

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

MISC. NO. 7/92

IN THE MATTER of Section 354 of the
Code of Civil
Procedure of the High
Court 1981

AND

IN THE MATTER of an application for
an Interlocutory
Injunction

BETWEEN BLUE PACIFIC
LAUNDRY AND
DRYCLEANERS(1984)
LIMITED

Applicant

AND

WESTPAC BANKING
CORPORATION
LIMITED

Respondent

Mr Lynch for the Applicant
Mr Broach for the Respondent

Date of Judgment : 16 APRIL 1993

JUDGMENT OF DILLON J.

The Respondent has issued against the Applicant a notice under the provisions of the Property Law Act 1952 and dated the 23rd day of October 1991. The Respondent claims that the amount now owing to it by the Applicant is \$42,506.01.

The Applicant has countered that move by the Respondent by making application for an injunction to prevent the proposed mortgagee's sale of the Applicant's leasehold property known as Lot 9 Section 190A No. 2 Kiikii, Avarua.

THE COMPANY

"Blue Pacific Laundry & Drycleaners Limited" was incorporated on the 19th day of May 1977. In 1984 the Company changed its name to "Blue Pacific Laundry & Dry Cleaners (1984) Limited". On the 10th day of September 1992 the Company again changed its name to "Blue Pacific Laundry Limited".

THE LEASE

On the 20th day of March 1979 the Applicant as Lessee executed a lease of Lot 9 Section 190A No. 2 Kiikii, Avarua, for a term of 60 years from the 1st day of April 1979 upon terms and conditions generally applying to leases in the Cook Islands.

The Lease was approved by the Leases Approval Committee on the 16th day of May 1979; and confirmed by this Court on the 8th day of August 1979.

THE MORTGAGE OF THE LEASE

The Applicant on the 12th day of February 1980 executed a mortgage in favour of The National Bank of New Zealand Limited. The mortgage was the standard printed document in use at that time by the National Bank.

The consideration set out in the mortgage was expressed as follows :

"IN Consideration of advances or other banking accommodation now or heretofore made or given or hereafter to be made or given by THE NATIONAL BANK OF NEW ZEALAND LIMITED (hereinafter (with its successors and assigns) called "the Bank") to the Mortgagor(s) whether alone or jointly or together with any other person firm or company or to any person firm or company at the request of or under any obligation or security incurred, given, made or executed by the Mortgagor(s) And in respect of advances and other banking accommodation heretofore made or given in consideration of the Bank forbearing for one day to press for payment thereof the Mortgagor(s) do(th) hereby (jointly or severally) covenant with the Bank as Mortgagee as follows:-"

There is one further provision in the mortgage relied upon by the Respondent, viz. :

"5. That this security shall be deemed to be a running and continuing security irrespective of any sums which may from time to time be paid to the credit of the account current of the Mortgagor(s) with the Bank and notwithstanding that such account may appear at any time to be in credit and notwithstanding any settlement of account or any other matter or thing whatsoever this security shall remain in full force and effect and shall not be deemed to have been released or discharged or in any way vacated until a discharge thereof shall have been executed by the Bank."

This mortgage, according to submissions filed by Counsel for the Respondent and not contradicted by Counsel for the Applicant, was approved by the Leases Approval Committee on the 13th day of March 1980 (Counsel for the Respondent refers to the mortgage being dated the 12th day of February 1981 and Leases Approval Committee consent on the 13th day of March 1981. I have assumed that to be a typographical error, as I do not have a copy of the Committee's consent.)

THE ASSIGNMENT OF THE MORTGAGE

On the 2nd day of October 1988 The National Bank of New Zealand Limited transferred its Cook Island operations to Westpac Banking Corporation pursuant to an agreement for sale and purchase of that date. Included in the sale was the mortgage, the subject of these proceedings.

On 15 March 1991 the two Banks entered into a Deed of Assignment formalising the transfer of the mortgage to the Respondent.

The Applicant contends that this Deed of Assignment requires the formal consent of the Leases Approval Committee; that because this consent was not obtained the Deed of Assignment is therefore "invalid and unenforceable".

The question of consent is governed by the Leases Restrictions Act 1976, and in particular Sections 3(1) and (2), viz :

"(1) Notwithstanding any other provision in any Act, no lease, or sublease executed after the coming into force of this Act shall be valid and of any effect unless the approval of the Leases Approval Committee has been obtained to that lease, assignment of lease or sublease as the case may

be :

Provided that this provision shall have no application in the case of any lease, assignment of lease or sublease made pursuant to a right of renewal or right or option of purchase or assignment contained in any lease or sublease or to any agreement to lease or sublease or to assign any lease or sublease executed before the coming into force of this Act.

- (2) The approval of the Leases Approval Committee may be obtained before or after the execution by the parties or any of them of the lease, assignment of lease, or sublease as the case may be."

These provisions clearly apply to a "... lease, assignment of lease, or sublease ...". While the mortgage of a lease is an "assignment of a lease" as defined in Section 2 of the Act, the assignment of a mortgage is not within that definition. Consent to the Deed of Assignment is therefore not necessary.

The Respondent has, however, applied to the Leases Approval Committee and formal consent was granted on 23 March 1993 pursuant to the provisions of Section 3(2) above.

NOTICES TO THE APPLICANT

Following the formal execution of the Deed of Assignment between the two Banks on the 15th day of March 1991 the Respondent Bank issued various notices to the Applicant, viz :

1. A notice of assignment of debt by The National Bank of New Zealand Limited and dated 15 March 1991, as follows :

" **NOTICE OF ASSIGNMENT OF DEBT**

Blue Pacific Laundry & Dry Cleaners (1984) Limited
Panama
RAROTONGA

WHEREAS

You executed a memorandum of mortgage dated the 12th day of February 1980 in favour of the National Bank of New Zealand Limited over your land comprising 947 m² more or less situated in the district of Avarua, Rarotonga in the Cook Islands and being all of the land named

by the Land Court as Lot 9, Section 190A, No. 2, Kiiiki Tapere, Avarua district in part of the land contained in the partition order made by the Native Land Court on the 7th of October 1918 which said parcel of land is more particularly delineated and described in the plan deposited in the office of the Chief Surveyor at Rarotonga under number S0953 together with rights of way adjacent thereto described in the Deed of Lease made the 20th day of March 1979 between Emma Moetaua and you.

AND WHEREAS The National Bank of New Zealand has assigned the said mortgage to Westpac Banking Corporation a duly incorporated company incorporated in Australia.

You are hereby given notice of the assignment of the mortgage.

Dated this 15th day of March 1991

SIGNED by)
a duly authorised attorney)
of the National Bank of)
New Zealand Limited on the)
15th day of March 1991)
before me :)

"Roberts"

Manager

in the presence of :

"M. Storm"
Bank Officer
Rarotonga"

2. A Notice of Demand by the Respondent dated the 10th day of April 1991, as follows :

" Westpac Banking Corporation
Rarotonga Branch
10 April 1991

TO : BLUE PACIFIC LAUNDRY AND DRYCLEANERS (1984)
LIMITED
previously called
BLUE PACIFIC LAUNDRY AND DRYCLEANERS LIMITED
PANAMA
RAROTONGA

Sir

WESTPAC BANKING CORPORATION (hereinafter called "the Bank")

hereby demands payment by you of the moneys secured by MEMORANDUM OF MORTGAGE dated the 12TH day of FEBRUARY 1980, made between your BLUE PACIFIC LAUNDRY AND DRYCLEANERS (1984) LIMITED and the Bank.

The amount due by you to the Bank under the said Mortgage at the date of this Demand is TWENTY NINE THOUSAND THREE HUNDRED AND TWENTY FIVE DOLLARS AND 97 CENTS (\$29,325.97).

Unless the moneys secured by the said Mortgage be paid to the Bank before 3 p.m. on the 24TH day of APRIL 1991 the Bank will take such actions as it may be advised for recovery of the said moneys.

WESTPAC BANKING CORPORATION

"Roberts" Manager
RAROTONGA Branch"

3. A letter dated 19 June 1991 from the Respondent to the Applicant setting out in detail the negotiations concluded between the parties and confirmed as correct by the Applicant. A copy of that letter follows :

"

Westpac Banking Corporation
Main Road, Avarua
Rarotonga
P.O. Box 42, Rarotonga
Cook Islands
Telephone : 22014
Telex : 62014 RG
Facsimile : 20802

19 June 1991

The Secretary
Blue Pacific Laundry & Drycleaners (1984) Limited
Panama
RAROTONGA

Dear Sir

We refer to correspondence received from Mianlea Consultants Limited, on your behalf, offering reduction arrangements.

Mianlea Consultants made mention in their correspondence to Westpac not holding any security over Company property. We advise however

that a Mortgage dated 12 February 1980 is currently in place over Lot 9 Sec 190A, 2 Kiiikii Tapere and we reject the assertion made by Mianlea Consultants.

Your offer of reductions of \$800.00 (eight hundred dollars) per calendar month from 31 May 1991 up to and including 31 August 1991 and then \$1000.00 (one thousand dollars) per calendar month until overdraft plus interest are met in full, is acceptable to the Bank without prejudice to our rights under Demand dated 10 April 1991.

We also advise that acceptance of your offer is subject to the strict understanding that in the event of default, enforcement of the Mortgage is to continue under the Notice of Demand served on 10 April 1991, and we require your immediate written acceptance of this condition.

Yours faithfully

P.E. Roberts
MANAGER

WE HEREBY ACKNOWLEDGE ABOVE TERMS AND CONDITIONS

"Towgood" 20/6/91"

THE APPLICANT'S SUBMISSIONS

The Applicant has applied for an injunction to restrain the Respondent from proceeding with a mortgagee sale of its house. The applicant bases its application on the following grounds :

- (a) That the mortgage dated the 12th day of February 1980 is "invalid and unenforceable". The basis for that allegation is the failure to obtain the consent of the Leases Approval Committee to the Deed of Assignment entered into between The National Bank of New Zealand Limited and the Respondent. However consent to such an assignment is not required by the Leases Restrictions Act 1976.
- (b) That while the Applicant acknowledges the existence of "a debt", it does not

acknowledge the existence of "the debt". The letter dated 19 June 1991 already referred to and acknowledged as correct by Mr Towgood (who by his affidavit is entitled to act and speak on behalf of the Company), and who confirms the previous correspondence; the indebtedness of the Company; the amount of the debt; and therefore binds the company, the Applicant, in those proceedings.

- (c) That the original debt has been repaid. The Respondent acknowledges that the original loan of \$12,000 was repaid in 1985. While a company debenture was discharged at that time, the company mortgage was not and so provided the security for the subsequent advances which have accumulated and which form the basis for these present proceedings. There is, therefore, no disputing that the original mortgage arrangements agreed upon in 1980 were repaid in 1985. But since then the Respondent has provided the credit arrangements relying on the mortgage given by the Applicant; which has never been discharged; and which is a continuing security in favour of the Respondent.
- (d) The Applicant claims to have the original lease document. So does the Respondent. There is an allegation of theft. This aspect of the application for an injunction is irrelevant, and therefore it is not necessary for me to consider it. If the Respondent has difficulties with the lease documentation then that is a problem which it will have to decide independently of these proceedings. If the Applicant has the lease that does not prove a discharged mortgage as submitted. This claim has no basis and I disregard it.
- (e) The Applicant claims that because the Company debenture was satisfied therefore the mortgage is also satisfied. That does not follow, and is based on a false premise.
- (f) Finally Mr Towgood, in an affidavit supporting the Applicant company's request for relief by way of injunction stated as follows :

"I humbly seek this restraint because myself, my wife and three young

children continue to occupy the residence on the Land. We have occupied it since 1984 and it would cause unreasonably distress and suffering a sale of the property was to take place before any debt had been proven. If the sale proceeds it must lead inevitably to our eviction from our home which would be unreasonable and unfair in the circumstances."

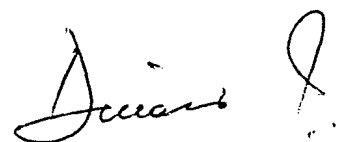
The Court can and does express every sympathy with the Towgood family if the outcome of these proceedings should mean they can no longer stay in the Applicant company's house. The lease and the house belongs to the Company; it was the Company who entered into the mortgage which is still current; and it was the Company that incurred the substantial amount now owing to the Respondent.

CONCLUSION

The Applicant company and Mr Towgood in particular have exercised considerable ingenuity in presenting submissions to support the application for injunction. But ingenuity is no substitute for the law of the Cook Islands which makes provision for certain proceedings when a person or a company fail to meet their financial obligations or, as in this case, to meet repayment arrangements acknowledged by Mr Towgood but not adhered to or complied with.

The Respondent is owed a debt by the Applicant; the Applicant acknowledges it owes the Respondent a debt; the Applicant executed a mortgage in favour of the Respondent; and that mortgage is still current.

The application for injunction is refused. The Applicant must pay costs to the Respondent. I fix costs at \$500.00.



Dillon J.