IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2019-485-416
[2019] NZHC 2534

BETWEEN	EASTLIGHT ASSET TRADING NO. 5 LIMITED Applicant
AND	GROUND SUPPORT (WGTN NO. 1) LIMITED Respondent

Hearing: 25 September 2019

Appearances: J D Dallas for applicant
R B Hucker for respondent

Judgment: 4 October 2019

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

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[1] This is an application by Eastlight Asset Trading No. 5 Ltd (Eastlight) pursuant to s 143 of the Land Transfer Act 2017 for an order sustaining a caveat registered over the titles to two properties owned by Ribble Ltd (in receivership), formerly Ground Support (Wgtn No. 1) Ltd, (Ribble).

[2] The principles relating to such applications are well settled:[1]

(a) The caveator bears the burden of establishing that the caveat should be sustained.

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[1] *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61, (2014) 14 NZCPR 813 at [24].

(b) In order to discharge that burden, the caveator must establish that he, she or it has a reasonably arguable claim to an interest in the land of the type described in s 138(1)(a) of the Land Transfer Act.

(c) Even if the caveator can establish a reasonably arguable case, the Court retains a residual discretion as to whether or not to make an order and will not do so if no useful purpose would be served.

[3] Ribble was incorporated in September 2010. Its shareholders are Mr Michael Kooiman and a company with which he is connected. Its sole director is Mr Kooiman. Ribble is a property developer.

[4] In October 2010, FM Custodians Ltd and Ribble entered into an agreement whereby FM Custodians agreed to sell and Ribble agreed to purchase two properties at 2/44 and 46 Ribble Street, Island Bay, Wellington.

[5] In March 2013, FM Custodians offered to lend funds to Ribble in order to enable it to settle the purchase of the properties. The details of this offer are not relevant for present purposes, except to the extent that they address security. Essentially, FM Custodians proposed security consisting of:

(a) a first mortgage over the two properties;

(b) a general security agreement "over all of the assets (present and future) of [Ribble]"; and

(c) a personal guarantee from Mr Kooiman.

[6] FM Custodian's offer was accepted by Ribble. Loan documentation was executed on 19 March 2013. This included a memorandum of mortgage over the two properties, a general security agreement whereby Ribble charged "all the assets and undertakings of [Ribble]" and a deed of guarantee.

[7] By mid-2016 Ribble, had defaulted under the loan.

[8] On 5 December 2016, FM Custodians appointed Mr Kevin Whitley as a receiver pursuant to the general security agreement.

[9] Eastlight was incorporated in November 2014. Its shareholder is a company connected with Mr Kooiman. Its sole director is Mr Kooiman. Eastlight appears to have been incorporated for the sole purpose of acquiring the two properties.

[10] On 26 June 2019, Eastlight purported to enter into an agreement with Ribble pursuant to which Ribble would agree to sell and Eastlight would agree to purchase the properties. Mr Kooiman executed the agreement on behalf of both parties.

[11] Also on 26 June 2016, Eastlight registered a caveat pursuant to s 138 of the Land Transfer Act over the titles to the properties, claiming an interest in them as purchaser and therefore owner in equity.

[12] The dispositive issue in this case is whether, following the appointment of a receiver pursuant to the general security agreement, Mr Kooiman retained authority to deal with the two properties on Ribble's behalf, or whether such authority passed to the receiver. Put another way, the question is whether the general security agreement charged the two properties. If Mr Kooiman retained such authority then he was entitled to bind Ribble to the sale of the two properties to Eastlight, that company became the owner in equity and has an interest capable of supporting its caveat. If the receiver obtained such authority upon his appointment, then the agreement for sale and purchase is a nullity.

[13] Eastlight's position is of course that Mr Kooiman retained authority to deal with the two properties on behalf of Ribble, and Mr Dallas advanced this contention on a variety of bases. In doing so, he made extensive reference to the Receiverships Act 1993, the Property Law Act 2007, the Land Transfer Act 2017 and the Personal Property Securities Act 1999. The immediate relevance of these references was not obvious to me, and I do not propose to refer to the legislation except to the extent that it is necessary to dispose of the case.

[14] Mr Dallas' first argument, as I understood it, was that it was not possible for Riddle to grant security over the two properties under both the mortgage and the general security agreement. That was said to be because charges over real property are generally governed by the Property Law Act and the Land Transfer Act, while charges over personal property are generally governed by the Personal Properties Securities Act. The result, he submitted, is that the receiver's rights in relation to real property are governed exclusively by the terms of the mortgage and his rights in relation to personal property are governed exclusively by the general security agreement. On that basis, Mr Dallas argued, as I understood him, that as FM Custodians appointed the receiver not under the mortgage but under the general security agreement, Mr Kooiman, as the director of Ribble, retained authority to deal with the company's real property.

[15] That argument appears to reflect a misunderstanding of the legal position.

[16] Ribble, as the owner of various forms of property, was entitled to grant security over that property for the purposes of obtaining credit to enable it to conduct its business. It elected to grant both a mortgage over its real property and a general security agreement over all of its property. There is nothing at common law or in any of the legislation referred to preventing it from doing so. Nor is there anything unusual about a lender securing real property by both a mortgage and a general security agreement. Each type of security offers distinct advantages. A mortgage grants the lender certain proprietary rights, while a general security agreement grants the lender the contractual right to appoint a receiver over its entire undertaking.

[17] Indeed, as Mr Hucker observed, the taking of multiple securities in the form of mortgages and charges (fixed and floating) over both real and personal property by lenders is commonplace in the case of borrowers who are engaged in property development. By this means, the lender seeks to circumvent any difficulties arising from the nature of property development where an asset may be personal property one day but become attached to land and therefore real property the next.

[18] It is true that in certain circumstances the Property Law Act, the Land Transfer Act and the Personal Properties Securities Act, and in particular the registration

processes provided for in that legislation, might have given rise to priority issues as between the various parties. But no such issues arise in this case. Here, FM Custodians has elected to appoint a receiver pursuant to one form of security and the only issue is the scope of that security, that is to say, whether the general security agreement charged the two properties.

[19] Mr Dallas' second argument was that, even if Ribble was entitled to grant security over the two properties pursuant to a general security agreement, it did not do so in this case.

[20] In part "C", the general security agreement provides that Ribble is granting a security interest in respect of certain property referred to as "collateral". Immediately below that, still in part "C", there are three boxes. These contain options as to the type of charge involved — options 1, 2 and 3.

[21] The parties have identified the option that involves Ribble granting security over:

> All [Ribble's] present and after acquired property, being all [Ribble's]:
>
> (a) **personal property**; and
>
> (b) all **other property**.

[22] There follows an explanatory note, which reads:

> *If this option is selected then all [Ribble's] property is subject to this* ***security interest****.*

[23] Part 1 of the general terms and conditions contains a series of definitions.

[24] This includes a definition of "collateral":

> "collateral" means:
>
> (i) If this instrument is a mortgage of land, the land referred to in the memorandum of mortgage;
>
> (ii) In the case of all other instruments either real or personal property together or separately as the circumstances may dictate and as further defined in this instrument.

[25] Clearly sub-para (i) is irrelevant, and it is sub-para (ii) that applies.

[26] In pt 3, the general terms and conditions address the extent of the security interests being created. Clause 4 addresses the three options identified in part "C" of the document. Clause 4(a) deals with mortgages of land, which is not applicable here. Clause 4(b) deals with security over specifically identified property, which corresponds to both the options described above that require the identification of specific property in schedules. Finally, cl 4(c) deals with security over all property. Plainly it is cl 4(c) that applies here. Materially, it says:

> If this instrument is a general security agreement over all of the property of the party granting the security then the party granting the security grants to the security holder a security interest, and where any part of the secured monies is used to acquire rights in collateral, a purchase money security interest, in an over:
>
> (i) **personal property** …
>
> (ii) **real property**: all its real property assets of any nature and kind, both present and future including by way of example and not limitation, all its interest in land and the rents, revenue or income from its land to the intent that a caveatable interest in land is created in favour of the security holder; and
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> (iii) **other property**: all its other property of any kind and nature both present and future.

[27] In my view, it could not be clearer that Ribble granted FM Custodians a charge over all the company's present and future property, both real and personal, including the two properties that are the subject of this proceeding.

[28] Mr Dallas' third argument, as I understood it, was that even if FM Custodians could appoint a receiver over Ribble's real property pursuant to the general security agreement, it had not done so in the deed of appointment dated 5 December 2016.

[29] Mr Dallas referred me to cl 1 of the deed of appointment, which provides:

> Pursuant to the powers conferred by the GSA, the Security Holder appoints the Receiver to act as receiver and manager of the undertaking, property and assets of the Company charged by the GSA being all present and after acquired personal property and other property with each and all of the powers conferred on receivers and managers by the GSA and at law and as receiver of income under Mortgage.

[30] He emphasised that the deed of appointment was limited — as it had to be — to the conferring of powers on a receiver pursuant to the terms of the general security agreement. He submitted that under that agreement a security holder does not have power to appoint a receiver pursuant to the mortgage.

[31] Essentially, this argument is a repetition of the first.

[32] In any event, s 14 of the Receiverships Act provides that a "receiver has the powers and authorities expressly or impliedly conferred by the deed or agreement or the order of the court by or under which the appointment was made". The terms of the deed of appointment itself are not relevant. The general security agreement sets out the powers conferred on the receiver in cl 25. These are comprehensive. As Mr Hucker submitted, they include the entitlement of the receiver to act as if he or she were the owner of the property secured. There is clear authority for the proposition that this entitles a receiver to deal with real property by alienating it (subject of course to the rights of any mortgagee).[2]

[33] Mr Dallas' fourth and final submission started from the proposition that the interests of the mortgagee of the properties takes priority over the interests of the chargeholder under the general security agreement.

[34] There is a sense in which this is correct because, as Ribble's agent, the receiver's interest in the properties is subject to the mortgages.

[35] But Mr Dallas submitted that the receiver has a conflict of interest because he is "purporting to promote the mortgagee's position", whilst seeking "orders based on the same whilst holding the office of receiver of Ribble Limited and by that being agent of the grantor".

[36] I am satisfied there is nothing in this.

[37] Ribble, as the registered owner of the properties, would, but for the fact of the receivership, be entitled to exercise its equity of redemption and sell the properties,

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[2] See generally *DB Breweries Ltd v Hyndman* [2012] NZHC 2897, [2013] 1 NZLR 601 at [29].

subject to redeeming the mortgages. As Ribble's agent, the receiver is in exactly the same position. There is no conflict of interest.

Conclusion

[38] In my judgement, following FM Custodian's appointment of a receiver pursuant to the general security agreement, the receiver became the company's agent and was entitled to deal with all property covered by the general security agreement. The general security agreement charged Ribble's interest in the two properties. The practical effect of that is that Ribble's directors and officers had no entitlement to deal with the company's property in the absence of such authority being conferred by the receiver. There is no suggestion in this case that the receiver authorised Mr Kooiman to enter into an agreement to sell the properties on Ribble's behalf to Eastlight. Because of Mr Kooiman's directorship of Eastlight, Eastlight is visited with full knowledge of Mr Kooiman's want of authority. Accordingly, the agreement for sale and purchase is of no effect, meaning Eastlight received no interest in the properties pursuant to the sale and purchase agreement and has not established any rights that would support its caveat.

[39] On that basis, I make an order that the caveat lapse.

Costs

[40] I reserve costs, not having heard from counsel in relation to them, except by written submission. My preliminary view is that the receiver is entitled to his costs on a 2B basis. If counsel are unable to agree on costs — as I would certainly expect them to be able to do — they may revert to me by memorandum.

Associate Judge Johnston

Solicitors:
J D Dallas, Wellington for applicant
Hucker & Associates, Auckland for respondent