IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-000899
[2013] NZHC 2324

BETWEEN	ROSEBUD CORPORATE TRUSTEE LIMITED Plaintiff
AND	PAUL NEVILLE BUBLITZ First Defendant
	CHRISTOPHER GIL COOK Second Defendant
	HUNTER GILLS ROAD LIMITED Third Defendant

Hearing:	2 September 2013
Appearances:	A M Swan for the Plaintiff/Respondent P Dalkie and J Foley for the First and Second Defendants/Applicants D Hoskin for the Third Defendant
Judgment:	6 September 2013

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
06.09.13 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

[1] This judgment deals with the defendants' summary judgment claim.

[2] The issues concern two written agreements. The first of those is dated 18 October 2010, the second is dated 10 May 2012.

[3] By the 18 October agreement, Mr Nielsen, Mr Bublitz, Mr Cook and another acknowledged they proposed to undertake business ventures. The parties agreed that ownership of the business and all entities established for the purpose of conducting and carrying on the business was to be held by the parties in equal shares and likewise any shareholdings in any companies or other entities established for the purpose of carrying on the business was to reflect the agreed position of equal ownership.

[4] Four days later Mr Nielsen assigned his interests in that agreement to the plaintiff (Rosebud). Mr Nielsen has provided a copy of the deed of assignment. Whilst Mr Nielsen was a bankrupt when he signed the 18 October agreement his evidence is that he did so as a trustee for Rosebud. Mr Nielsen provides evidence that he told Mr Bublitz prior to signing the agreement that he would be signing as trustee for Rosebud. The evidence is clear that the 18 October agreement made provision for the assignment of interests to a trust or trusts.

[5] Mr Bublitz disputes evidence of having been told that Mr Nielsen was signing in his capacity as a trustee.

[6] The 18 October agreement does provide for ownership of shares in the joint venture business to be held by a trust or trusts established for or on behalf of each party.

[7] Evidence indicates that all parties to the 18 October agreement assigned all their interests to their various trusts and immediately any income received through that agreement was accounted for through those trusts.

[8] The 10 May agreement was completed by Rosebud, Mr Bublitz and Mr Cook, and their respective companies Hunter Gills Road Limited (Hunter), and Albany Heights Villas Limited (Albany).

[9] The background to that agreement notes:

> (a) [Messrs Bublitz, Cook and Nielsen] and/or entitles associated with or controlled by them are parties to an agreement dated 18 October 2010... which records the terms of joint venture business...
>
> (b) Rosebud has agreed to sell and [Mr Bublitz] has agreed to purchase Rosebud's interest in the [18 October agreement] and the business including all intellectual property rights that Rosebud has to the FRR development funding model in New Zealand... the agreement records that Rosebud agreed to sell and Mr Bublitz agreed to purchase all of Rosebud's right, title and interest in the 18 October agreement and the business and other entities created to carry out the business for:
>
> (i) $270,000 in cash.
>
> (ii) Deferred payments payable out of the sale of lots in the development.
>
> (iii) A further payment of $3,000 from each of the FRR payments.
>
> (iv) A further payment of $3,000 from sales effected within five years.

[10] The agreement also noted that as part of the total consideration that Mr Bublitz, Mr Cook, Hunter and Albany would:

> (a) Transfer a completed three bedroom house on Lot 53 in stage one to Rosebud or to its nominee Mr Alistair Brown, or alternatively at Mr Bublitz's option he was to make a cash payment of [$400,000].
>
> (b) Pay to Rosebud or its nominee a completed three bedroom house in stage two of the development or at Mr Bublitz's option he was to make a cash payment to Rosebud [of $450,000].

[11] The value of all payments due amounted to $3.224M.

[12] By their agreement no houses or lots in the development were to be transferred to any other party than a cash buyer paying full consideration.

[13] It appears by these terms that Rosebud was providing additional consideration for the sale of its interests because of the FRR program that it agreed to transfer. Also and clearly the 10 May agreement was entered into on the basis that the parties acknowledged that Rosebud acquired an interest in the 18 October agreement.

[14] In this background of matters the Court accepts there may be a strong argument that the inclusion of Rosebud as a party in the 10 May agreement, coupled with the recitals referred to, provides recognition that Rosebud acquired an interest in the 18 October agreement through Mr Nielsen and that the defendants may be estopped from denying that occurred.

[15] The Court accepts Mr Swan's submission that the parties to the 10 May agreement have entered into it upon the basis that it was enforceable, that it affected their legal relationship and that each intended to act in reliance upon the assumption that the agreement be regarded as binding. In these circumstances it is arguable that it would be unconscionable to allow any party to resile or depart from that assumption.

[16] Mr Swan submits that Rosebud relied on the shared assumption to its detriment in that it provided everything it was supposed to do, that is its interests and/or rights to the development and its interest in the FRR program, without having been paid for. Furthermore that it would be unconscionable to allow the defendants to resile or depart from that assumption because they have had the benefit of all the property handed over and indeed sold it to third parties without having to pay for it.

[17] It is the defendants' position regarding any obligation to transfer Lot 53 in stage one to Rosebud or its nominee that such obligation was subject to a requirement allowing plans to be varied or altered to increase or decrease the number of the units in the development.

[18] The defendants' claim that due to the 10 May agreement Lot 53 no longer existed as it had to be removed and converted to common property.

[19] Whether or not that occurred is a matter for enquiry in due course. It would indeed be strange if the defendants agreed to the transfer of a lot which it appears they now claim they knew did not exist. The evidence suggests indeed Lot 53 did exist when the 10 May agreement was signed. It appears to be the defendants' position that because the original Lot 53 was deleted for planning consent reasons, that therefore there was no obligation to make any transfer at all of a property.

[20] The defendants also claim that the 10 May agreement proceeded on the basis that Albany had an agreement to purchase the stage two land. However when it came to settlement of the purchase of the stage two land on 29 June 2012 Albany nominated a related entity of the defendants as purchaser and that entity took title to the property. The defendants claim that this in effect removed the obligations that Albany had in respect of the 10 May agreement.

[21] Mr Swan submits and the Court accepts that it is arguable that the defendants having received the benefit of being given Rosebud's interest and rights in stage two and by having a related entity purchase the property the defendants have attempted to avoid their obligations under the 10 May agreement.

Discussion

[22] The defendants challenge Rosebud's status to bring this proceeding because they say that whatever property or interest Rosebud received under the 18 October agreement had been transferred to it by Mr Nielsen who was at the time a bankrupt; that because Mr Nielsen was bankrupt any right or interest in the 18 October agreement had already vested in the Official Assignee and was never Mr Nielsen's to assign.

[23] The defendants say there is no legitimate claim to Lot 53 as that Lot does not exist. Likewise the defendants submit that claims in relation to stage two ought to be struck out because stage two was never purchased or owned by the defendants.

[24] In brief, it is the defendants' position that none of Rosebuds' claims against them can succeed.

[25] A defendant summary judgment application is more akin to an application to strikeout. The Court should be prepared to strikeout only if it is clear that the defendant has an answer to the plaintiff's claim which cannot be contradicted.

[26] Of course in these cases the Court will refrain from attempting to resolve genuine conflicts of evidence or to assess the credibility of the parties' statements in their affidavits.

[27] The Court has already expressed concerns regarding the nature of the defendants position in respect of its claims that Lot 53 cannot be transferred because it no longer exists, or that Mr Cook or Albany retain no obligations in respect of the stage two payments because it was not Albany that purchased the stage two property, but that instead a related entity did complete that purchase.

[28] The real focus of this case is upon the fact that Mr Nielsen was bankrupt at the time the 18 October agreement was entered into.

[29] It is the defendant's position that the claims of Rosebud are nullified because of ss 101 and 102 of the Insolvency Act 2006. Accordingly they say that when Mr Nielsen became bankrupt all his property vested in the assignee and any property that Mr Nielsen acquired or that which passed to him also vested in the assignee as did any power that Mr Nielsen could have exercised in or over or in respect of that property. However those sections are subject to s 104 which provides that property held by a bankrupt in trust for another does not vest in the assignee. Clearly s 104 applies to property owned by the bankrupt at adjudication and acquired during bankruptcy.

[30] Property is defined in s 3 as:

> Means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal and includes rights, interests and claims of every kind in relation to property however they arise.

[31] Mr Swan submits and the Court accepts it is arguable that Mr Nielsen did not acquire any property whatsoever under the 18 October agreement. That agreement referred to a proposal to undertake business and business was defined in the agreement as including "all business and activities to be undertaken". Indeed it is arguable the 18 October agreement merely provided rules and guidelines by which the parties would operate their future business. Therefore it is arguable that no property was acquired in terms of s 102 of the Act as defined by section 3.

[32] It is the Assignee's obligation to realise a bankrupt's assets for the benefit of creditors. The assignee may disclaim as onerous property that which is unsalable or not readily saleable. [s 117 of the Act]. In this case if Mr Nielsen personally acquired property by the two agreements or if he transferred property of his to Rosebud or the Trust then that is a matter for the Assignee to address.

[33] The defendants submit Mr Nielsen acquired contractual rights by the 18 October agreement. It is arguable this is not so because there is nothing in those which has a tangible monetary value. As Mr Swan submits the 18 September agreement had no bank accounts, no money, and no assets, was not contracted to buy any assets, did not have any paid up shares and accordingly had no value. Furthermore it did not contain any contractual rights to property. To all intents and purposes the agreement in question could be considered worthless.

[34] Regardless, and as noted earlier in this judgment, whilst Mr Nielsen signed the 18 October agreement in his name, it is arguable that he did so as trustee for a company which existed and which it was always intended would assume any obligations and acquire any rights in the parties' development activities.

[35] On 22 October 2010 Mr Nielsen signed a deed of assignment by which he formally assigned to Rosebud all of his rights title and interest in the 18 October agreement. The deed of assignment recites that because the 18 October agreement was signed in the United States (by Mr Nielsen) and because Rosebud was based in New Zealand Mr Nielsen entered into the agreement as a trustee for Rosebud in his capacity as a trustee of the Rosebud. Submissions on behalf of the defendants attempted to discredit this explanation. They say it was an afterthought to explain

why the 18 October agreement did not specifically refer to Mr Nielsen signing in his capacity as the trustee.

[36] Like many of the submissions on behalf of the defendants which have has sought to discredit Mr Nielsen they are properly the subject of trial enquiry. Until then they can only be matters for speculation.

[37] In the course of my discussions with Mr Dalkie I asked what evidence there was that the FRR program belonged to Mr Nielsen. The response was that they must have been because Rosebud and its associated Trust were in Mr Nielsen's control notwithstanding that directorships may have been held in the names of professional advisors at relevant times.

[38] The evidence strongly suggests that Rosebud and its Trust were indeed entities Mr Nielsen had management and practical control of. However, evidence that those entities and through them Mr Nielsen owned the property of the FRR program is also based on speculation. The fact is the Court has little evidence about that. Notwithstanding Mr Dalkie's submissions that these entities are sham trusts the Court does not have sufficient information to draw such conclusions, much less that the FRR program was property which because of Mr Nielsen's bankruptcy became vested in the assignee.

[39] In an affidavit Mr Nielsen deposed that Mr Cook had visited him at his home in Las Vega in 2008. Thereafter he said Mr Cook lived with him and his family for about 19 months. He deposed:

> In any event during the time that Chris lived with me I outlined to him a business model created for my UK property business, World Capital Partners UK Limited. This involved a raising of funds from investors via an option to buy agreement ("the business model"). I set up the UK business in 2005 and had offices in New Zealand, US and London. I was very successful in the raising of investor funds via this method.

[40] In other paragraphs of his affidavit Mr Nielsen said:

(a) That the business model was used by his various Nevada based "entities" who allowed the business model to be used under the 18

October agreement following the assignment of 18 October agreement to Rosebud (para 15).

(b) The parties to the 18 October agreement used the business model to raise funds from South East Asia but the model was changed to the FRR program to comply with security laws in South East Asia (paras 14 – 18).

(c) That the FRR program was also used in New Zealand by Mr Bublitz, Hunter, and another to raise $18M to settle the purchase of the stage one property (para 15).

[41] In my discussions with Mr Dalkie I intimated there was not sufficient evidence that the FRR program was the property of Mr Nielsen, or indeed of Rosebud or the Trust. Indeed there is no suggestion or evidence that the business model was ever owned by anyone and/or any entity. It was simply a method used to raise funds elsewhere and which was introduced to the 18 October agreement partnership by Rosebud. Clearly it was part of the consideration for which Rosebud sold its interests pursuant to the 10 May agreement. By then it had been successfully used by Mr Bublitz and Hunter to raise funds. The recitals to the 10 May agreement confirm the parties' assumption that Rosebud had an interest in the FRR development funding model in New Zealand.

[42] It was on that basis that at the conclusion of submissions and whilst reserving my judgment that I may have indicated there appeared to be insufficient evidence to draw any assumptions of ownership.

[43] The day following the hearing the Court received a letter and memorandum from Mr Dalkie. He said that in the course of enquiries undertaken after the hearing he has learned that there is no company in the UK by the name of World Capital Partners UK Limited. He says there is a company called World Capital Partners Limited with the letters UK not appearing in the name.

[44] Mr Dalkie had sought the assistance of London solicitors overnight. Their report indicated that World Capital Partners Limited was incorporated on June 6 2005 and was placed into liquidation on February 11, 2009 or about 10 months before Rosebud was incorporated on 17 December 2009. At the time of the liquidation Mr Nielsen was the only director.

[45] Mr Dalkie has requested copies of the liquidator's reports but these are not readily available. He believes that if the FRR item is recorded as an asset then it would have to have been sold by the liquidators to Mr Nielsen in which case it would have been the sole property of Mr Nielsen and not the property of any other.

[46] Mr Dalkie requests the Court to defer issuing its decision until the Court has had an opportunity to consider the liquidator's reports.

[47] The Court is not prepared to do this. The hearing has finished and all available evidence has been addressed. Furthermore it is not at all clear that the information Mr Dalkie seeks will necessarily provide proof of the ownership of FRR when its use was provided through Rosebud.

[48] The defendants have had plenty of time to prepare their case for the hearing before me. The Court will not permit any further delay and the potential for prejudice that may be caused.

[49] It is quite clear to the Court that the resolution of the issues of Mr Nielsen, Mr Cook and Mr Bublitz will only be resolved once the Court has had an appropriate opportunity to hear the evidence of all three persons.

The third defendant

[50] These proceedings were filed in the outcome of Rosebud's application filed on 17 September 2012 to sustain its caveat against the stage one land then owned by Hunter.

[51] I heard that application on 17 December 2012 and on that date recorded that by about 3:00pm Rosebud and Hunter had reached an agreement on terms to resolve

caveat issues. I recorded that by the parties' agreement Hunter was to pay into Court on or before 21 December 2012 the sum of $400,000 and in consideration of which Rosebud would provide a withdrawal of caveat. The $400,000 was to be held by the Court on interest bearing account on the condition that Rosebud would promptly file and serve its claim for payment due pursuant to the 10 May agreement.

[52] Hunter paid the sum of $400,000 into Court as required. The evidence discloses that more or less immediately Hunter then transferred its interests in the stage one property to a related entity of the defendants. Further, on 27 March 2013 Hunter was placed into voluntary liquidation. It is reasonable to assume that by then Hunter retained no assets. The position of Hunter as explained by Mr Hoskin is that Rosebud does not presently have the leave of the Court to continue its proceedings against it. Moreover the liquidators of Hunter now request the payment into Court of $400,000 to be paid out to the liquidators for the benefit of creditors.

[53] The Court is not prepared to order the payment of $400,000 to the liquidators at this time. The fact that Rosebud has not yet sought the leave of the Court to continue its proceeding against Hunter can be explained by the fact that the events have been somewhat overtaken by the defendants' summary judgment application.

[54] It is readily apparent from the brief description of Hunter's affairs between December 2012 and March 2013 that there is also further cause for enquiry of the persons who have been in control of those entities at the relevant time.

[55] The Court is not prepared to authorise the release of the funds the Court was to hold pending resolution of the parties' proceedings. That purpose should not be undermined by the liquidation of the company in circumstances from which it could be inferred there was an intention to undermine the purpose for which the $400,000 was paid.

Conclusion

[56] There is no king hit available to the defendants upon their summary judgment applications. For the most part the defendants' summary judgment claims assume

Mr Nielsen owned the property which was sold to the defendants. In fact evidence of ownership is far from clear and cannot be assumed because Mr Nielsen may have been in control of Rosebud. Nor is it appropriate to receive as evidence after the case is closed that which may have been overlooked before then.

[57] This is an appropriate case for costs to be fixed.

Judgment

[58] The applications for summary judgment are dismissed.

[59] The defendants' jointly and severally shall be liable to pay the plaintiff's costs on a 2B basis together with disbursements as are approved.

Associate Judge Christiansen