

IN THE SUPREME COURT OF NEW ZEALAND

**SC 35/2013
[2013] NZSC 44**

BETWEEN

BARRY JOHN HART
Applicant

AND

ANZ BANK NEW ZEALAND LTD
Respondent

Counsel: J N Bioletti for Applicant
L A O’Gorman and A L Williams for Respondent
G S Caro for Official Assignee

Judgment: 1 May 2013

JUDGMENT OF WILLIAM YOUNG J

REASONS

A The application for a stay and consequential orders is dismissed.

B Costs are reserved.

REASONS

Background

[1] ANZ Bank New Zealand Ltd, the respondent, lent Barry Hart, the applicant, and a company associated with him, Malory Corporation Ltd, a large sum of money. Mr Hart and two other companies associated with him, Woodhill Stud Ltd and Woodhill Holdings Ltd, guaranteed Malory’s loan. The loans fell into arrears. The bank took steps to realise its securities over eight properties but it became clear quite quickly there was going to be a shortfall.

[2] There has been much legal skirmishing between Mr Hart and the three associated companies¹ and the bank. In the course of that litigation, Mr Hart gave an undertaking that he would not pursue further injunctive relief against the bank to prevent the bank's mortgagee sales.

The High Court proceedings

[3] The only proceeding currently relevant is CIV-2012-404-2583, a High Court proceeding in which Mr Hart and the companies brought a claim against the bank and the bank counterclaimed against them. Mr Hart's claim was effectively a pre-emptive strike, intended to set up a defence to the bank's claim for the debt he owed. The bank sued Mr Hart and the companies for over \$20 million. Mr Hart by his claim defended that by seeking damages for two wrongs said to have been committed by the bank:

- (a) it had breached its statutory duty of care in relation to the mortgagee sale process resulting in the sale prices achieved by the bank's tender process falling substantially short of the current market value of the properties; and
- (b) it had breached another statutory duty by failing to allow Mr Hart to redeem the mortgage over the Home Block.²

[4] The bank also sued Mr Hart for an order that he vacate the Home Block. The bank, exercising its powers as mortgagee, had put that property up for sale and invited tenders. It wished to be in a position to accept a tender and settle with vacant possession, and in fact, had received offers conditional on obtaining vacant possession. Mr Hart opposed the order to vacate on the basis the bank had stipulated it was not prepared to accept tenders expressed as an amount exceeding any other tender and was thus not prepared to accept an offer from him to pay \$25,000 more than the highest tenderer.

¹ We refer to the three associated companies as "the companies".

² This is what Mr Hart calls the property on which he lives.

[5] The bank applied for summary judgment on its claim and, as a defendant, for summary judgment on Mr Hart's claim. Associate Judge Abbott delivered his judgment on 29 October last year.³ The bank succeeded on both of its applications for summary judgment. The Judge held that Mr Hart and the companies had not demonstrated an arguable case with respect to either head of claim put forward by way of set-off. In particular, the steps taken by ANZ to obtain the best prices were sufficient to meet its statutory duty of reasonable care. In respect of the second claim, Mr Hart was entitled to redeem only by paying the full amount owing. The Judge held the bank was not obliged to accept Mr Hart's "tender", whether construed as attempted (part) redemption or as a tender in the mortgagee sale process. The Judge also ordered Mr Hart to vacate the Home Block.

The appeal to the Court of Appeal

[6] Mr Hart and the companies appealed. On 17 December, Mr Hart was adjudicated bankrupt.⁴ All three associated companies were placed in liquidation on 11 March this year, with the Official Assignee appointing himself liquidator of the three companies. The Official Assignee abandoned the appeal by Mr Hart and the companies. His asserted power derives from s 101 of the Insolvency Act 2006 (in so far as Mr Hart is concerned) and s 248 of the Companies Act 1993 (in so far as the companies are concerned).

[7] The appeal came on for hearing on 20 March this year. Mr Bioletti, purporting to act for all the appellants, sought an adjournment. He submitted that Mr Hart disputed the Official Assignee's right to abandon the appeal. The basis of the challenge in relation to Mr Hart's involvement in the appeal was a claim that Mr Hart had been litigating as a trustee of a trust and not in his personal capacity. Broadly similar issues arose in relation to ownership of the shares in the companies and thus the right of the Official Assignee to treat them as passing on adjudication. In his dealings with the Official Assignee, Mr Hart had not supplied documentary or other evidence to support his contentions as to trust involvement and there was nothing in the material before Associate Judge Abbott to suggest that Mr Hart was

³ *Hart v ANZ National Bank Ltd* [2012] NZHC 2839.

⁴ *ANZ Bank of New Zealand Ltd v Hart* [2012] NZHC 3464.

suing as a trustee. Even in the Court of Appeal, when Mr Hart was challenging the entitlement of the Official Assignee to abandon the appeal, no evidence was adduced to substantiate the trust argument. Mr Hart had, however, appealed to the High Court against the Official Assignee's decision to abandon the appeal.

[8] The Court of Appeal, while perhaps sceptical of the trust claims, did not seek to resolve them one way or the other. It noted that the trust issues would be determined in the High Court appeal and held that, since the Official Assignee had abandoned the appeal, the appeal had to be treated as terminated. Accordingly, the application to adjourn the hearing of the appeal was dismissed. The Court made consequential orders,⁵ which included confirmation that the bank was released from an undertaking it had given not to take any further steps to exercise its power of sale over the home block.

The application for leave to appeal to this Court

[9] Mr Hart and the companies have sought leave to appeal from the Court of Appeal's decision and for a stay of the Court of Appeal judgment. For the purposes of the stay application, which is all I am deciding, I need discuss in any detail only the position in relation to Mr Hart. I will, however, come back to the position of the companies later.

[10] The Official Assignee advised that he has not authorised Mr Hart to apply for leave to appeal or for a stay. He does not support either application and submits Mr Hart has no standing to make them.

[11] The dispute between Mr Hart and the Official Assignee placed the Court of Appeal in a difficult position. It was dealing with an appeal involving Mr Hart and the ANZ Bank. It was not well-placed to resolve a dispute between Mr Hart and the Official Assignee. It seems to have proceeded on the basis that as Mr Hart's affairs and the companies' affairs were under the control of the Official Assignee, his abandonment represented the status quo which should prevail pending the result of Mr Hart's appeal against his decision in the High Court and accordingly warranted

⁵ *Hart v ANZ Bank New Zealand Ltd* [2013] NZCA 94.

the conclusion that the abandonments were effective. I am prepared to accept that it is open to question whether the Court of Appeal was right to take that approach.

[12] Mr Hart has now filed an affidavit in which he has provided some details of the trust arrangements he relies on, including and in particular, his contention that the Home Block is an asset of the Watkinson Family Trust. He has produced a copy of the trust deed (under which he is one of a number of trustees) and has asserted that he holds the Home Block as trustee for that trust. No details of this latter assertion are provided.

[13] Whether the abandonment of Mr Hart's appeal was effective, depends (at least as I understand) on whether, in appealing to the Court of Appeal, Mr Hart was seeking to assert personal claims or trust claims. His challenges to the money judgment against him might be thought to be personal. On the other hand, if the Home Block was an asset of the Watkinson Family Trust, his attempt to resist the bank's claim for possession of the Home Block was presumably in his role as trustee and if so, it is presumably also the case that the Official Assignee was not entitled to abandon his appeal.

[14] I suppose that it would be open to this Court hear evidence as to whether the Home Block was an asset of the Watkinson Family Trust and on this basis decide whether the abandonment was effective. But determining, de novo, such a factual issue lies well outside the normal way in which this Court operates. In those circumstances, I am inclined to think that the decision whether to grant leave to appeal should be deferred pending the determination by the High Court of Mr Hart's appeal against the Official Assignee's decision.

[15] Any party seeking an earlier determination of the leave application should file a request accordingly along with submissions in support.

[16] I should note that even if it should transpire that the Official Assignee was not entitled to abandon Mr Hart's appeal (whether in whole or in part) it will not necessarily follow that leave to appeal to this Court would be granted. It may be that Mr Hart's problem could be resolved differently, either by the Court of Appeal

recalling its decision or by allowing him leave to appeal out of time. As well, this Court might well wish to be satisfied that there is something substantial in his substantive appeal grounds before granting leave to appeal.

The application for a stay

[17] If Mr Hart is entitled to pursue his appeal against the judgment of Associate Judge Abbott, it seems that there is only one argument which he proposes to advance.⁶ It is encapsulated in the proposition: “the ANZ ‘all obligations’ mortgage secures nothing”. In his submissions in support of the application for leave Mr Bioletti develops that argument and concludes:

...[B]ecause the ANZ mortgage secures nothing, the applicant had a statutory right to redeem the Home Block by paying a nominal sum (one peppercorn), which it sought to do, and an injustice occurred when the Court of Appeal omitted to uphold that right.

[18] This proposition was not pleaded or argued in the High Court. It is not an answer to the bank’s claim in debt. It does not provide support for Mr Hart’s claim for damages advanced as a set-off. In so far as it is now being used as some sort of defence to the bank’s claim for possession of the Home Block, it finds no support in this Court’s decision in *Westpac New Zealand Ltd v Clark*⁷ on which Mr Bioletti seeks to rely.

[19] One solution to the present imbroglio would be for the Court to determine that the proposed substantive ground of appeal is so hopeless as to warrant dismissal of the application for leave to appeal despite it being arguable that the Official Assignee was not entitled to abandon the appeal to the Court of Appeal. As will now be apparent, however, I would prefer a more orderly resolution of the litigation. But I recognise that such orderly resolution will take time and that this carries the risk of prejudice to the bank, as explained in the submissions filed on its behalf.

[20] I can see no substance in the substantive appeal ground which is developed in the submissions. There is also not much apparent merit in any of the other

⁶ See [41] of the Court of Appeal judgment but also see n 8 below.

⁷ *Westpac New Zealand Ltd v Clark* [2009] NZSC 73, [2010] 1 NZLR 82.

arguments advanced on behalf of Mr Hart and rejected in the High Court.⁸ On my appreciation – admittedly on the limited material Mr Hart has placed before the Court – it is far from clear that he will be able to establish that he held the Home Block as trustee for the Watkinson Family Trust. So his prospects of ultimate success against the bank are slim, to say the least. As well, I am left with the view that his attempt to prevent the sale of the Home Block is in breach of at least the spirit, if not the letter, of the undertaking to which I have referred.⁹

[21] For those reasons, I refuse a stay.

The companies

[22] Initially the companies also purported to be applicants for leave to appeal. There was nothing to indicate that the liquidator of those companies, the Official Assignee, had approved the application for leave including them as applicants. Chambers J in a Minute of 11 April 2013 pointed out that any application for leave by those companies had to be signed by the companies' liquidator or someone authorised by him or her.¹⁰ Subsequently the Official Assignee made clear he did not consent to the companies seeking leave to appeal. Mr Bioletti initially seemed to drop them as applicants but subsequently filed submissions on their behalf.

[23] Mr Hart claims that the shares in the companies which he held were in fact held on behalf of trusts. He challenges the entitlement of the Official Assignee to place the companies in liquidation¹¹ and to appoint himself liquidator. This challenge is to be determined in the High Court and for reasons similar to those earlier expressed in relation to Mr Hart and the home block,¹² I am of the view that a decision by this Court as to the status of these companies as applicants is best deferred pending resolution of the High Court proceedings.

⁸ Although Mr Bioletti was recorded by the Court of Appeal as saying that the only substantive appeal which would be run if the appeal proceeded is the 'no security' argument (see n 6 above), I am not completely certain that this is the case. For this reason I have gone back to the High Court judgment.

⁹ At [2]: A stay preventing a sale is functionally very similar to an injunction preventing sale.

¹⁰ Companies Act, s 248(1)(c).

¹¹ Which is what I assume happened.

¹² See [14] above.

Costs

[24] I reserve costs.

Solicitors:

Jeremy Bioletti, Auckland, for Applicant

Buddle Findlay, Auckland, for Respondent

Guy Caro, Office Solicitor, Ministry of Business, Innovation and Employment for Official Assignee