IN THE SUPREME COURT OF NEW ZEALAND

SC 130/2015
[2016] NZSC 12

BETWEEN	THOMAS FREDERICK MAZLIN KING AND JUDITH RUTH KING Applicants
AND	PFL FINANCE LIMITED First Respondent
	CRAIG BEECROFT Second Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	D G Chesterman for Applicants K M Quinn and S M Thompson for Respondents
Judgment:	17 February 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B If the applicants are not legally aided, costs of $2,500 are payable to the respondents.

C If the applicants are legally aided, we make an order under s 45(5) of the Legal Services Act 2011 that, had the applicants not been legally aided, they would have been liable for costs of $2,500.

REASONS

Introduction

[1] PFL Finance Ltd lent $3.385 million (secured by mortgage) to Havelock Farms Ltd. Havelock's land was used for a dairying operation run by a partnership (Mr and Mrs King). Mr and Mrs King guaranteed repayment of the loan. Following

Havelock's default, notice (under s 119 of the Property Law Act 2007) was served on Havelock. The default was not remedied within the time specified in the notice.

[2] PFL appointed Mr Beecroft as receiver. He immediately ended the farming operation and relocated all livestock, plant and equipment (most of which was owned by Mr and Mrs King but which was also part of the security for the loan).

[3] Mr and Mrs King's challenge to the actions of the receiver and PFL was dismissed in the High Court.[1] Their appeal against that judgment was dismissed by the Court of Appeal.[2]

Application for leave

[4] Mr and Mrs King seek leave to appeal to this Court on the grounds that the courts below erred in holding:

(a) that the receiver's decision to cease farming did not breach s 18(3) of the Receivership Act 1993;

(b) that the failure to serve Mr and Mrs King with the Property Law Act notice did not cause them loss;

(c) that documents from their solicitor, Mr Ellis, were admissible under s 18 of the Evidence Act 2006 as evidence that Mr and Mrs King knew about the Property Law Act notice; and

(d) that PFL's enforcement of its loan agreement was not oppressive in terms of the Credit Contract and Consumer Finance Act 2003.

First ground

[5] As to the first ground, it was held by the High Court that Mr Beecroft, in making the decision to cease trading, took into account the advice of an expert on

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1 *King v PFL Finance Ltd* [2014] NZHC 250 (Peters J) [*King v PFL Finance Ltd* (HC)].

2 *King v PFL Finance Ltd* [2015] NZCA 517 (Harrison, Wild and Kós JJ) [*King v PFL Finance Ltd* (CA)].

dairy farming, Mr Carr. The Judge accepted that the farm and the livestock were in a poor state[3] and that the farming operation was not trading profitably and unlikely to improve.[4] Peters J also accepted that there were risks in continuing to trade, aside from issues arising from the farm's financial performance. These included matters going to the security of assets, animal welfare and breaches of resource management legislation.[5]

[6] The Judge did not consider that the price achieved on a sale would have been affected by the cessation of farm operations.[6] She accepted that the decision to cease trading may have removed any prospect of Mr and Mrs King refinancing the debt. However, their interests were secondary to those of PFL and, in any event, there was no realistic prospect of refinancing.[7]

[7] The Court of Appeal upheld the finding as to refinancing.[8] It was also unpersuaded that there was any breach of duty proved for essentially the same reasons as the High Court.[9]

The submissions

[8] Mr and Mrs King in their submissions submit that the courts below failed to take into account a number of matters, including the lack of experience of the receiver, an alleged conflict of interest,[10] that there had been no independent checks of the soil or grass quality or of the animals and what are alleged to be significant errors made by the receiver on the feed situation and milk production. Mr and Mrs King argue that these errors and omissions show an approach to s 18(3) that does not properly protect people in their positions.

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3 *King v PFL Finance Ltd* (HC), above n 1, at [170]–[176].
4 At [164]–[169].
5 At [157]. The environmental concerns included stock movement through the Kaituna River: see at [174].
6 At [179]. In any event no issue as to the sale price had been raised in the High Court.
7 At [180].
8 *King v PFL Finance Ltd* (CA), above n 2, at [85]–[89].
9 At [90].
10 Neither the lack of experience nor alleged conflict of interest feature in the judgements of the lower courts. Peters J did dismiss an allegation that PFL appointed Mr Beecroft for improper purposes: see *King v PFL Finance Ltd* (HC), above n 1, at [140]–[141].

Our assessment

[9] Although there has been an attempt to assert an error of principle, effectively Mr and Mrs King are seeking to impugn the concurrent factual findings of the courts below. There is thus no issue of general public or commercial significance. Nor does anything raised by Mr and Mrs King suggest a risk of a miscarriage of justice.[11]

The second ground

[10] The High Court held that Mr and Mrs King knew that PFL had served notice under the Property Law Act and that they also knew that PFL was entitled to appoint a receiver if the default was not remedied.[12] The Judge also held (as noted above) that the prospect of refinancing was remote.[13]

[11] The Court of Appeal said that, even if there was uncertainty whether Mr and Mrs King knew about the service of the notice,[14] there is no doubt that they knew Havelock was in default of its obligations. In addition, even after Mr and Mrs King accepted that they knew about the notice, a payment of just $10,000 was made towards a shortfall then exceeding $70,000 plus penalty interest. The only rational inference is that there was no ability to remedy the default.[15] The recent credit history (including Havelock defaulting on the first interest payment to PFL) and the unprofitability of their farming operations meant that "no prudent lender would have entertained an application to refinance their distressed loan".[16] No concrete proposal to refinance was ever presented by Mr and Mrs King.[17]

The submissions

[12] Mr and Mrs King argue that service of the notice is essential and that the courts below were wrong to rely on Mr and Mrs King's knowledge of the notice

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11 As to the interpretation of "miscarriage of justice" in s 13(2)(b) of the Supreme Court Act 2003 in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liquidation)* [2006] NZSC 60; (2006) 18 PRNZ 369.

12 *King v PFL Finance Ltd* (HC), above n 1, at [119] and [121]–[139].

13 At [180].

14 *King v PFL Finance Ltd* (CA), above n 2. The Court said that, while the issue of knowledge was not decisive (because there was no ability to refinance), Peters J's findings on knowledge were unassailable: at [68]–[70].

15 At [59]–[63].

16 At [88].

17 At [86].

gained otherwise than through service. As this is the case, there is no basis for the inference that Mr and Mrs King had no ability to pay.

Our assessment

[13] We do not accept this submission. The issue is whether the failure to serve the notice caused loss. There are concurrent findings in the courts below that there was no ability to remedy the default or to refinance. Nothing put forward impugns those factual conclusions.

[14] There is no risk of a miscarriage of justice. Nor is there a matter of general public or commercial importance. The issues relate to the particular factual circumstances of the case.

The third ground

[15] The respondents accept that the admissibility of Mr Ellis' file notes may raise questions of general importance but submit that, in the circumstances, the issue is of no moment given the findings of the courts below that there was no prospect of refinancing and therefore no loss. We accept that submission.

The fourth ground

[16] This ground relies essentially on the same matters as the first two grounds. It is rejected for the same reasons.

Result

[17] The application for leave to appeal is dismissed.

[18] If the applicants are not legally aided, costs of $2,500 are payable to the respondents.

[19] If the applicants are legally aided, we make an order under s 45(5) of the Legal Services Act 2011 that, had the applicants not been legally aided, they would have been liable for costs of $2,500.

Solicitors:
Holland Beckett, Tauranga for the Applicants
Heimsath Alexander, Auckland for the Respondents