IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002968
[2017] NZHC 265

UNDER	the Credit Contracts and Consumer Finance Act 2003
AND	
UNDER	Part 18 of the High Court Rules
BETWEEN	DUNCAN JOHN NAPIER and SARA ANN NAPIER First Plaintiffs
	DUNCAN JOHN NAPIER, SARA ANN NAPIER and CHRISTOPHER JOHN DAVIS as Trustees of the Napier Family Trust Second Plaintiffs
AND	WAIMANA INVESTMENTS LIMITED Defendant

Hearing: 9 February 2017

Counsel: S O McAnally for the Plaintiffs
G P Blanchard and J W H Little for the Defendant

Judgment: 24 February 2017

JUDGMENT OF EDWARDS J

This judgment was delivered by Justice Edwards
on 24 February 2017 at 4.15 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: G P Blanchard, Auckland
J W H Little, Auckland

Solicitors: Keegan Alexander, Auckland

Introduction

[1] The defendant (Waimana) and another creditor (Torbay) entered into an arrangement in relation to their respective interests in a property owned by the first plaintiffs (Napiers). Waimana agreed with Torbay that it would release its mortgage over the property, so as to leave it subject to Torbay's charging order (and subsequent sale order).

[2] On the sale of their property, the Napiers requested that the proceeds be applied to discharge both their loan agreements with Waimana, and those of the second plaintiffs, the trustees of the Napier family trust (Trustees). If that had occurred, it would have resulted in a discharge of the mortgage over the Trustees' property which secured the Waimana loans. But the proceeds of sale were not paid to Waimana. Instead, they were applied in reduction of the Napiers' judgment debt to Torbay.

[3] Waimana now seeks to enforce its loan agreements against the Napiers and the Trustees, and to exercise its power of sale in relation to the Trustees' property. The plaintiffs seek an interim injunction restraining them from doing so on the basis that Waimana has acted oppressively within the meaning of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).

Facts

[4] The Napiers ran a rest home business owned by Torbay.[1] The Napiers are trustees of the Napier family trust. The third trustee, Mr Christopher Davis, is a professional trustee, whose liability is limited to the assets of the Trust.

[5] By judgment dated 9 October 2015, Woolford J found that the Napiers had misappropriated substantial sums from Torbay.[2] Judgment in favour of Torbay was entered against the Napiers and the Trustees for a total sum of approximately $2.2m,

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1 Torbay Holdings Ltd and Torbay Rest Home Ltd.
2 *Torbay Holdings Ltd v Napier* [2015] NZHC 2477.

of which the net recoverable by Torbay was approximately $1.4m. That judgment was upheld on appeal.[3]

[6] On 19 February 2016, Torbay registered charging orders in respect of its judgment debts against properties owned by the Napiers (the Whangaripo property), and the Trustees (the Glenfield property). Orders for sale for both properties were subsequently obtained in late April 2016.[4]

[7] At the time the charging orders were registered, the Whangaripo property was subject to a mortgage in favour of ASB Bank Ltd (ASB). The Trustees are guarantors of that debt. The Glenfield property was also mortgaged to ASB, and secured a debt owed by the Trustees. The Napiers guaranteed that debt also.

[8] On 10 May 2016, ASB assigned its rights and obligations under the loan agreements and mortgages to Waimana. Waimana has the same directors as Torbay.

[9] At about this time, Torbay was starting to take steps to force the sale of the Whangaripo property pursuant to its sale orders. In an affidavit sworn in support of the application for an interim injunction, Mr Napier says that whilst the Napiers did not agree with the High Court judgment, they nevertheless accepted that "something had to be done about the judgment debt". His view was that sale on a "voluntary" basis would "enhance the prospects of getting the best price possible which we considered to be in the best interest of everyone". Accordingly, with the consent of both Waimana and Torbay, the Napiers agreed to sell the property. On 27 July 2016, they entered into an agreement for the sale of the Whangaripo property for $1.325m.

[10] By letters dated 8 and 16 November 2016, Waimana and Torbay reached an agreement in relation to their respective interests in the Whangaripo property. Waimana agreed not to require any repayment from the plaintiffs on the sale of that property, and to release its mortgage security without consideration. Torbay agreed to indemnify Waimana if it was unable to recover repayment of all the loans owing

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3 *Napier v Torbay Holdings Ltd* [2016] NZCA 608.

4 Torbay also lodged a caveat over the Whangaripo property in respect of the constructive trust imposed by Woolford J in its favour in the sum of $233,066.68.

by the plaintiffs. The intention of the agreement was to give Torbay priority in relation to the sale proceeds.

[11] The sale of the Whangaripo property settled on 25 November 2016. Waimana's mortgage over the Whangaripo property was released on settlement in accordance with its agreement with Torbay.

[12] The Napiers paid the deposit, and subsequently the balance of proceeds of sale, to the solicitors for Waimana, who also acted for Torbay. They specifically requested that these sums be applied to their debt, and the Trustees' debt to Waimana, and not Torbay. The proceeds of sale of the Whangaripo property were sufficient to clear the debts owed by the Napiers personally and by the Trustees to Waimana, and therefore would have resulted in a release of the mortgage over the Glenfield property.

[13] However, the proceeds of sale were not applied to the Waimana debt. They were instead applied in partial reduction of Torbay's judgment debt against the Napiers. As a result, the debt owing to Waimana remains undischarged, and the mortgage against the Glenfield property remains in place. The judgment debt owed by the Napiers personally to Torbay has been reduced, but there remains an outstanding balance.[5] Charging and sale orders in respect of the Glenfield property in favour of Torbay remain extant.

[14] In October 2016, Torbay served bankruptcy notices on the Napiers in reliance on the judgment of Woolford J. Those notices have expired, and have not been remedied. That in turn triggered the "adverse credit event" provisions of the Waimana loan agreements. On 3 November 2016, Waimana served the plaintiffs with notices pursuant to ss 119, 120, and 122 of the Property Law Act 2007. Those notices required the act of bankruptcy to be remedied by 2 December 2016, failing which the total outstanding sum of $1,005,937.08 would become due and payable (the accelerated debt), and the defendant would exercise its rights under the

[5] The parties disagree on the exact sum which is outstanding. The difference between them appears to relate to the calculation of interest on the principal sum.

Glenfield mortgage to force the sale of the Glenfield property. Those notices have expired and the act of bankruptcy has not been remedied.

[15] The Napiers and the Trustees seek an injunction to restrain Waimana from demanding the accelerated debt or "otherwise relying upon acts of bankruptcy arising from bankruptcy notices served on the first plaintiffs in October 2016 as an act of default …".

[16] The plaintiffs say that Waimana's conduct in refusing to accept payment in discharge of the Waimana loans and the mortgages was oppressive conduct within the meaning of the CCCFA.

Legal framework

[17] The plaintiffs apply for an injunction pursuant to ss 96 and 98 of the CCCFA. Section 98 governs applications for interim injunctions. Subsection (2) provides:

> **98 Interim injunction**
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> …
>
> (2) The Court may grant an interim injunction if the Court is satisfied that it is desirable to do so,—
>
> (a) whether or not the person has previously engaged in conduct of that kind; and
>
> (b) whether or not there is an imminent danger of substantial damage to any person if that person engages in conduct of that kind.
>
> …

[18] Mr McAnally, on behalf of the plaintiffs, submits that the Court is not constrained by the ordinary law of injunctions when an application is made under ss 96 and 98 of the CCCFA. Mr McAnally referred to *JJ International Ltd v Streetsmart Ltd* in support of that proposition.[6] That case concerned an application for an interim injunction under s 164 of the Companies Act 1993. Keane J found that the jurisdiction under s 164 was independent of the equitable jurisdiction to

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6 *JJ International Ltd v Streetsmart Ltd* HC Auckland CIV-2005-404-857, 11 March 2005.

grant an injunction, and the power was to be exercised for the purposes of the Companies Act 1993. However, His Honour found that the equitable principles (as set out in *American Cynamid* and *Klissers Bakehouse*[7]) provided useful guidance on whether an injunction under s 164 should issue.

[19] I respectfully follow that approach in this case. In deciding whether to issue an injunction under s 98, I have borne in mind the purpose of the CCCFA as set out in s 3, and in particular the primary purpose which is "to protect the interests of consumers in connection with credit contracts ...".[8]

[20] Whether an injunction is "desirable" in light of that purpose is to be determined by considering whether there is a serious question to be tried; and where the balance of convenience and overall justice of the case lies.

Serious question to be tried

[21] The first issue is whether there is a serious question to be tried.

[22] The plaintiffs claim that Waimana has acted oppressively within the meaning of the CCCFA by:[9]

(a) denying them the right to redeem both mortgages from the net proceeds of sale from the Whangaripo property; and

(b) by failing to act in accordance with reasonable standards of commercial practice "by increasing the Trustees' burden under the Glenfield mortgage by obstructing the ability of the plaintiffs to repay their indebtedness from the sale of the Whangaripo Property in order to advance the interests of a subordinate creditor in the form of Torbay".

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7 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); *Klissers Farmhouse Bakeries Ltd* [1985] 2 NZLR 129 (CA).

8 Credit Contracts and Consumer Finance Act 2003, s 3(1).

9 "Oppression" is defined in s 118 to mean "oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice".

[23] The first plank of the plaintiffs' case concerns the plaintiffs' equity of redemption.[10] It is difficult to see how Waimana's conduct prevented the Napiers from redeeming the Whangaripo mortgage. That mortgage was released without the Napiers having to repay their loan. That is ostensibly to the Napiers' benefit, not detriment. The Waimana/Torbay arrangement simply altered the direction of the flow of funds from Waimana to Torbay. That change in direction did not, in my view, prevent the Napiers from exercising their equity of redemption over the Whangaripo property.

[24] The position in relation to the Glenfield mortgage is slightly different. Because the Waimana loans were not discharged, the Glenfield mortgage remains in place. But it does not necessarily follow that the Trustees were prevented from exercising their equity of redemption. The Trustees were free (and remain free) to redeem that mortgage. Put at its highest, the Trustees' argument is that they have been prevented from using their preferred source of funds (the proceeds of sale from the Whangaripo property) to redeem the Glenfield mortgage. But that preferred source of funds was already subject to the claims of two creditors. It is far from clear that the impact of the Waimana/Torbay arrangement on the Trustees' equity of redemption was oppressive or unduly harsh in those circumstances.

[25] The second plank of the plaintiffs' argument is that Waimana's conduct is a departure from reasonable standards of commercial practice. The plaintiffs have filed an affidavit by Ms Walsh setting out her expert opinion on this question. Ms Walsh has over 20 years experience in the New Zealand finance and banking sectors. In her opinion:

> … in the absence of the First Plaintiff's express consent, it is outrageous that Waimana has, and may continue to, unilaterally manipulate the situation to extend the benefit of this mortgage security to an unsecured third party, which was not the intention of the original parties to that mortgage security and which is to the material detriment of the First and Second Plaintiffs.

[26] Ms Pidgeon has provided an affidavit on behalf of the defendant. Ms Pidgeon is a lawyer with over 22 years experience in property, banking, finance

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[10] Section 97(1) of the Property Law Act 2007 provides that "the current mortgagor or any other person entitled to redeem mortgaged property may redeem it in accordance with this subpart at any time before it has been sold under a power of sale by the mortgagee or a receiver".

and commercial law. In her opinion, Waimana's conduct is consistent with the principle of marshalling. Ms Pidgeon opines that agreements such as the one between Waimana and Torbay are not uncommon, and are in accordance with reasonable standards of commercial practice.

[27] The concept of marshalling was explained by Elias J (as she then was) in *National Bank of New Zealand Ltd v Caldesia Promotions Ltd* as follows:[11]

> Where a creditor is secured in respect of a single debt by the same debtor over two securities, he is free to chose the order in which he realises the securities. There is no legal or equitable principle which restricts that choice but the consequences as between junior creditors are balanced and adjusted through the equitable mechanism of marshalling. It operates by a type of subrogation to place the junior creditor in the place of the senior creditor with recourse to the two securities. The effect of marshalling is to prevent the arbitrary choice of a secured creditor from determining whether another creditor is paid or not.

[28] The parties are at odds about whether the marshalling principle is engaged in this case. The plaintiffs dispute Torbay's status as a secured creditor, and contend that the principle only applies where there are two funds at issue which are owned by the same debtor. Waimana says that a charging order gives a sufficient interest in property for the doctrine to apply, and the cross-guarantees of each of the debts are sufficient to establish commonality in the identity of the debtor.

[29] In my view, whether or not the marshalling doctrine formally applies is somewhat of a side issue. Even if the arrangement *is* in the nature of a marshalling agreement, the key question at trial is whether arrangements of that nature which impact on the rights of debtors (assuming such an impact is established as a matter of fact), are a departure from reasonable standards of commercial practice.

[30] The experts disagree on that question. That is not a dispute I can resolve in the context of an interim injunction application. The very existence of such a dispute suggests that the question of whether Waimana's conduct is a departure from general standards of commercial practice is a serious one to be tried.

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[11] *National Bank of New Zealand Ltd v Caldesia Promotions Ltd* [1996] 3 NZLR 467 (HC) at 474.

[31] For the purposes of the interim injunction application therefore, I accept that there is a serious question to be tried.

Balance of convenience

[32] The second issue concerns the balance of convenience.

[33] The prejudice to the plaintiffs if the interim injunction is not granted is that there will be nothing to prevent Waimana from enforcing its loan, and exercising its mortgagee rights of sale in relation to the Glenfield Property.

[34] There is no evidence from the plaintiffs that the sale of the property will cause them any special harm or loss which could not be met with an award of damages. It appears from the certificate of title for the property that it has been in the Napier family for some time. However, Mr Napier does not depose to there being any sentimental or private value attaching to the property. The Napiers do not appear to reside in the property. The Whangaripo property appears to have been the family home.[12] Mr Napier estimates that the total value of the Glenfield property is $900,000.

[35] Although I accept that damages may not adequately compensate for the special or unique qualities of land, in the absence of evidence about those qualities in this case, I consider an award of damages to be an adequate remedy should the plaintiffs be successful at trial.

[36] Further, Mr Single, on behalf of Waimana has given an undertaking that Waimana will not exercise its power of sale if the plaintiffs agree to sell their property voluntarily. The plaintiffs therefore have an opportunity to take steps to reduce any loss in value that may arise from a "forced sale". Discussions about the prospect of a voluntary sale have not yet occurred.

[37] Finally, there is related litigation before the Court in which the Trustees are seeking to prevent Torbay from enforcing their judgment debt. The resolution of that

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[12] *Torbay Holdings Ltd v Napier* [2016] NZHC 536 at [4].

litigation will have a bearing on what is to happen with the Glenfield property. If the Trustees' application is not granted, then Torbay may force the sale of the property pursuant to its sale order. In those circumstances, any injunction which effectively prohibits Waimana from exercising its rights of sale would be futile.

[38] I consider the adequacy of damages as a remedy tips the balance of convenience against the grant of an injunction. However, the Trustees should be afforded time to consider whether or not they are prepared to sell the property voluntarily, and accordingly reduce the prospect of any loss being suffered as a result of a forced sale.

Overall justice

[39] Finally, I consider the overall justice of the case.

[40] Considering these factors in their totality, I am not satisfied that it is "desirable" (within the meaning of s 98 of the CCCFA) to grant an interim injunction in this case. The consumer protection purpose of the CCCFA is met by an award of damages if the plaintiffs are successful at trial. The enforcement process should be allowed to run its course.

[41] However, for the reasons stated above, I consider the overall justice of the case favours the grant of an interim injunction for a short period of time (six weeks) to allow the Trustees to consider whether to agree to a voluntary sale of the Glenfield property. That will not cause the defendant undue prejudice, as the plaintiffs are continuing to make payments under the Waimana loan agreement. Leave will be reserved to either party to bring the matter back to Court should there be a change of circumstances.

Result

[42] I make the following orders:

(a) As set out in paragraph 1(a) of the interlocutory application for an interim injunction dated 18 November 2016;

(b) The order in (a) above shall endure until **5.00 pm Friday 7 April 2017**, or further order of the Court.

(c) Leave is reserved to either party to bring the matter back to Court on the filing of a memorandum of counsel.

[43] The defendant is entitled to an order of costs as it has been substantially successful in defending the application. If costs cannot be agreed then the defendant shall file and serve a memorandum of counsel in support of costs within 10 working days, with any memorandum in reply to be filed five working days thereafter. Costs will be determined on the papers.

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Edwards J