

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2010-409-2807
[2012] NZHC 1959**

UNDER the Property Law Act 2007

BETWEEN SIMON JOHN THORN, DAVID IAN
RUSCOE, TIMOTHY WILSON
DOWNES
Plaintiffs

AND RFD FINANCE LIMITED
First Defendant

AND LIVINGSPACE PROPERTIES LIMITED
(IN RECEIVERSHIP)
Second Defendant

Hearing: 27 June 2012

Counsel: R B Stewart QC, D Lester and K M Lawson for Plaintiff
A J Forbes QC for First Defendant

Judgment: 7 August 2012

**JUDGMENT OF POTTER J
on application for interim relief**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 3 p.m. on 7 August 2012.

Solicitors: Goodman Tavendale Reid, Christchurch – michael.singleton@gtrlaw.co.nz
Canterbury Legal Services Ltd, Christchurch – grant@canterburylegal.co.nz

Copy to: B Stewart QC, Auckland – rbstewart@xtra.co.nz
D M Lester, Christchurch – dmlester@xtra.co.nz
A J Forbes QC, Christchurch – forbes@clear.net.nz

Introduction

[1] The focus of a hearing before me on 27 June 2012 was interim relief sought by the plaintiffs who are the receivers of the second defendant. They sought an order that the first defendant (RFD) withdraw from possession of the whole of the personal property, goods and accounts receivable in relation to the serviced accommodation business of the second defendant, LivingSpace Properties Limited (in liquidation and receivership) (LivingSpace) in Dunedin and Invercargill, upon such terms as the Court thinks just.

The proceedings

[2] The proceedings were commenced by a statement of claim filed on 8 December 2010. By the amended statement of claim dated 18 May 2012, the plaintiffs seek:

- (a) An order declaring that RFD does not hold a valid and effective security over the assets of LivingSpace;
- (b) In the alternative (if RFD is held to hold a valid security) an order permitting Equitable Property Holdings Ltd (Equitable) (of which the plaintiffs are receivers) to redeem the charged property on terms (the proposed terms essentially seek to protect RFD for the amount properly due under its security if valid, following the taking of accounts, and require RFD to provide full disclosure so that accounts can be properly taken in respect of the LivingSpace business).
- (c) An order directing that RFD withdraw from possession of the personal property of LivingSpace including the accounts receivable relating to the personal property.

[3] At the interim relief hearing the plaintiffs did not pursue the first basis of claim, namely the challenge to the validity of the security held by RFD. This will be an issue for the substantive hearing.

How the interim relief application came before the Court

[4] A fixture was allocated for two days in the week commencing 25 June 2012. A minute of Chisholm J dated 6 June 2012 states that the fixture is allocated on the basis that the question of whether or not there should be redemption would be first established and depending on the outcome, there would be a further hearing in relation to quantum.

[5] A further minute of Chisholm J on 12 June 2012 records that the two day fixture is to enable an interim ruling to be obtained “on jurisdictional issues”. Those issues were to be defined by a joint memorandum of counsel to be filed by 21 June 2012. A statement of issues was eventually filed which also identified the plaintiffs’ position and RFD’s position on the issues.

[6] The 12 June 2012 minute also recorded that counsel were to discuss the possibility of a payment into a trust account by the plaintiffs in return for them resuming control of LivingSpace’s business. At the start of the hearing I inquired as to any discussions to that end. Counsel advised there had not been discussions. But Mr Stewart QC confirmed that the plaintiffs, as receivers of LivingSpace, had paid into a solicitors’ trust account \$305,000 and were that day to pay a further \$80,000, a total of \$385,000, being the receivers’ assessment of the amount required to cover RFD’s entitlement under its security (if ultimately held to be valid). He also advised that they would add to that amount an estimate of future costs, properly made. He emphasised that it had not been possible to get a redemption figure from RDF. Requests over many months had been unsuccessful. The latest response from Canterbury Legal, solicitors for RDF, dated 26 June 2012, was that RDF was not in a position to provide a redemption figure because of the need to obtain details of contingent liabilities including tax etc.

[7] The plaintiffs' application for interim relief relied principally on s 171 of the Property Law Act 2007 (PLA) - withdrawal by direction of court.

[8] The application was opposed by RFD on two principal grounds:

(a) Section 171 does not apply as the right to redeem is governed by s 132 and s 114 of the Personal Property Securities Act 1999 (PPSA); and

(b) Even if s 171 does apply:

(i) It is not appropriate for the Court to grant interim relief under s 171 because there is much evidence in dispute and the Court has not had the opportunity to hear all the evidence; and

(ii) There are a number of other issues (referred to in the statement of issues) which make interim relief in the nature sought by the plaintiffs inappropriate in the circumstances.

Outcome of hearing

[9] Having heard from the parties I advised at the conclusion of the hearing that:

(a) I was satisfied that the Court had jurisdiction under s 171 PLA to grant the interim relief sought by the plaintiffs;

(b) Interim relief in the general terms sought by the plaintiffs was justified because:

(i) The plaintiffs have a reasonably arguable case;

(ii) The balance of convenience favours interim relief;

(iii) The overall justice favours interim relief; and

- (iv) Any issues of prejudice for RFD can be met by the arrangements and undertakings the plaintiffs are prepared to give.
- (c) There being no formal application before the Court, counsel would need to submit for my consideration a draft order. This should include appropriate terms and conditions. I proposed that counsel should confer in order to reach agreement, if possible, on the terms of the draft order including appropriate terms and conditions.
- (d) Once the terms of the interim relief were agreed or determined I would grant interim relief and I would issue reasons for my findings at (a) and (b) above.

[10] A consent order granting interim relief on terms and conditions was made on 2 August 2012. My reasons now follow.

Issues

[11] The issues were identified in the parties' statement of issues as:

- (a) Do the plaintiffs have standing to seek redemption?

This issue arose from the position taken by RFD that only the appointor of the receivers, Equitable, would have the right to redeem, not the plaintiffs as receivers. However, at the hearing Mr Forbes advised that RFD did not pursue the "agency" point, that is, it took no point regarding the standing of the plaintiffs as agents of:

- (i) Equitable, the appointor of the receivers; or
- (ii) LivingSpace of which the plaintiffs are receivers.

This concession was properly made. There can be no question that the plaintiffs have full powers as agents under Equitable's security

and by virtue of s 14(1) of the Receiverships Act 1999, which provides that a receiver has the powers and authorities expressly or impliedly conferred by the deed or agreement by which the appointment was made.

This concession is important in relation to the application of s 171 of the PLA, as will become apparent later in this judgment.

- (b) Does the Court have jurisdiction to make interim orders under s 171 of the PLA removing RFD as mortgagee in possession of the business of LivingSpace?
- (c) If the Court has jurisdiction to make interim orders under s 171:
 - (i) Do the plaintiffs have a reasonably arguable case?
 - (ii) If so, where does the balance of convenience lie?
 - (iii) Where does the overall justice lie, particularly regarding issues of prejudice?
 - (iv) If the Court determines that interim relief should be available, what terms should apply?

Factual background

[12] The background is complex. It is set out in the brief of evidence of Mr Simon Thorn, one of the plaintiffs, dated 15 May 2012, and his supplementary brief dated 1 June 2012. Many of the matters addressed in Mr Thorn's brief of evidence are disputed by Mr Daniel Godden, general manager of LivingSpace's accommodation group, in his brief of evidence dated 26 June 2012, particularly in respect of what might be loosely called "accounting issues". What may be properly due to RFD (assuming it is found ultimately to have a valid security) is clearly in dispute.

[13] The structure and relationships of the various entities is not materially in dispute and may be summarised as follows:

- (a) The plaintiffs are the receivers of Livingspace appointed by Equitable on 21 June 2010 under a General Security Agreement (GSA) dated 18 March 2010. About \$15.2m was outstanding under the GSA at the time of appointment, but as Mr Stewart pointed out, this is a theoretical figure because considerable interest and costs will have accrued.
- (b) On 19 October 2009, Livingspace had granted a prior security to Secured Finance Ltd and Secured Lending Ltd (Secured). They are independent parties. The security supported guarantees totalling about \$2.5m. Whether there is anything owing under this security is not clear. Secured appointed a receiver, Mr Allott, on 26 July 2010. He took possession of Livingspace's personal property and the plaintiffs surrendered possession and control to him. Negotiations between the plaintiffs as receivers of Equitable and Secured concerning Equitable purchasing Secured's prior security interest were inconclusive. Mr Allott resigned on 15 September 2010.
- (c) Mr Allott's resignation followed an assignment¹ on 13 September 2010 by Secured to RFD of Secured's GSA. The assignment recorded a "purchase price" of \$300,000 payable by Livingspace to Secured. RFD advanced \$300,000 to Livingspace which Livingspace paid to Secured. That \$300,000 was secured to RFD by the GSA of which RFD had taken an assignment from Secured. It was a term of the assignment that Livingspace was released from its contingent guarantee liability to Secured (RFD was to provide substitute guarantees and securities for Secured).
- (d) There was also a term loan agreement between RFD and GP 96 Limited as borrower which Livingspace guaranteed. It is dated 16

¹ The validity of this assignment is in dispute.

September 2010 and was for \$80,000 to finance the purchase by GP 96 Limited of the chattels of the Christchurch business of Livingspace. RFD advanced \$80,000 to GP 96 Limited on 17 September 2010.²

- (e) RFD then took possession of Livingspace's business as mortgagee in possession under the securities which, if the assignment is valid, RFD had acquired from Secured. RFD took possession on 16 September 2010, the day after Mr Allott resigned.

The receivers' assessment

[14] In summary, the position of the plaintiffs is that since RFD entered into possession as mortgagee of Livingspace's business it has:

- (a) Refused to provide or been extremely slow in providing any information to Equitable.
- (b) Treated Livingspace as a "cash cow", diverting management fees and operating expenses to companies formed for the purpose of "managing" the business of Livingspace in Dunedin and Invercargill.
- (c) Filed six monthly reports³ as required under the PLA of a mortgagee in possession which show a total of over \$1m received by RFD and associated companies⁴ in the 18 month period since RFD entered into possession. The receivers have made an estimate of the most recent three months to assess the financial position as at 1 June 2012.

² The validity of this security is in dispute.

³ Six monthly reports by RFD as mortgagee in possession are dated 16 November 2010 (first report under s 162 PLA), 16 May 2011, 16 November 2011, and 16 March 2012 (further reports under s 163 PLA).

⁴ The evidence indicates that all of these entities have links with Mr David Henderson despite his inability to be a director since he was adjudicated bankrupt on 29 November 2010.

[15] The overall situation as assessed by the receivers is that RFD and associated companies are depleting the assets of LivingSpace to the detriment of Equitable, the subsequent security holder. Equitable's position is that even on RFD's own figures (which Mr Thorn in his brief of evidence criticises, describing the accounting as "woeful"), RFD has been handsomely rewarded and its debts of \$300,000 and \$86,000, as recorded in the s 162 report dated 16 November 2010, plus interest and costs have been well repaid.

[16] The receivers claim that the interim relief sought is necessary to arrest the situation under which RFD can continue to drain the profits out of LivingSpace, until the validity of its claimed security can be determined and full and proper accounting completed.

[17] As I have said, Mr Godden contests much of the detail in Mr Thorn's brief of evidence. He says that the management fees and operating expenses are justified and verifiable from the business accounts and records.

Does the Court have jurisdiction to make orders under s 171 Property Law Act?

[18] Section 171 of the PLA provides:

171 Withdrawal by direction of court

- (1) A court may, on the application of a specified person, make an order directing a mortgagee in possession to withdraw from possession of the whole, or any part, of the land, goods, or accounts receivable if the court is satisfied that —
 - (a) the purpose of the mortgagee's entry into possession of the land, goods, or accounts receivable has been fulfilled; or
 - (b) circumstances no longer justify the mortgagee remaining in possession of the land, goods, or accounts receivable.
- (2) in subsection (1), **specified person** means—
 - (a) the current mortgagor; or
 - (b) any other person who has an interest in the mortgaged land, goods, or accounts receivable and is entitled to redeem them.

- (3) A copy of an application under this section must be served on the mortgagee (unless the court orders otherwise).
- (4) The court may make an order under this section on any conditions the court thinks fit.
- (5) An order under this section does not affect any other mortgage or encumbrance over the mortgaged land, goods, or accounts receivable.

[19] The plaintiffs say that as receivers of LivingSpace and Equitable, they fall within the definition of “specified person” under both s (2)(a) and (b). I agree they fall within s 171(2)(a), noting Mr Forbes’ concession on the agency point.⁵ Given that concession, the redemption issue falls by the wayside in relation to the receivers’ entitlement to apply for relief, because paragraphs (2)(a) and (2)(b) are in the alternative, and entitlement to redeem under s 171(2)(b) is not a requirement under s 171(2)(a).

[20] Mr Forbes argued, however, that ss 97 (which relates to the mortgagor’s equity of redemption), and 171 of the PLA have no application because the Personal Property Securities Act 1999 (PPSA) governs redemption of GSA’s. I therefore turn to consider the redemption issue.

[21] Section 132 of the PPSA provides:

132 Entitled persons may redeem collateral

- (1) At any time before the secured party sells the collateral or is deemed to have taken the collateral in satisfaction of the obligation secured by it, a person who is entitled to receive a notice under section 114, may, unless that person otherwise agrees in writing after default, redeem the collateral by—
 - (a) tendering fulfilment of the obligations secured by the collateral; and
 - (b) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing, and preparing the collateral for sale, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

⁵ See at [11] (a) above.

- (2) The debtor's right to redeem the collateral has priority over any other person's right to redeem the collateral.

[22] Mr Forbes maintained that under s 132, redemption can only be effected by tendering the full amount secured by the GSA plus expenses. Further, that entitlement to redeem is limited to "a person who is entitled to receive a notice under section 114" and that under s 114(2)(f), Equitable is excepted from the notice regime under s 114.

[23] Section 114 of the PPSA relevantly provides:

114 Notice of sale of collateral

- (1) A secured party who intends to sell collateral under section 109 must, not less than 10 working days before selling the collateral, give notice to the following persons:
 - (a) the debtor;
 - (b) any person who has registered a financing statement in respect of the collateral that is effective at the time the secured party took possession of the collateral;
 - (c) any other person that has given the secured party notice that that person claims an interest in the collateral.
- (2) Subsection (1) does not apply if—
 - ...
 - (f) the security interest arises under an instrument creating a charge on the property of a body corporate that comprises all, or substantially all, of the assets of the body corporate whether or not there is a collateral security interest in the collateral securing the same debt or obligation;⁶ or
 - ...
- (4) If the security interest is created or provided for by a mortgage over goods,—
 - (a) sections 128 to 136 of the Property Law Act 2007 apply; and
 - (b) the notice that is given under subsection (1) must be—
 - (i) in the form prescribed by regulations made under that Act (instead of being in the form prescribed by regulations made under this Act); and

⁶ Section 114(2)(f): added on 1 January 2008 by section 364(1) of the Property Law Act 2007 (2007 No 91).

(ii) given to the persons referred to in sections 128 and 130 of the Property Law Act 2007 (instead of to the persons referred to in subsection (1)).

(5) In subsection (4), **mortgage** has the same meaning as in section 4 of the Property Law Act 2007.

[24] Mr Forbes submitted that ss 132 and 114 create a specific regime for redemption under the PPSA as to who may redeem and what is required to redeem.

[25] He argued that the PLA has no application because of the specific redemption regime under the PPSA. He relied on s 78(2) of the PLA, which relevantly provides:

78 Provisions of Part are supplementary, but subject, to Personal Property Securities Act 1999 in relation to mortgages over personal property

(1) If a provision of this Part applies to a mortgage that creates or provides for a security interest to which the Personal Property Securities Act 1999 applies, the provision is supplementary to the Personal Property Securities Act 1999.

(2) However, if the provision is inconsistent with a provision in the Personal Property Securities Act 1999, the provision in the Personal Property Securities Act 1999 prevails. ...

[26] He submitted that because of the specific regime created by ss 132 and 114 under the PPSA, the provisions of the PLA have no application. Therefore, the plaintiffs may not seek relief under ss 97 and 171.

[27] In support of this proposition, he submitted that because s 114(4) refers to notice provisions in ss 128 to 136 of the PLA where a mortgage over goods is involved, the legislature specifically contemplated provisions of the PLA which might have application in the redemption process under the PPSA, but did not preserve the provision for relief under s 171.

[28] I do not accept these submissions. Rather, I agree with the plaintiffs' submission that subpart 6 of Part 3 of the PLA applies a regime when mortgagees are in possession. Part 3 is headed **Mortgages**; subpart 6 relates to mortgagees in possession; ss 141 to 173 in subpart 6 relate to powers and obligations of mortgagees in possession; and within this subpart, s 171 provides for withdrawal by direction of the Court.

[29] Section 97 which is in subpart 4 of Part 3 of the PLA, under the heading **Redemption of mortgages**, provides for an equity of redemption in terms not dissimilar from those in s 132 of the PPSA. However, it does not include an equivalent of the cross-reference to s 114, which is the basis of Mr Forbes' argument that the category of persons entitled to redeem is limited by the provisions of s 114 under the PPSA. Thus, there is nothing to indicate that a mortgagor cannot redeem under s 97 of the PLA.

[30] Section 4 defines **mortgage** as including:

- (a) any charge over property for securing the payment of amounts or the performance of obligations; and
- (b) any registered mortgage; and
- (c) any mortgage arising under a mortgage debenture.

A GSA is therefore clearly a mortgage as defined.

[31] It cannot be correct that the fundamental right of redemption of a mortgagor/debtor is limited under the PPSA by the cross-reference to s 114 in s 132. I agree with the plaintiffs' submission that this is a drafting facility and that the proper interpretation of s 132 requires the cross-reference to s 114 to be read as a reference to the persons in s 114(1) without the limitation that would be imported by s 114(2). Section 114(2) is a convenience provision for security holders seeking to realise their securities. It provides an exception to the normal notice provision (not less than 10 working days before sale) in specified cases, including where the equivalent of a floating charge is the security.⁷

[32] In terms of s 78 PLA, the regimes under the PPSA and PLA are parallel and not inconsistent. The submissions of the plaintiffs on the redemption issue and the inter-relationship of the PPSA and the PLA are logical and persuasive. I do not

⁷ See s 114(2)(f). There is a similar provision in s 135(1)(e) of the PLA which provides a like exception to the notice provision under the PLA where a mortgage over goods arises under a mortgage debenture.

consider s 132 and s 114 of the PPSA can be interpreted in the way Mr Forbes contends.

[33] I conclude, therefore, that s 171 of the PLA is available to the plaintiffs to seek interim relief.

Should relief be granted under s 171?

[34] I must then be satisfied that the circumstances of this case bring it within s 171(1)(a) or (b). It is difficult to reach such a conclusion under (a) because of the factual disputes, particularly in relation to the accounting aspects. But I am satisfied under s 171(1)(b) that the circumstances of this case no longer justify RFD remaining in possession as mortgagee. On RFD's own figures, it has received sufficient to cover repayment of the amounts secured plus interest and costs. The continuation of its regime as mortgagee in possession will see it continuing to benefit to the detriment of Equitable.

[35] On the other hand, Equitable, which is owed a significant sum – \$15.2m plus interest and costs – is denied access to the business profits of LivingSpace; and if it is ultimately proven that RFD has been overcompensated, it is highly unlikely that Equitable will be able to recover. In this respect I note that no offer has been made by RFD to secure future receipts to protect the position of Equitable in the event of the substantive proceedings being resolved in its favour, on either the invalid security or accounting issues.⁸

[36] At this stage, it is difficult to assess the respective strengths of the parties' cases relating to the validity of RFD's security and the amount required to redeem (if the security is held to be valid). This must await evidence and full submissions at trial. But it does not seem to be seriously disputed that the plaintiffs have an arguable case. Counsel have agreed to confer to define the issues for the substantive hearing.

⁸ This contrasts with the provision offered by the plaintiffs to protect RFD's position if its security is held to be valid – see at [6] above.

[37] On the available evidence, the balance of convenience and the overall justice strongly favour the plaintiffs.

[38] Any prejudice for RFD is fairly met by the provisions the plaintiffs are prepared to make by:

- (a) Paying into their solicitors' trust account a sum to cover principal, interest and costs (including future costs) under RFD's securities if found to be valid; and
- (b) Undertaking to retain future profits in a separate account until trial and judgment.

Conclusion

[39] For those reasons I determined that interim relief should be granted to the plaintiffs, subject to terms and conditions being settled. The terms and conditions of the interim orders have subsequently been agreed by the parties and consent orders were made on 2 August 2012.

Costs on interim relief

[40] I have received no submissions as to costs. The plaintiffs have been successful and are entitled to costs. I consider the appropriate category is 2B, and that costs should be allowed for two counsel. Leave is reserved to apply if costs cannot be agreed with the benefit of this indication.

Judith Porter, J.