IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 1184

	BETWEEN	BLUE WATER RESORT LIMITED Plaintiff
	AND	MARAC FINANCE LIMITED Defendant

Hearing: 1 August 2008

Appearances: M Wallace for Plaintiff
TJG Allan for Plaintiff

Judgment: 20 August 2008

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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[1] The plaintiff (Blue Water) applies to set aside the statutory demand issued by the defendant (Marac) dated 13 May 2008 in the amount of $500,000.00.

[2] The amount demanded by Marac is claimed to arise pursuant to an assignment of debt from WMO Limited (In liquidation) and R & B Management (2000) Limited.

[3] Blue Water challenges the legal effect of the assignment pursuant to which Marac claims to be its creditor.

[4] Blue Water alleges that the assignment relied upon by Marac is not an absolute assignment of the debt, but is rather an assignment by way of charge. On that basis, Marac cannot demand payment of the debt; it can only require that it receive any payment by Blue Water to the assignors pursuant to their security.

[5] Marac's position is that this argument on behalf of Blue Water misses the point because its demand is issued by virtue of the rights it has acquired under the Personal Property Securities Act 1999 (PPSA), and not by virtue of rights acquired by a mortgage of property at common law.

[6] The issue in this case devolves to a consideration of Marac's claim that it is protected pursuant to the PPSA, and that protection is not affected by the exclusions contained in s 23 of the Act.

Principles

[7] Blue Water must show there is arguably a genuine and substantial dispute regarding its liability to pay upon Marac's statutory demand. More than a mere assertion of the dispute is required – some material short of proof is needed. This Court's task is limited to determining whether there is a substantial dispute. It does not involve making a decision about whether or not the payment is due.

Background

[8] Blue Water, along with Wilson Holdings Limited, Boys Road Holdings Limited, and others, are known as the Thompson Group. Wilsons Mill Limited and R & B Management (2000) Limited are known as the Brown Group.

[9] The parties' dealings were initiated by agreements for sale and purchase dated 28 April 2005, which to an extent involved an exchange of properties. Then, by a document known as the Initial Agreement dated 24 May 2005, the Thompson Group (including Blue Water) and the Brown Group, agreed to vary the existing agreements for sale and purchase. The variations incorporated an agreement to mortgage certain land. The effect of those variations was to require the payments due by the Thompson Group to be met by specified extended dates.

[10] On 16 November 2006 the initial agreement was varied by a document now commonly referred to as "the settlement agreement". Clause 1 of that agreement provided:

> The Thompson Group agree to pay the sum of $500,000.00 (inclusive of GST) (if any) in full settlement of the monetary consideration required under the further agreement. Such payment is to be made on a date no later than 30 November 2006.

[11] The reference in that clause to "further agreement" is a reference to the initial agreement.

[12] The settlement agreement also provided at clause 3:

> Upon payment of the sum mentioned in clause 1 hereinbefore the security given over the property owned by Boys Road Holdings Limited will be fully discharged. The Brown Group further agrees to provide withdrawals of caveats over three of the sections of the property owned by Boys Road Holdings Limited immediately and without consideration in order that sale contracts can be proceed with.

[13] On 18 March 2007 Wilsons Mill Limited (of the Brown Group) entered into a term loan agreement with Marac. That agreement was guaranteed by Mr Brown (of the Brown Group) and by R & B Management (2000) Limited. The loan agreement contained a provision whereby all monies that were owed by the Thompson Group (including Blue Water) pursuant to clause 1 of the settlement agreement was assigned by way of mortgage to Marac. At about that same time Marac registered its security interest over the debt at the Personal Property Security Register. As part of Marac's settlement requirements it received notices of assignment addressed to each of the Thompson Group.

[14] The Thompson Group did not meet the payment due to the Brown Group by 30 November 2006, nor indeed at all to this time.

[15] In summary, in the dealings between the Thompson Group and the Brown Group the former incurred payment obligations, the performance of which was secured by mortgages and guarantees.

Discussion

[16] The background to the parties' dealings is factually complex. Confusion is added by some of the documentary detail. The loan agreement which Marac relies upon identifies a loan of $375,000.00. It is for a term of six months. The clause requiring monthly payments in excess of $4000.00 has been amended by hand to delete reference to monthly payments and provides for one instalment only of principal and interest of $401,531.16. On the face of that document the amount payable under the loan agreement is the latter mentioned sum only.

[17] The loan agreement also provides at clause 14.10:

> The Brown Group assigns and transfers by way of mortgage all of its interest in the rights and obligations in clause 1 of the Agreement to the Lender. The Brown Group:
>
> (a) acknowledges the Lender has the first registered security interest in the Settlement Agreement; and
>
> (b) acknowledges the Lender is entitled to receive all moneys payable to the Brown Group under clause 1 of the Settlement Agreement; and
>
> (c) shall give notice to the Thompson Group of the assignment of their rights in terms of section 130 Property Law Act 1952; and
>
> (d) acknowledges the Lender may enforce any rights of the Brown Group pursuant to clause 1 of the Settlement Agreement; and
>
> (e) warrants:
>
> (i) not less than $500,000.00 is owing under the Settlement Agreement by the Thompson Group; and
>
> (ii) it will not vary the Settlement Agreement; and
>
> (f) shall not call for a discharge of the security interest granted in respect of the Settlement Agreement until the Loan has been repaid to the Lender; and

(g) acknowledges the Auckland District Law Society memorandum of general terms and conditions (ref 6302) applies to the security interest created by this clause.

[18] The operative clause of that assignment is stated to be particular to the "rights and obligations in clause 1 of the Settlement Agreement". This clause is to be compared with the notice of assignment by which the Brown Group claim that all of their rights under the documents have been assigned and transferred to Marac. The documents defined in that notice include the settlement agreement and also a mortgage. It follows that although the loan agreement purported to enable Marac to enforce any rights of the Brown Group, pursuant to clause 1 of the settlement agreement, it is arguable that in fact the Brown Group had no rights by that clause because the rights, if any, were limited to receipt of any payment made. Also, it is not clear by that clause to whom the payment was to be made. Confusion is added by the fact that by the term loan agreement the Brown Group agreed to assign and transfer by way of mortgage all its interest in the settlement agreement. Arguably, that wording supports the contention that any assignment is being made by way of charge and is, therefore, not an absolute assignment. Of course, if an assignment is not an absolute statutory assignment then it can have effect only as an equitable assignment. In that case, usually all parties must be joined to proceedings enforcing the equitable assignment of the legal chose in action.

[19] In summary, it is arguable that because the assignment is expressed to be by way of mortgage over a payment of $500,000.00, to secure repayment of a loan of $375,000.00 repayable as one sum of $401,531.16, such is more consistent with being a mere charge than an absolute assignment of the full debt of $500,000.00, which is an amount greater than the obligation sought to be secured. So submits Mr Wallace. With respect, I agree.

[20] Regardless, Mr Allan submits Marac's position is saved by registration of its interest pursuant to the PPSA.

[21] Mr Allan refers me to s 108 of the PPSA, which provides:

> **108 Secured party may apply certain collateral in satisfaction of secured obligation**
>
> A secured party with priority over all other secured parties may apply an account receivable, investment security, money, or a negotiable instrument in the form of a debt obligation taken as collateral to the satisfaction of the obligation secured by the security interest if the debtor is in default.

[22] Mr Allan then refers to the provisions of the loan agreement whereby the Brown Group assigned and transferred by way of mortgage all its interests in the rights and obligations in clause 1 of the settlement agreement, to Marac. The same provision of the loan agreement provided an acknowledgement that the Auckland District Law Society memorandum of general terms and conditions applied to the security interest created. Clause 3(a) or Part 2 of those ADLS general terms provided:

> 2(a) ...The party granting the security must;
>
> (i) pay the secured money at the times and in the manner provided by any secured agreement and, to the extent that there is no such agreement, then upon demand.

[23] Marac's position is that a default occurred when Blue Water failed to pay any part of the secured monies in accordance with the ADLS general terms. Any time thereafter the security holder may, in respect of a personal property, call up and collect the collateral, in this case the account receivable of $500,000.00. In this case the account receivable was the settlement agreement by which the Thompson Group (including Blue Water) was to pay $500,000.00 to the Brown Group by 30 November 2006. That account receivable was then charged to Marac. Marac's loan to the Brown Group was repayable on 19 October 2007. Before then the notice of assignment was given to Blue Water by Marac. Later, a notice of default issued and default then having occurred Marac was entitled to exercise its right under the security agreement general terms, to call in the collateral. It did this by issuing a statutory demand. In summary, it is argued for Marac:

(a) The PPSA does away with the need to be concerned in or an inquiry into distinctions between absolute assignments and assignments by way of charge (or a mortgage).

(b) The PPSA was intended to simplify distinctions between legal mortgages, equitable mortgages, equitable charges, floating charges, pledges, liens, hypothecation and reservation of property or title: *Companies & Securities Law in New Zealand* by John Farrah at p 635.

Considerations

[24] The PPSA applies to all security interests except for those excluded by s 23. If a transaction does not create a "security interest", a defined in s 17, the transaction is outside the scope of the Act. The PPSA encompasses two types of transaction within the definition of "security interest": "true" or "in substance" security interests (s 17(1)(a)); and "deemed security interest" (s 17(1)(b)).

[25] Marac argues that it has a deemed security interest within s 17(1)(b) being "...an interest created or provided for by a transfer of an account receivable or chattel paper..". Against this Blue Water argues Marac has a right to payment that has arisen in connection with an interest in land, therefore the Act does not apply pursuant to s 23(e)(ii), which provides:

> This Act does not apply to...an interest created or provided for by…a transfer of a right to payment that arises in connection with an interest in land…unless the right to payment is evidenced by an investment security.

[26] For Blue Water Mr Wallace submits there is no investment security, so the proviso has no application.

[27] The initial agreement shows that the payments to be made by the Thompson Group to the Brown Group are for the sale and purchase of land from the Brown Group, and that the guarantee for payment provided by Boys Road Holdings is secured by a mortgage over land that it owns. The settlement agreement shows (at clause 3) that upon payment of $500,000.00 by the Thompson Group to the Brown Group by 30 November 2006, the mortgage over land owned by Boys Road Holdings Limited would be discharged.

[28] In my assessment the right to payment that the Brown Group had under the settlement agreement arose in connection with an interest in land, and the Brown Group owned the land which it was selling to the Thompson Group. That right to payment that arose in connection with an interest in land was then transferred and assigned to Marac.

[29] Even though the transfer and assignment was not absolute because it was by way of mortgage, by the loan agreement Marac was "entitled to receive all monies payable to the Brown Group under the settlement agreement", and that Marac could "enforce any rights of the Brown Group pursuant to clause 1 of the settlement agreement".

[30] In my assessment these clauses indicate that in substance the right to payment under the settlement agreement has been transferred and assigned to Marac. In that assessment I am guided by the policy of the PPSA, which is to focus on the substance of agreements rather than on the form.

[31] In my view, it is reasonably arguable that Marac has had transferred to it a right to payment that has arisen in connection with an interest in land, thereby preventing the PPSA from applying. It follows then that Blue Water has a reasonably arguable case for a defence to Marac's claim under the PPSA for the money owed.

[32] However, if I am wrong in my view that s 23(e)(ii) arguably prevents enforcement by Marac under the PPSA, and if Marac does indeed have a "deemed" security interest under s 17(1)(b) as it claims, it is still arguable whether it can enforce its security interest under the PPSA. Part 9 of the Act (ss 104 – 134) deals with the rights and obligations of a secured party when enforcing a security interest. It creates rights for both the secured party and the debtor, and imposes obligations on the secured party.

[33] Section 105(b)(i) provides that Part 9 does not apply to a security interest created, or provided, by a transfer of an account receivable or chattel paper. Prima facie, Marac cannot enforce its security interest.

[34] The term "transfer" is not defined in the PPSA. At page 385 of Gedye Cumming & Wood *Personal Property Securities in New Zealand***,** the authors assert that the term "transfer" should be limited to absolute transfers of accounts receivable and chattel paper; that there is no reason to exclude from Part 9 agreements documented as a "transfer by way of mortgage"; and s 105(b)(i) cannot be meant to cover non-absolute transfers.

[35] If the authors are correct, then Marac could enforce its security interest, notwithstanding s 105(b)(i) because the transfer/assignment to Marac of the accounts receivable and chattel paper was only a non-absolute assignment/transfer because it was by way of mortgage.

[36] But the position is unclear and, as the authors concede, such an interpretation that excludes from Part 9 in substance security interests in the form of absolute transfers of accounts receivable and chattel paper, but does not exclude in substance security interests in the form of non-absolute transfers, may be contrary to the Act's policy of regulating according to the substance rather than the form of the transaction.

[37] At best, it can be conceded Marac may have the right to enforce its security interest under Part 9 of the PPSA by virtue of the application of s 105(b)(i). However, it is still reasonably arguable that they might not be able to enforce that security interest and, therefore, that Blue Water has an arguable case for a defence to Marac's claim under the PPSA for the money owed.

[38] Matters of form and substance are important in this dispute. A proper assessment of those factors is not possible upon the papers filed upon Blue Water's application to set aside the statutory demand.

Judgment

[39] The application to set aside the statutory demand is granted. I am inclined to the view that costs should not be fixed until the Court has had a better opportunity to deal with the merits of Marac's claim of payment due.

Solicitors
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Grove Darlow & Partners, Auckland for Defendant