

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

**CIV-2015-404-001747
[2015] NZHC 2828**

BETWEEN NEW ZEALAND MINT LIMITED
 Plaintiff

AND GREYS AVENUE INVESTMENT
 LIMITED
 Defendant

Hearing: 21 October 2015

Counsel: A R B Barker for the Plaintiff
 S O McAnally for the Defendant

Judgment: 13 November 2015

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 13 November 2015 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: A R B Barker, Auckland

Solicitors: Schnauer and Co, Auckland
 Keegan Alexander, Auckland

Introduction

[1] The plaintiff (NZ Mint) and defendant (Greys Ave) are parties to a lease as tenant and landlord respectively of a number of floors in a building in Auckland Central.

[2] NZ Mint sues Greys Ave for breach of a clause in the lease prohibiting a transfer of shares in Greys Ave without NZ Mint's consent. The clause states that its intent is that the effective ownership and/or control of the landlord company is not to be varied while the tenant has the rights of first refusal in relation to the building as set out in the lease.

[3] Greys Ave applies to strike out the claim against it on the grounds that there is no reasonably arguable cause of action, the remedies sought are untenable, and that NZ Mint has acted frivolously in commencing the proceeding. Indemnity costs are sought on the application.

Background

[4] NZ Mint operates a bullion exchange, mint, and storage facility from premises in a building owned by Greys Ave.

[5] NZ Mint purchased the business in 2012 from companies associated with Mr Gary McNabb. The shares in the vendor companies were all owned by the McNabb Investment Trust. Mr McNabb, his wife, and a solicitor are trustees of the McNabb Investment Trust. The trustees provided guarantees and indemnities in relation to the sale of the business.

[6] Following settlement of the sale, there was a dispute between NZ Mint and the vendor companies, and the trustees of the McNabb Investment Trust, about the terms of sale. This dispute resulted in an arbitral award issued in April 2014 in favour of NZ Mint against the trustees of the McNabb Investment Trust amongst others. Enforcement of that award forms part of the backdrop to the current proceeding.

[7] As part of the sale and purchase of the business, NZ Mint and Greys Ave entered into a lease. Greys Ave was, at that time, wholly owned by MFT Treasury Ltd, which was in turn wholly owned by the McNabb Investment Trust. Mr McNabb was a director of Greys Ave and the sole director of MFT Treasury.

[8] The lease is for three floors of the building. Mr Harding has sworn an affidavit on behalf of NZ Mint in opposition to the strike-out application. He deposes that the premises have particular value for NZ Mint because of the nature of the fit-out on these floors, including highly secure vault and associated rooms, which are necessary to run the bullion and secure storage business.

[9] Clause 51 of the lease sets out terms relating to a right of first refusal for the landlord's interest in the building. Clause 51.1 provides:

If at any time before the expiry of the initial term of the Lease or any renewed term the Landlord receives a bona fide offer to purchase the Landlord's interest in the building and such offer is or has become unconditional in all respects except being conditional upon the within Right of First Refusal and the Landlord wishes to accept that offer; then the Landlord must immediately give notice ("Landlord's Notice") to the Tenant providing a copy of any such offer. If requested by an offeror of any such offer ("the Offeror") then the name/identity of such Offeror may be deleted from the copy of the offer.

[10] Clauses 51.2 through to 51.6 set out relatively standard terms about how that right of first refusal is to be exercised.

[11] Clause 51.7 of the lease provides as follows:

No shares in the Landlord company i.e. Greys Avenue Investments Limited nor in its holding company MFT Treasury Limited may be transferred to any other person/entity without the consent of the Tenant and to the intent that the effective ownership and/or control of the Landlord company is not to be varied while the Tenant has the rights of first refusal set out in this clause 51.

[12] On 7 August 2014, the shares in Greys Ave were transferred by MFT Treasury Ltd to a company called QED Holdings Ltd (QED sale). QED Holdings Ltd is another company associated with Mr McNabb. Details about this sale have yet to be discovered.

[13] On 15 May 2015, QED Holdings Ltd then transferred its shares in Greys Ave to Mr Aaron Coupe, who was by then, the sole remaining director of Greys Ave (Coupe sale). It would appear that the consideration for this sale was \$65,000 plus forgiveness of various debts.

[14] NZ Mint's consent to the transfer of shares pursuant to the QED sale and the Coupe sale was not sought.

Pleadings

[15] The statement of claim was filed on 11 August 2015. It contains a single cause of action alleging breach of cl 51.7 of the lease.

[16] Greys Ave takes particular issue with the pleading at paragraphs 16 and 17 of the statement of claim. Those paragraphs and the prayer for relief are as follows:

16. The purpose and effect of both the QED Transfer and the Coupe Transfer was to defeat the right of first refusal in clause 51.7 of the deed of Lease.
17. NZ Mint has suffered loss as a result of the breach of clause 51.7, in that:
 - a. both the QED Transfer and the Coupe Transfer had the effect of a sale of the Property without reference to the right of first refusal set out in clause 51 (**the value of the lost right of first refusal**);
 - b. NZ Mint had the right to withhold consent to any transfer (**the value of the lost right to consent**);
 - c. Quantification of the value of the lost right of first refusal and the lost right to consent will be quantified after discovery, and in particular, after full details of the value provided in the QED Transfer and the Coupe Transfer are provided.

Accordingly, NZ Mint seeks the following relief:

- a. An inquiry into the value attributed to and paid for the Property as part of the QED Transfer and the Coupe Transfer;
- b. An order that Greys Ave offer the Property to NZ Mint at the value of the QED Transfer or the Coupe Transfer (which

ever is lower) and otherwise in accordance with the right of first refusal set out in clause 51;

- c. Damages reflecting the value of the lost right of first refusal;
- d. Damages reflecting the value of the lost right to consent;
- e. Interest;
- f. Costs.

[17] Greys Ave's statement of defence was filed on 20 August 2015. It admits the QED sale and Coupe sale took place. It pleads that it has no knowledge of whether or not the consent of NZ Mint was sought or acquired in relation to either sale and it denies paragraph 16 of the statement of claim.

[18] As to relief, Greys Ave pleads that the right to withhold consent to a transfer of shares held in the defendant has no value independent of the right of first refusal in respect of the sale of the building.

Strike-out principles

[19] Rule 15.1 provides that a court may strike out a pleading if it discloses no reasonably arguable cause of action.

[20] The jurisdiction to strike out a claim is to be "sparingly employed". The Supreme Court has stressed that it will be inappropriate to strike out a claim unless the court is certain that a claim cannot succeed.¹

Analysis

[21] For the purposes of this strike out application, there is no dispute that cl 51.7 has been breached. The real area of contest is the consequences which flow from that breach.

[22] Mr Barker, on behalf of NZ Mint, submits that breach of cl 51.7 gives rise to three possible remedial responses:

¹ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

- a. The transfer of shares in the shareholding companies triggered the right of refusal under clause 51.1. Accordingly, Greys is required to offer the Building for sale to NZ Mint, on terms that match the sale that has already taken place.
- b. If a breach of clause 51.7 does not directly trigger the right of first refusal, then damages should be awarded on a similar basis. The measure of damages should be based on an assessment of the difference between the value of the Building as reflected in the QED or Coupe sales, and the value of the Building to NZ Mint at that time.
- c. Alternatively, damages can be assessed on the basis of the value of the right of consent held by NZ Mint (i.e. what Greys would have paid to obtain that consent).

[23] Mr Barker submits that NZ Mint is not required to elect its remedy at this early stage when discovery has yet to be completed and NZ Mint does not have all the necessary details of the QED and Coupe Sales.

[24] Mr McAnally, on behalf of Greys Ave, says the issue is not whether NZ Mint is required to elect its remedy but whether it has pleaded a cause of action that has sufficient allegations to support an available remedy. He submits that none of the three alternatives are tenable. He says the only remedy available for breach of cl 51.7 is nominal damages, but that has not been pleaded by NZ Mint and accordingly the claim as presently pleaded cannot succeed.

[25] The parties' respective contentions are canvassed in respect of these three alternatives in more detail below.

Trigger of right of first refusal or damages assessed on the same basis

[26] Mr McAnally submits that the first two alternatives posed by Mr Barker are untenable because there has not been any loss of the right of first refusal in cl 51.1. He accepts that the purpose of cl 51.7 is to protect the right of first refusal and that breach could give rise to a caveatable interest and decree of specific performance.² However, he submits that those rights would only arise if the transfer of shares amounted to a repudiation, or an arguable repudiation, of the right of first refusal. In

² Relying on *Botany Land Development Ltd v Auckland Council* [2014] NZCA 61, (2014) 14 NZCPR 813.

this case, he says there has been no repudiation of the right of first refusal as it remains enforceable both in contract and in equity.

[27] Mr McAnally further submits that the claim for relief is based upon a false premise. He submits that the claim confuses a transfer of shares with a transfer of property, namely the building in respect of which NZ Mint enjoys a right of first refusal. He says a share transfer cannot trigger a right of first refusal in respect of the building and that there is no right of first refusal in respect of the shares.³

[28] As part of this submission Mr McAnally says that NZ Mint is attempting to obtain the building at a price substantially less than the value of the building. He submits that there is a difference between the value of the shares and the value of the building and that if the sale of the shares was treated as triggering the right of first refusal at the price that the shares were sold for then NZ Mint may obtain a windfall benefit. He submits that NZ Mint's motives in this respect are disingenuous.

[29] I accept Mr McAnally's submission that NZ Mint will need to prove loss as part of its cause of action to succeed at trial. The fact that the right of first refusal remains available and enforceable presents a hurdle which NZ Mint will need to overcome if it is to prove its claim. But that hurdle is not insurmountable. I do not consider that the loss has to amount to a complete loss of the right of first refusal as Mr McAnally appears to suggest. Something less than that may suffice. The fact that the right of first refusal remains enforceable does not render NZ Mint's claim so clearly untenable that it should be struck out.

[30] Whether the share sales triggered the rights in cl 51.1 or gave rise to a damages claim to be assessed on the same basis involves first determining what the parties intended when they agreed to cl 51.7. It will be for the trial judge to conclusively determine the meaning of cl 51.7 in light of the relevant factual matrix. For the purposes of this strike-out application, I consider it reasonably arguable that the object of cl 51.7 was to prevent the right of first refusal in cl 51.1 from being

³ Mr McAnally relies on *Swift New Zealand Co Ltd v Owen* (1981) 1 NZCPR 308 (HC) in making this submission. The Court held in that case that there had not been a breach of covenant in a lease because an alteration in the ownership of the plaintiff did not amount to a parting with possession of the land.

circumvented by way of a share sale. The clause itself expressly states its intent as being that the “effective ownership and/or control of the Landlord company is not to be varied while the Tenant has the rights of first refusal set out in this clause 51”. In light of that stated purpose it is reasonably arguable that breach of cl 51.7 either triggered the right in cl 51.1 or gave rise to damages to be measured on that basis.

[31] I do not consider NZ Mint’s claim confuses a share transfer with an asset transfer. Clause 51.7 arguably provides a link between these two otherwise conceptually different transactions. The nature and scope of that link is to be determined at trial. It cannot, in my view, be conclusively determined by the application of general propositions of law at this early stage in the proceeding.

[32] It follows that I do not consider the claim improperly equates the value of shares with the value of the building. It is possible that the value of shares held by a company can be determined by the value of the property owned by that company. Whether there is such a correlation in this case is yet to be seen. In the absence of any evidence regarding the terms of the share sales and their relationship to the value of the building, it is premature to conclude that NZ Mint is seeking to compel a sale of the building at an undervalue or acting disingenuously.

[33] Ultimately, whether breach of cl 51.7 gives rise to the remedies sought by NZ Mint are issues to be determined on the evidence adduced at trial. As Mr Barker submits, whether the sales were bona fide sales, whether they would have proceeded had NZ Mint refused its consent, and why NZ Mint’s consent was not sought prior to the share sales, are all factual issues which will bear upon the question of loss and the appropriate remedial response for breach of cl 51.7. The fact that these issues cannot be determined at this early stage in the proceeding does not render the claim hopeless or untenable.

Damages for failure to obtain consent

[34] The third alternative remedial response is damages based on the value of the right of consent under cl 51.7. Mr Barker submits that this is to be determined on the

basis of what Greys Ave would have paid to obtain NZ Mint's consent to the share transfer.

[35] Mr McAnally submits that this alternative is also untenable because the value of the lost right of consent is zero because NZ Mint has no ability to control what Greys Ave shareholders do with their shares and no interest in restraining them from selling their shares.

[36] I consider it premature to conclude at this stage in the proceeding that the value of the consent to a share transfer under cl 51.7 is zero. It is reasonably arguable that the consent holds some value given the underlying purpose of the clause appears to be the protection of the right of first refusal. The value, if any, is a matter to be determined at trial. Issues of quantum are not generally capable of resolution using the strike-out procedure, unless the party seeking to strike out can establish that there was no loss suffered.⁴ For the reasons set out above, I am not satisfied that no loss has been suffered as a result of breach of cl 51.7 and I decline to strike out NZ Mint's claim on this basis.

Summary

[37] Overall, I find that NZ Mint's claim for relief for breach of cl 51.7 is reasonably arguable and is not so untenable that it should be struck out at this stage of the proceeding.

Costs

[38] Greys Ave seeks an award of indemnity costs. Mr McAnally submits that the claim is so clearly bad that NZ Mint's motives in bringing it must be questioned. He submits the case is a "try on" and accordingly indemnity costs should be awarded.

[39] It follows from my conclusions above that Greys Ave's claim for indemnity costs cannot succeed. I do not regard the claim as either frivolous or vexatious or

⁴ *Sealey v Craig* [2014] NZHC 520 at [12].

having been brought with ulterior motives. The claim is far from being hopeless and, as I have found, is reasonably arguable.

[40] In accordance with the principle that costs follow the event, NZ Mint is entitled to an award of costs in its favour.

Result

[41] The application is dismissed.

[42] If there are matters affecting costs of which I am unaware, then counsel are invited to file memoranda as to those matters within 10 working days of the delivery of this judgment. In the absence of such memoranda, NZ Mint will be awarded costs on a schedule 2B basis.

Edwards J