IN THE COURT OF APPEAL OF NEW ZEALAND

CA243/2014
[2015] NZCA 380

BETWEEN	SOS INVESTMENTS LIMITED Appellant
AND	FM CUSTODIANS LIMITED Respondent

Hearing: 29 July 2015

Court: Miller, Heath and Collins JJ

Counsel: R J Katz QC for Appellant
R B Stewart QC and N L Penman-Chambers for Respondent

Judgment: 18 August 2015 at 2.00 pm

JUDGMENT OF THE COURT

A. Relief from the "unless" order made on 8 July 2015 is granted.

B. The appeal is dismissed.

C. No order as to costs.

REASONS OF THE COURT

(Given by Heath J)

[1] FM Custodians Ltd (F M Custodians)[1] sought summary judgment against SOS Investments Ltd (SOS) on a debt arising out of a series of advances made to

[1] FM Custodians Ltd is the trustee of the Auckland Mortgage Trust. On occasion, documents refer to Auckland Mortgage Trust. All references to FM Custodians and Auckland Mortgage Trust are interchangeable.

SOS from 30 September 2005. The advances are secured over a property situated at Te Awa Road, RD 3, Hamilton.

[2] In a judgment delivered in the High Court at Hamilton on 17 April 2014 Associate Judge Doogue entered judgment in favour of FM Custodians in the sum of $3,131,255.51. The Associate Judge also made an order for possession of the Te Awa Road property in favour of FM Custodians.[2]

[3] SOS appeals against both the entry of summary judgment and the possession order. It does so on the ground that the Associate Judge wrongly applied principles applicable to the consideration of summary judgment applications. In particular, it is contended that the Associate Judge wrongly found that the evidence of a representative of SOS, Mr Cribb, did not provide a sufficient evidential foundation for an arguable defence.

Preliminary issues

[4] The appeal first came before this Court on 8 July 2015. For reasons given in a judgment given on that day, the appeal was adjourned for hearing on 29 July 2015. Strict terms were imposed on the adjournment, in the form of an "unless order".[3] SOS complied with two of the three conditions ordered.

[5] The condition with which SOS failed to comply was a requirement that it protect new counsel, Mr Katz QC, for his fee on the hearing of the appeal. Although not paid, nor otherwise protected for his fee, Mr Katz appeared on the appeal and sought relief against the "unless order" sanction on behalf of SOS. Relief was required because of the self-executing nature of such an order.[4]

[6] FM Custodians did not oppose that application. For that reason, we made an order granting relief against the sanction, so as to enable the present appeal to be

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2 *FM Custodians Ltd v SOS Investments Ltd* [2014] NZHC 817 at [58] and [59].

3 *SOS Investments Ltd v FM Custodians Ltd* [2015] NZCA 296 at [5].

4 See generally *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 (CA), *LFDB v SM* [2014] NZSC 131 (leave to appeal granted) and *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262 (revocation of leave to appeal).

pursued. Having done so, we thank Mr Katz for the diligent way in which the appeal has been prepared and for undertaking the appeal without protection for his fee.

Background facts

[7] On 3 November 2005, FM Custodians advanced $1,750,000 to SOS. That was secured by the mortgage over the Te Awa Road property. The mortgage was registered on 11 November 2005. It is in a standard form customarily used by the mortgagee. A further advance was made by FM Custodians to SOS on 22 November 2006, in the sum of $450,000. That too was secured by the mortgage.

[8] Under its loan agreement, SOS promised to repay the principal sum, together with all other moneys secured (including interest), on expiry of the loan period on 10 May 2007, or on earlier demand by FM Custodians. The contractual arrangements required FM Custodians' legal costs were payable on a solicitor/client basis. On default, FM Custodians was entitled to call up the moneys outstanding and to exercise powers under its mortgage; including the rights to take possession of and to sell the Te Awa Road property.

[9] Repayment of the principal sum was not effected by the due date. On 8 October 2007, FM Custodians issued a notice under the Property Law Act 1952. The notice demanded the sum of $2,274,462.07. On 20 May 2008, FM Custodians agreed to extend the term of the loan until 23 August 2008. It made an additional advance of $300,000 on 9 June 2008, also secured under the mortgage. For a second time, repayment of the amount outstanding was not made on the due date. A notice under s 92 of the Property Law Act 2007 was issued on 23 November 2010, claiming a sum of $3,646,234.67. Subsequently, for reasons into which we need not go, FM Custodians agreed to accept $3,022,012.90 in satisfaction of its debt.

[10] All shares in SOS are owned by Mr Cribb, in his capacity as trustee of the Cribb Family Trust (the Trust). He was involved in all dealings with FM Custodians concerning the advances, though it is unclear from the evidence whether he was a director of SOS at all material times. On 6 March 2012, Mr Cribb was adjudged

bankrupt.[5] From that time, he was disqualified from being a director of the company, or otherwise involved directly or indirectly in the management of its business.[6] The evidence is vague about who actually made important decisions on behalf of SOS in the period after Mr Cribb's bankruptcy.

[11] After Mr Cribb was adjudged bankrupt, negotiations continued to enable F M Custodians to recover the debt owed by SOS. In order to understand the basis on which SOS resisted summary judgment, it is necessary to begin by referring to separate proceedings brought by the Trust in the High Court.

[12] On 21 February 2013, Mr Cribb, as trustee, obtained summary judgment against Zender Minol d.o.o. (Zender), a Croatian company, Frucom Engineering GmbH (Frucom), an Austrian company, and a Ms Margaret Laughrin. The amount ordered was $33,200,000, plus costs. That judgment was subsequently registered, on 10 April 2013, in the Queen's Bench Division of the High Court of Justice of England and Wales. Upon registration, it became potentially enforceable throughout the European Union. Nothing was put before the High Court to explain the basis on which this judgment was obtained.

[13] Mr Fletcher was acting as solicitor for SOS. Before the judgment was registered in London, he had been in correspondence with the General Manager of FM Custodians, Mr Rasmussen, about payment of the SOS debt. Mr Rasmussen wrote to Mr Fletcher on 5 March 2013, stating:

> … I confirm our telephone conversation of yesterday, that despite the legal action you have taken, we must now recommence the mortgagee sale process that we commenced prior to Christmas. Despite many promises Maggie [Laughrin] has delivered nothing for us.
>
> My board and the Trustee are unanimous that given the considerable amount of time (years) and the payment of rates, insurances etc that we have provided to [Mr Cribb] to allow him to complete a refinance, *we cannot hold off any longer*.
>
> (emphasis added)

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5 *Re Cribb* HC Hamilton CIV-2011-419-631, 6 March 2012.

6 See generally Companies Act 1993, s 151(2)(b) and Insolvency Act 2006, s 149.

[14] During this time Mr Cribb had gone to the United Kingdom, seemingly in an endeavour to raise finance to pay FM Custodians. By 15 May 2013, Mr Fletcher was reporting to Mr Rasmussen on the outcome of Mr Cribb's attempts. In an email sent on that day, he identified three options:[7]

> **Plan A**
>
> [Mr Cribb] carries on with his recovery action in Europe for the Cribb Family Trust
>
> You enquired as to why he had not taken the 50% deal when it was offered. As a trustee [Mr Cribb] is required to do the very best for the trust and its beneficiaries. *Based on what he knows from multiple sources, Frucom Engineering is good for the full $32.3m within a reasonable timeframe (max 3 months). So he could never justify to his co-trustees a proposal which would result in the loss of $16m for the sake of a few weeks*
>
> *You have asked for a timeframe and I have advised you that we do not have a definitive date – other than the best guess of within 3 months*
>
> **Plan B**
>
> I have been having discussions with a "white knight" who is in the position to buy out your mortgage (this requires exit from another investment)
>
> The question is "how much"? I have indicated an enquiry of you is required to confirm
>
> Likely date for settlement is on or before 14 June 2013
>
> Can you give us an indicative settlement figure?
>
> **Plan C**
>
> The property is sold for the best price – assuming Plan A and Plan B fail within 3 months (considered to be most unlikely). Best time to be selling is on the spring market, not now as we head into winter
>
> Please carefully consider this proposal and contact our office if you should have any queries. You asked if the OA knows anything of what is going on with [Mr Cribb]. We confirm that [Mr Cribb] is in the UK with the OA's blessing and [Mr Cribb] has been providing the OA with an update on his activities.
>
> (Emphasis added)

[15] Although, when writing on 15 May 2013, Mr Fletcher expected the $33.2 million owed by Frucom to be paid within (about) three months, no monies

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[7] We note that the reference to the judgment sum is incorrect – the award was of $33.2 million.

have ever been received from that source to facilitate repayment of FM Custodians' debt.

[16] Mr Cribb swore an affidavit in opposition to the application for summary judgment. He did so in his capacity as trustee for the Trust. He referred to discussions between himself and Mr Rasmussen. Mr Cribb says that "meetings, discussions and correspondence" that took place "largely between [himself] and Mr Rasmussen" resulted in an agreement that FM Custodians would withhold legal action and mortgagee sale proceedings and accept an alternative option for repayment. In doing so, he referred to a later paragraph in his affidavit in which he deposes:

> It is my *understanding* [F M Custodians] varied the arrangement with the defendant, for repayment of the loans, by agreeing to an alternative course of action in accepting repayment of the loans direct from Frucom Engineering GmbH, being part of the Judgement owing to the Cribb Family Trust.
>
> (Emphasis added)

[17] In support of that contention, Mr Cribb referred to advice received from a lawyer in London, Mr Quist, that the three judgment debtors had made arrangements to pay that judgment in full to his trust account. Mr Cribb deposed to his belief that Frucom was "a substantial Austrian company which has the capacity to pay" the judgment debt in full. There is no evidence that Frucom, or either of the other defendants against whom the Trust obtained judgment have paid the debt. No explanation has been given about why, in the period between the date on which Mr Cribb filed his affidavit in the summary judgment proceeding, 28 November 2013, and the present time an apparently solvent entity has been unable to meet the demand. Nor is there any evidence that enforcement action has been taken by the Trust following registration of the judgment in London.

[18] No evidence has been given by Mr Cribb (or any other deponent) to indicate precisely how any agreement between SOS and FM Custodians was reached, whereby FM Custodians agreed to forego enforcement proceedings against SOS pending claims against Frucom and others being resolved. Mr Cribb does not even say that he was the person authorised by SOS to enter into an agreement to that effect. When referring to the suggested variation, Mr Cribb described it as his

"understanding".[8] Use of that word suggests no personal knowledge of the manner in which the agreement was reached.

[19] Mr Cribb deposes that the debt "has grown at a time of falling property market values to a point where now the loans exceed … the value of" the Te Awa Road property. He adds that Mr Rasmussen is "acutely aware that a mortgagee sale is likely to crystalise a considerable loss to the investor contributors to the loan". Without stating the basis on which his opinion is expressed, Mr Cribb states that "the property may have a current realisable value of approx $1.4 million at mortgagee sale".

[20] Mr Cribb's affidavit was supported by Mr Gerald McKay, who describes himself as the director of SOS. He too expressed the view that SOS had a defence to the claim. No specific information is given by Mr McKay as to the circumstances in which any variation to the agreement was made. He does not say that he was the authorised representative of SOS who made the agreement. Most of Mr McKay's evidence is of a hearsay character; he also gives inadmissible opinion evidence. None of that evidence has any probative value to the facts in issue.

[21] Mr Rasmussen swore an affidavit in reply. Unequivocally, he denied that any agreement of the type alleged by SOS had been reached with FM Custodians.

[22] We have reviewed the correspondence to which we were referred by Mr Katz during the course of the hearing. It is unnecessary to rehearse it in detail. It is sufficient to say that nothing in that documentation evidences a clear intent on the part of FM Custodians to enter into an agreement whereby it would forego its rights to obtain repayment from sale of the Te Awa Road property while attempts were made to enforce the judgment registered in the Queen's Bench Division. Indeed, we consider that, having regard to the commercial realities of the situation in which FM Custodians found itself, any suggestion that it did is inherently improbable.

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[8] See the excerpt of his affidavit set out at [16] above.

The alleged defences

[23] It is against that background that the defences advanced by SOS must be considered. Specifically, SOS contended that it did not owe the principal sum outstanding of $2,500,000 plus interest and costs. It alleged:

> [24] FM Custodians had reached an agreement with SOS that it would pursue Frucom for payment of the advances before either suing SOS or seeking to enforce its security over the Te Awa Road property.
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> [25] FM Custodians had either waived its right to pursue SOS for repayment of the debt (or to exercise powers as mortgagee), or was estopped by conduct from denying the agreement to pursue Frucom first.
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> [26] The arrangement entered into between FM Custodians and Frucom operated as a novation of the contractual terms agreed between FM Custodians and SOS.
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> [27] FM Custodians had waived the right to call up the debt and realise its security by reason of delay.

[28] The existence or otherwise of an arguable defence on the first three grounds turns on SOS establishing a plausible narrative to demonstrate that FM Custodians had reached an agreement with it to pursue Frucom in preference to SOS. The fourth required an evidential foundation to support an inference of waiver by delay.

Analysis

[29] Associate Judge Doogue rejected the defences advanced by SOS. As a necessary consequence, he was satisfied that FM Custodians had demonstrated, on a balance of probabilities, that SOS had no arguable defence to the claim. The Associate Judge took the view that SOS had not established a plausible narrative

from which the defences (other than waiver by delay) could be established following evidence at trial.[9]

[30] On the separate point of waiver by delay, the Associate Judge applied cl 7(b) of the loan agreement which provided:[10]

> **Delay does not affect exercise of powers**: The lender's rights under this contract will not be affected by any delay in exercising them (whether or not the lender knows that they have become exercisable). The lender may only be held to have acquiesced in or waived any matter in relation to this clause and if to the extent that the acquiescence or waiver is expressed in writing.

[31] Mr Katz contended that the Judge had misapplied the advice of the Privy Council in *Eng Mee Yong v Letchumanan*.[11] He submitted that the evidence given by Mr Cribb could not be rejected summarily, and that there were questions of fact that could only be resolved at trial. Applying *Pemberton v Chappell*,[12] Mr Katz submitted that FM Custodians could not establish that SOS had no defence to the claim, in the sense that it was arguable.

[32] In *Robertson v ASB Bank Ltd* (a decision involving an application to set aside a bankruptcy notice) this Court commented on the extent to which it was appropriate, in a summary judgment context, to proceed on the basis that a defence was implausible without the evidence being tested through cross-examination.[13] The Court said:[14]

> [32] The Court's approach on an application to set aside a bankruptcy notice should be treated as akin to that taken when affidavit evidence is considered on an application for summary judgment or when continuation (or otherwise) of a caveat is in issue. As with those types of applications, the summary nature of the procedure "is wholly unsuitable for the determination of disputed questions of fact". However, *in assessing the strength of a claim the Court need not accept uncritically evidence that is inherently lacking in credibility; for example, where it is inconsistent with contemporary documents or inherently improbable*.

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9 *FM Custodians Ltd v SOS Investments Ltd*, above n 2, at [20]–[21].

10 At [24]–[27].

11 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC).

12 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

13 *Robertson v ASB Bank Ltd* [2014] NZCA 597.

14 The authorities on which this Court relied for the propositions set out in [32] were *Eng Mee Yong v Letchumanan*, above n 11, at 341; *Sims v Lowe* [1988] 1 NZLR 656 (CA) at 659–660 (in the context of a caveat proceeding); and *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26] (in the summary judgment context).

(Emphasis added, footnotes omitted)

[33] With respect to Mr Katz, we have no hesitation in finding that the evidence adduced on behalf of SOS fell well short of establishing the type of arguable defence necessary to resist a summary judgment application. In the face of a denial by Mr Rasmussen on behalf of FM Custodians, and the absence of anything in contemporary documents to support the agreement that Mr Cribb asserted had been reached, it is inherently improbable that anyone acting on the authority of FM Custodians entered into an arrangement of the type alleged. Such an arrangement would be wholly lacking in commercial reality.

[34] So far as delay is concerned, that is answered conclusively by cl 7(b) of the loan agreement,[15] to which we need make no further reference.

[35] We uphold Associate Judge Doogue's decision to enter summary judgment and to make an order for possession of the Te Awa Road property. Our reasons for doing so are substantially the same as those given by the Associate Judge.

Result

[36] The appeal is dismissed.

[37] Relief from the "unless" order made on 8 July 2015 is granted.[16]

[38] No order as to costs is made. Mr Stewart QC, for FM Custodians, advised us that reliance will be placed on the contractual documents to recover costs on a solicitor/client basis.[17]

Solicitors:
Grayson Clements, Hamilton for Appellant
Hesketh Henry, Auckland for Respondent

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15 Set out at [26] above.
16 See [4]–[6] above.
17 See [8] above.