's affidavit of 15 April 2020 explains that there were seven tenders, and that Mr and Mrs Wilson had submitted the highest tender offer at $370,000, and that a negotiation had taken place with the Wilsons involving a proposal that they pay the rates, rental and legal fees outstanding to the Marlborough District Council, which would take their tender value in excess of $390,000.

Interim injunction principles

[12] There is no dispute about the relevant principles to apply in relation to an application for an interim injunction under r 7.53 of the High Court Rules 2016.[1] The Court follows the following approach:[2]

(a) The applicant must establish that there is a serious question to be tried or, put another way, that the claim is not frivolous or vexatious.

(b) Next, the balance of convenience must be considered, which requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order.

(c) Finally an assessment of the overall justice of the position as required as a check.

[13] In the present case the parties focused greatest attention on whether the receiver's actions were legitimate, and accordingly the first stage of this test, albeit that Mr LaHatte also emphasised the other aspects of the test given the situation of Mr Mann and his family, and the potential that they would lose their home.

Is there a serious question to be tried?

[14] In advancing the argument on behalf of Mr Mann, Mr LaHatte focused on three key arguments. I address each in turn.

Validity of assignment

[15] First Mr LaHatte argued that the assignment by Isso of Silo's debt and the related security interest was either not effective, or that it has led to a material misunderstanding by the receiver of the position concerning indebtedness.

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1 The application relied on r 32.2, but there is no material difference in terms of what the applicant was seeking.

2 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12].

[16] The relevant term of the assignment agreement assigns the relevant loan and security interests "free of all securities, interests and encumbrances of any nature". One of the listed security interests is the lease between Silo and the Marlborough District Council. Mr LaHatte argued that there was a problem with the wording of this assignment. In his written submission he put the suggested problem in the following terms:

> … Under the wording of the operative clause, the assignment is therefore free of all encumbrances. It may not have been intended, but if there was outstanding rent or other money owed to the [Marlborough District Council], then the assignment was without those debts.

[17] For a number of reasons I do not think this argument has any substance. First it seems to me that all the clause was doing was assigning the relevant security interest arising in relation to the lease — I understand that the lease comtemplates certain enforcement rights that Isso could have exercised. Secondly I do not see how the wording of the assignment clause could have in any way removed the obligation of Silo to pay rent to the Marlborough District Council. Thirdly, and in any event, even if there was some effect on that debt obligation, it had no effect on the more substantial debt that Silo owed Isso, which Isso duly assigned. It was that debt, and the associated security interest, that gave rise to the appointment of the receiver. So it seem to me that the argument has no material effect on the validity of the appointment of the receiver, or the actions taken under the security interest.

Validity of notice

[18] Prior to the appointment of the receiver a notice of demand was prepared and served on Silo at an address at Oriental Parade in Wellington. That address was the formal address given for the giving of notices under the security and loan agreements. But in July 2019 Silo had changed both its registered office, and its address for service at the Companies Office. This give rise to the second argument advanced by the plaintiff.

[19] First, I reject Mr Mann's evidence that the notice was not served at the Oriental Parade address at all. The evidence provided by Mr Worth in response shows exactly how, and when that notice was duly given at that address.

[20] Mr LaHatte then argued that a failure to give the notice at the registered office of the company, or its formal address for service, meant that proper notice was not given, and accordingly the steps subsequently taken such as the appointment of the receiver were invalid. In advancing that submission he relied on *Taylor v Bank of New Zealand* where the Court observed that the manner in which a receiver is appointed must be strictly followed.[3]

[21] For three reasons I do not think there is any substance to this argument. First the notice was given at the address that had been specified in the contractual agreements for giving notice. Silo could have, but did not, give any advice that that address was now changed. I accept Mr Sullivan's point that ss 388(1)(a) and 387(1)(e) of the Companies Act 1993 apply as this was the address the parties had agreed would be used. The formal registered office, or address for service were not relevant. Secondly, I accept Mr Sullivan's further point that, in any event, notice of demand was not required before enforcement action could be taken under the loan and security agreements, including the appointment of the receiver. There is no dispute that Silo was in default under the loan at that time. No formal demand was required prior to enforcement action. Indeed by that stage there was also an application to place the company into liquidation, and bankruptcy proceedings had been initiated against Mr Mann. Finally I see the point taken about notice to be a highly technical one given that Mr Mann was advised of the steps that were being taken, at the very latest on 8 January 2020 when a copy of the demand was emailed to him.

Good faith

[22] Finally, and given the circumstances surrounding Mr Mann's interactions with Mr Wilson, Mr Mann relies on s 25 of the Personal Property Securities Act 1999 which provides:

> **25 Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice**
>
> (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.

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3 *Taylor v Bank of New Zealand* [2011] 2 NZLR 628 (HC) at [31]–[33].

> (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

[23] The complaint is based on Mr Wilson taking unfair advantage of the company by obtaining information through the personal connection with Mr Mann and his son at a time when the company was vulnerable. It is said that Mr Wilson has engaged in a plan to acquire a neighbouring property with the result that Mr Mann is left personally exposed as a guarantor in circumstances where he and his family may become homeless at a time when there is uncertainty about finding another home.

[24] I accept that s 25 can be used to challenge the appointment of a receiver.[4] I also accept that, notwithstanding some authority, the question whether s 25 requires some active misleading conduct is still undecided.[5] Nevertheless I do not think there is an arguable case for the application of s 25 here. In *Fatupaito v Harris* the Court of Appeal reviewed the authorities in relation to the application of s 25 to enforcement action by a secured creditor.[6] Ultimately it held:

> [53] A mortgagee therefore need not have purity of purpose. But it does act in bad faith if, judged objectively, it acts for a predominant purpose which is collateral to, or to use the language of this Court in *Lepionka*, exogenous to, its interests as mortgagee in preserving its security and obtaining repayment of a secured debt. However a mortgagee does not act in bad faith if the effect of the exercise of its power undertaken for the predominant purpose of securing repayment is that it secures to itself some collateral advantage.

[25] There may be different perspectives of the acts taken by Mr Wilson here. Mr Mann may feel deceived by his neighbour. On the other hand Mr Wilson may feel he has saved Mr Mann from bankruptcy. But, in any event, Mr Wilson's business strategy has been implemented through the technique of appointing a receiver, and the receiver has gone about his tasks in accordance with a receiver's normal functions and duties. He has advised the property for sale on the open market by a tender process. Seven tenders were received. It would appear that the highest tenderer was Mr Wilson. This may mean that Mr Wilson has proceeded in a manner that has meant that he has secured a collateral advantage — he has obtained ownership of the next door property

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4 See *Compass Capital Ltd v NZ Guardian Trust Ltd* HC Auckland, CIV-2009-404-0015, 17 March 2009 at [30]–[35] per Cooper J; and *Taylor v Bank of New Zealand*, above n 3.

5 *Stiassny* v *Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [56]; and *Gibson v Stockco Ltd* [2011] NZCCLR 29 (HC) at [200]–[203].

6 *Fatupaito v Harris* [2018] NZCA 497, [2019] NZAR 192, referring to *Coltart v Lepionka and Co Investments Ltd* [2016] NZCA 102, [2016] 3 NZLR 36.

that he wished to own. But this has been also done in a way that apparently preserves a sale at market value through the use of an independent third party acting as receiver. Accordingly I do not accept Mr LaHatte's arguments.

The overall circumstances

[26] For these reasons I conclude that there is not a serious question to be tried. That provides a sufficient basis to dismiss the application for an interim injunction. But it is also appropriate to stand back to consider the case as a whole, as is contemplated by the remaining aspects of the test for the grant of an injunction.

[27] The ultimate problem for Mr Mann is that the place he used as his home was used as security for his company's business. His company then faced financial difficulties. An application was made to appoint liquidators, bankruptcy proceedings were commenced, and creditor's claims were otherwise being advanced. Mr Mann hoped to stave off the apparent imminent collapse by securing a settlement of the litigation that the company had against the customer who had not paid the full amount said to be owing. But that can only be described as a hope. The evidence does not suggest a settlement was imminent.

[28] The collapse of the business has unfolded in a different way than expected. This is a consequence of Mr Mann's neighbour spotting an opportunity to acquire the next door property. But Mr Wilson did not cause the collapse, and he has taken on his own business risks in the steps that he has taken. There is no basis to prevent him from enforcing the legal rights that he has paid to acquire. Such rights could equally have been exercised by Isso itself had it wished to take enforcement action.

[29] It is obviously a concern that Mr Mann and his family may lose their family home. But as I said when dismissing the application, at this stage I am only dealing with the application for an injunction. I particularly note the receiver's affidavit sworn 15 April 2020 which refers to the proceedings before the Tenancy Tribunal in relation to Mr Mann's occupation of the property, and which also states:

> I confirm that the successful tenderer or I are required to give 42 days' notice to the Mann's to vacate the premises once the lockdown is lifted and the government restrictions moved to level 2 or below.

[30] This will give the Mann's some breathing space, and it is also apparent that further legal processes will be involved in any eviction.

Outcome

[31] For these reasons the application for an interim injunction was dismissed.

[32] The defendant indicated that it would not seek costs of this application in the circumstances. I record that it reserves its position on future costs should Mr Mann continue to pursue this litigation.

Cooke J

Solicitors:
Thomas Law, Auckland for the Applicant
Langford Law, Wellington for the Respondent