IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2014-419-92
[2014] NZHC 1474

UNDER	s 16 of the Judicature Act 1908
IN THE MATTER	of an application for the exercise of the Court's inherent jurisdiction to grant relief against forfeiture of non Property Law Act 2007 leases and licences
BETWEEN	GREENSHELL NEW ZEALAND LIMITED (IN RECEIVERSHIP) Applicant
AND	TIKAPA MOANA ENTERPRISES LIMITED First Respondent
	KENNEDY BAY MUSSEL COMPANY (NZ) LIMITED Second Respondent

Hearing: 14 April 2014

Appearances: J Toebes for Applicant
D M O'Neill for First Respondent
B A Fletcher and D P Neild for Second Respondent

Judgment: 27 June 2014

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
27 June 2014 at 2.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
JTLaw, Wellington
Lamb Bain Laubscher, Otorohanga
Gascoigne Wicks, Blenheim
Copy to:
D M O'Neill, Hamilton

Introduction

[1] The applicant, Greenshell New Zealand Ltd (In Receivership) (Greenshell) has commenced an originating application for relief preventing cancellation of leases, licences and sub-licences of marine farm permits.

[2] Greenshell and the first respondent, Tikapa Moana Enterprises Ltd (Tikapa), sought an adjournment of Greenshell's application on the basis that the parties had reached an agreement on all issues between them subject to completion of a sale by Greenshell of its assets, including its position as licensee under the Tikapa licence. At the outset of the hearing on 14 April 2014 I granted the adjournment application and directed that the application against Tikapa be mentioned on 2 July 2014, unless a notice of discontinuance had been filed before that date.

[3] The application against the second respondent, Kennedy Bay Mussel Company (NZ) Ltd (KBMC), proceeded. The application sought an order preventing cancellation until 30 June 2014 of:

(a) A deed of unknown date in 2006 granting Greenshell a lease of KBMC's rights to use and occupy 11.1 hectares of marine coastal area pursuant to marine farming permit 754 issued under the Fisheries Act 1983 and resource consent 103484 issued by Environment Waikato under the Resource Management Act 1991 (RMA) affecting 12.6 hectares of the marine coastal area at Kennedy Bay, Coromandel; and

(b) A deed of unknown date in September 2006 granting Greenshell a sub-licence of KBMC's rights to use and occupy three hectares of marine coastal area at Kennedy Bay, Coromandel pursuant to marine farming licence 351 under the Fisheries Act 1983 and resource consent 112674 issued by Environment Waikato under the RMA.

I refer to the two deeds as the agreements.

[4] The orders sought were conditional on Greenshell continuing to make payments of all amounts when due under the agreements, otherwise performing and not breaching any other covenants under the agreements, and making payment of all outstanding rents owing, upon the granting of KBMC's consent to any assignment of Greenshell's interest in the agreement to a purchaser of Greenshell's business and assets.

[5] An exception to the obligation to otherwise perform and not breach covenants under the agreements would recognise the fact that receivers of Greenshell have been appointed and it was sought that Greenshell should not have to pay immediately outstanding historic rents pre-dating the appointment of the receivers.

[6] KBMC opposed the application. It argued that the Court did not have jurisdiction to grant the relief sought. Alternatively, if it did, it was argued the Court should not exercise the jurisdiction in Greenshell's favour.

Background

[7] The orders were sought against the background that on 19 November 2013, Messrs Brian Gibson and Grant Graham were appointed as receivers and managers of all the property and undertakings of Greenshell pursuant to a general security agreement granted in favour of Rabobank New Zealand Ltd. The security agreement granted Rabobank a security and interest in each of the agreements.

[8] Greenshell operates mussel farms from marine coastal areas in the Coromandel pursuant to marine farm permits and resource consents held either in its own name or leased or licensed from third parties, including KBMC.

[9] Clause 6.14 of the deed of lease between KBMC and Greenshell provided that the lessee, Greenshell, would not assign the lease without the prior written consent of KBMC. The clause also provided that:

> The Lessor will not unreasonably withhold the Lessor's consent to an assignment to a respectable, responsible, solvent and suitable assignee or sub-Lessee ("the Transferee").

[10] There were a number of conditions precedent to the giving of consent by KBMC. They included that Greenshell demonstrate to the satisfaction of KBMC that the proposed transferee is "responsible and of sound financial standing and has reasonable experience in the operation of a commercial marine farm", payment of all rental and other moneys payable by Greenshell up to the date of the proposed transfer, assignment or sub-letting, and the absence of any existing unremedied breach of any of the terms of lease.

[11] Clause 12 set out various acts of default by Greenshell, which would entitle KBMC to re-enter the "marine coastal area" or any part of it and, by such action, determine Greenshell's rights to occupy the area. In those circumstances, there would be 30 days within which mussel stock and plant would need to be removed. Re-entry under this clause would terminate the lease, without releasing the lessee from liability in respect of any breach.

[12] One of the circumstances in which KBMC could re-enter was if the rental was in arrears and unpaid for 28 days after any payment date (whether or not the rent had been demanded). Another provision authorised re-entry where the lessor had given written notice to the lessee specifying a breach of the lease which remained unremedied 28 days after giving the notice. Others acts of default were said to arise if:

> (c) the Lessee (if an individual) is declared bankrupt or insolvent according to law; or
>
> (d) any assignment is made of the Lessee's property for the benefit of creditors or if the Lessee compounds with the Lessee's creditors; and
>
> (e) the interests of the Lessee in or under this Lease or in the mussel plant are attached or taken in execution or under any legal process; or
>
> (f) the Lessee (if a company) has a resolution passed or an order made by a court for the winding up of the Lessee (except for the purposes of reconstruction approved by the Lessor) or if the Lessee is placed in receivership or under official or statutory management.

Paragraph (f) is particularly relevant here.

[13] Further background was set out in an affidavit sworn by Mr Gibson on 7 March 2014. Attachment A to that affidavit was the receiver's first report on the receivership of Greenshell, dated 19 January 2014. The report noted that the receivership had been prompted by a significant operating loss in the 2012 financial year, affecting not only Greenshell but other related companies including Ikana Ltd, Ikana New Zealand Ltd and Greenshell Investments Ltd. As at 30 September 2013, the report stated that Greenshell had total assets of $36,011,000 and total liabilities of $36,189,000 giving a net asset deficit of $179,000. The amount owing to Rabobank as at 30 September was $31,857,000.

[14] Mr Gibson deposed that Greenshell operates mussel farms over approximately 278 hectares. Of that area, the area operated under the Tikapa licences was 41 percent of the total area. The area unfarmed pursuant to the KBMC agreements was some two percent of the total area. Mr Gibson said that since the appointment of receivers, Greenshell has continued to operate its business as a going concern and continued to employ staff (there were 19 people on the pay roll as at the date of his affidavit) to undertake the mussel farming operations. Over the period since the receivership, payment of rentals due and payable under each of the relevant agreements had been made. He continued:

> 9. It has been "business as usual", which we have seen as an essential element of the offering of Greenshell's business for sale as a going concern. The Receiver's assessment, borne out by the outcome of the recent tender sale process (sale of Greenshell's assets as a going concern) was that the business will have a greater value when sold as a going concern than if the business ceased, and the assets were simply sold to the highest bidder for individual assets.

[15] Mr Gibson noted that the Greenshell business and most of the assets were placed on the market for sale with tenders closing on 21 February 2014. He referred to the receipt of substantial offers from reputable parties, with whom the receivers were then in negotiation. In a subsequent affidavit, sworn on 4 April 2014, he stated that the receivers were in the process of finalising the form of sale and purchase agreement with a single "substantial and reputable" offerer, on terms which were confidential. He noted however that an agreement could not be signed having regard to the need for KBMC to consent to the assignment of Greenshell's interest to the

purchaser, as well as referring to the then outstanding issues with Tikapa (which are not presently relevant).

[16] In his first affidavit, Mr Gibson also noted that the area occupied under the KBMC agreements was located alongside sites owned by Greenshell itself. He deposed that the sole purpose of the farming area located in Kennedy Bay was to supply mussel seed to Greenshell's operation, including its operation at Great Barrier Island.

[17] He also said:

> 30. If Greenshell was to lose the use of the Kennedy Bay Licences, its own owned sites located in Kennedy Bay would no longer comprise an economic operation. The farms in Kennedy Bay that are operated under the Kennedy Bay Licences provide a different growing pattern from mussel seed generated from Greenshell's own sites, which enables the Greenshell operation to run 12 months of the year. Greenshell also has the only two moorings available in that area for vessels to work overnight. Greenshell has invested a substantial amount of money in upgrading the mussel farming equipment on the marine farm area under the Kennedy Bay Licences, which is all owned by Greenshell.

[18] KBMC's managing director, Mrs Raewyn Allison-Potae, swore an affidavit in opposition to the application. She explained that the business had been run for many years by her late husband George. When he was terminally ill he had put arrangements in place for the sale of mussel lines and the operation of the farms so as to produce an ongoing income stream for his family. The lease and sub-licence were drafted by Greenshell who acquired the infrastructure of the mussel farm, including longlines, anchor warps, backbone and floats, together with stock on lines and seeded lines. The latter had an agreed value of $60,000 subject to a "stock take". That stock take never took place and Mrs Allison-Potae complained that a debt of $60,000 was owing for the seeded lines which had never been paid, despite being invoiced.

[19] More generally she complained about lack of advice by the receivers that the business was intended to be sold and finding out by chance that offers had been sought. She expressed the opinion that the areas subject to the agreements were not necessary for Greenshell's ongoing operation and referred to benefits that would

flow to her family, as Māori, if the areas now sought to be sold were retained in the control of KBMC. She said:

> While my husband George with the best of intentions arranged for the leasing of the mussel farms there is considerable benefit in our company and whanau retaining the farms. This would allow us to exercise our direct control over what we consider to be out manamoana. It will provide employment directly to our family members.

[20] KBMC also relied on an affidavit sworn by Mr Peter Bull, an experienced marine farmer who has operated in the Coromandel area for some 31 years. Mr Bull said:

> 13. The statement in paragraph 30 of Mr Gibson's affidavit that to lose the Kennedy Bay licences means that Greenshell sites in Kennedy Bay would no longer compromise economic operation cannot be correct. Greenshell has significant interests in marine farms.
>
> 14. From my knowledge of the industry I do not agree that not being able to use the licences of Kennedy Bay Mussel Company (NZ) Ltd would make the whole operation uneconomic. With appropriate management the farming including the growing of mussel seed can be properly carried out.

[21] The matters referred to in the affidavits filed by KBMC were relied on should the Court need to consider whether its discretion to grant relief should be exercised in favour of the applicant.

[22] The immediate genesis of the current application was a letter dated 21 February 2014 sent by solicitors acting for KBMC and two notices of the same date which were served with the letter.

[23] The letter was in the following terms:

> We act for Kennedy Bay Mussel Company (NZ) Ltd. As you are aware our client has a Deed of Lease and Deed of Sub Licence in respect of marine coastal areas with Greenshell.
>
> We advise that our client has exercised its rights under Clause 12.1 of the Deed of Lease and Clause 12.1 of the Deed of Sub Licence and re-entered the marine coastal areas and determined the rights of Greenshell New Zealand Limited to occupy the marine coastal areas in question.
>
> We attach copies of the Notices left by our client company at the marine coastal area.

> Accordingly the leases are now at an end.
>
> We are instructed that tenders have been called to purchase the assets of Greenshell New Zealand ltd. Please ensure that the lease and sub licence are excluded from any sale.

[24] In the two notices that accompanied the letter, KBMC gave notice to Greenshell determining both of the agreements. The notice concerning the lease, so far as is relevant, gave notice that:

> …subsequent to Greenshell New Zealand Ltd having been placed in receivership, Kennedy Bay Mussel Company (NZ) Ltd has re-entered the marine coastal area as defined in the Lease and that in accordance with the provisions in clause 12.1 of the Lease, the Lease is now determined and at an end.

[25] A notice in equivalent terms was sent determining the sub-licence.

[26] In an amended notice of opposition dated 10 April 2014, KBMC asserts that the equitable jurisdiction to grant relief is not available in the current circumstances because:

(a) There is no contract to transfer property or possessory rights.

(b) The covenant that was breached is not a covenant to pay money.

(c) The cancellation clause does not secure the performance of a stated result.

(d) The contract was commercial and arm's length in nature.

[27] If the jurisdiction is available then KBMC says that it should not be exercised because:

(a) The applicant failed to pay money due under the agreement.

(b) The farm is not of strategic value to the applicant.

(c) Given the uncertainty around who the assignee will be cancellation is proportionate to the insolvency.

(d) The applicant has failed to provide sufficient information which both the second respondent and the Court ought to have in order to properly assess any detriment that the applicant might suffer if relief against cancellation is not granted.

Jurisdiction

[28] It was common ground the relief sought in Greenshell's application could only be granted in the Court's equitable jurisdiction. That is because, despite the terminology of "lease" and "sub-licence" what is at stake are rights to use and occupy what is referred to as the "marine coastal area". Under the Deed of Lease the covenant to lease is as follows:

> The Lessor Sub-Leases to the Lessee and the Lessee takes on Sub-Lease the marine coastal area and all of the rights, title and interest of the Lessor in the Lease.

[29] The sub-licence is of the "marine coastal area and all of the right, title and interest of the Licensor in the Licence".

[30] The rights to occupy the areas concerned are now derived from the Resource Management Act. The area covered by the deed of lease was originally the subject of a marine farming permit issued under the Fisheries Act 1983. I infer, although counsel did not refer to it, that the marine farming permit would have become a deemed coastal permit under s 384(1) of the Resource Management Act, when that Act came into force. Thereafter it was the subject of a further resource consent, issued by the Waikato Regional Council. Occupation of the area which is the subject of the sub-licence would be authorised on the same basis. It is this right which underpins the agreements between Greenshell and KBMC.

[31] Section 122(1) of the Resource Management Act provides that a resource consent is neither real nor personal property. It follows that the provisions of the Property Law Act 2007 providing for relief against cancellation cannot apply, and

consideration needs to be given to the Court's equitable jurisdiction to grant relief against cancellation.[1]

[32] Mr Neild, who argued the jurisdictional issues for KBMC, submitted that in the present case the Court could not grant relief in its equitable jurisdiction because there was no contract to transfer property or possessory rights. In this respect, he referred to the decision of the English Court of Appeal in *BICC Plc v Burndy Corporation.*[2] In that case, Dillon LJ held that the Court's jurisdiction to grant relief against forfeiture was confined to contracts concerning the transfer of proprietary or possessory rights.[3] He nevertheless rejected a submission that the jurisdiction should be restricted to cases involving property as opposed to contractual rights.[4]

[33] In what is regarded as a classic statement of the circumstances in which relief against forfeiture can be granted in exercise of the Court's equitable jurisdiction Lord Wilberforce observed in *Shiloh Spinners Ltd v Harding*:[5]

> There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty.

[34] Notwithstanding the provisions of s 122 of the Resource Management Act, the rights conferred by the agreements in the subject case seem to me so closely analogous to property rights that it would be unduly formalistic to hold that in an appropriate case relief might not be granted in the Court's equitable jurisdiction. This is so because, although the rights could not exist without appropriate consents under the Resource Management Act, the parties have agreed on terms upon which

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1 Section 243(2) of the Property Law Act provides amongst other things that relief against the actual or proposed cancellation of a lease can only be given in exercise of the powers conferred by the relevant provisions of the Act. Consequently, the cases where resort has to be had to the Court's equitable jurisdiction are now likely to be few in number. It can also be noted that the power to grant relief under the Property Law Act is wider than the power to grant relief in equity.

2 *BICC Plc v Burndy Corporation* [1985] 1 Ch 232 (CA).

3 Citing *Scandinavian Trading Tanker Co AV v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 (CA) and *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776 (CA).

4 At 252.

5 *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) at 722.

the areas subject to the resource consent can be used by Greenshell, and they have also reached agreement as to the value to be accorded to the exercise of that right.

[35] In this respect, Mr Toebes referred to *Aoraki Water Trust v Meridian Energy*,[6] where on the facts of that case it was observed:

> While permits are not themselves either real or personal property, what is determinative in our view is that, when granting the consents the CRC created the right in Meridian to take, use or divert property, being surface water in Lake Tekapo, for a defined term at maximum rates and quantities and for maximum periods. Mr Milne's concession that Meridian's consents are of considerable economic value is explicable only on the basis of a recognition that such value derives from the holder's rights to use the property in accordance with its permits.

[36] Those observations are equally applicable here and I am of the opinion that the Court could, in the exercise of its equitable jurisdiction in an appropriate case, grant relief against forfeiture where the subject matter of the agreement is rights conferred by a coastal permit under the Resource Management Act.

[37] However, Mr Neild further submitted that the Court's ability to grant relief in its equitable jurisdiction is limited to cases where the condition breached is one designed to secure a stated result which can effectively be attained when the matter comes before the Court. He referred in particular to further observations of Lord Wilberforce in *Shiloh Spinners Ltd v Harding*:[7]

> I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the rights of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the Court, and where the forfeiture provision is added by way of security for the production of that result.

[38] Mr Neild also referred to the following passage from *Snell's Equity*:[8]

> Most of the established cases involve late payment of interest due under a mortgage or rent due under a lease. But equity is said to look to substance

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6 *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268.
7 *Shiloh* Spinners, above n 5, at 723.
8 John McGhee (ed) *Snell's Equity* (32nd ed, 2010, Thomson Reuters, London) at 420.

> not form. If the provision which a party is seeking to enforce is really a security in relation to a property or possessory right, securing the performance of an obligation to pay money, the Court has jurisdiction to grant relief against forfeiture.

[39] Mr Neild submitted that where the forfeiture clause does not secure performance, the Court will not exercise its jurisdiction to grant relief in equity. He contrasted this case, where KBMC had the right to terminate if Greenshell were placed in receivership, with cases where there has been non-payment of rent and equity regarded the right to re-enter for non-payment as a security for the payment of the rent. Here, Mr Neild submitted, KBMC's rights to cancel on receivership did not secure anything, whether money, good behaviour or anything else.

[40] In response, Mr Toebes argued that the forfeiture provision is in fact security for performance of the covenant to pay rent together with positive obligations under the agreement. It was he submitted a "self-help" remedy against breaches of the agreement. Further, the right of KBMC to receive rent and have a solvent lessee/licensee capable of performing the positive obligation under the agreements could be attained by the Court providing relief from forfeiture until Greenshell's interests are assigned to a successful, solvent assignee, and the rental arrears are paid.

[41] He referred to observations made by Williams J in *Pike River Coal Ltd (In Receivership) v O'Malley Farming Ltd*:[9]

> The breach in this case is the fact of Pike River's receivership. This breach is somewhere between a rent breach and a general breach. I say this because the receivership clause in the lease was undoubtedly designed as an extra protection against the increased risk that the lessor must shoulder when the lessee is "in trouble".

[42] However, I do not consider that that statement assists Greenshell's argument. The event of default is the receivership. As Williams J observed, the effect of a receivership will be to create an increased risk concerning the fulfilment of the lessor's obligations. Mr Toebes submitted that provided there is an assignment to a new lessee who is both solvent and satisfactory in other respects KBMC will be

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9 *Pike River Coal Ltd (In Receivership) v O'Malley Farming Ltd* HC Wellington CIV-2011-418-66, 14 October 2011 at [47].

protected against non-performance of the lessee's obligations. However, while that may be a consequence of granting relief against termination, it is not a reason for doing so in the face of a contractual provision entitling KBMC to terminate the agreement in the event of a receivership.

[43] I have already set out extracts from the judgment of Lord Wilberforce in *Shiloh Spinners*. It may also be noted that Lord Wilberforce quoted with approval observations made by Kay LJ in *Barrow v Isaacs & Son* (a case involving a covenant against sub-letting without consent):[10]

> It has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment or rent.

[44] It is important not to lose sight of the fact that, as with all relief against forfeiture applications, here the grant of relief would be on the face of it contrary to the contract of the parties entitling KBMC to cancel on the basis of Greenshell's receivership. The agreements were commercial arrangements freely undertaken by parties negotiating at arm's length. The receivership has already occurred. The grant of relief would treat that fact as inconsequential, and do nothing to remedy the breach the receivership represents. That is not the bargain that the parties struck. And there is no suggestion here that there could be any compensation payable to KBMC for the removal of its rights on the occurrence of a receivership. I suspect that the answer Greenshell would give to that would be that KBMC would suffer no loss as a result of the receivership provided that relief were accompanied by the full payment of any money due under the lease. But the fact is that KBMC would inevitably be faced with having to deal with the consequences of a receivership when it had contracted that it would be able to terminate the agreement if a receivership occurred.

[45] Both parties discussed the judgment of Winkelmann J in *Dark v Weenink*.[11] That was a case that arose in very different circumstances to this, and so far as is relevant here concerned, in one of its aspects, whether the Court had power to grant relief against the forfeiture of rights to receive payments under a superannuation

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[10] *Barrow v Isaacs & Son* [1891] 1 QB 417 (CA) at 425.
[11] *Dark v Weenink* HC Auckland CIV-2003-404-5846, 11 August 2005.

fund. The judgment's relevance for present purposes arises from Winkelmann J's acceptance as authoritative the statement of the law in *Halsbury's Laws of England*[12] that three conditions must be satisfied in a particular case for there to be jurisdiction to grant relief. Those three conditions are:

(a) The primary object of the bargain must be to secure a stated result.

(b) That result must be one which can effectively be attained when the matter comes before the Court.

(c) It must be possible to say of the forfeiture provision that it was added by way of security for the production of that result.

I note that the latest edition of *Halsbury's Laws of England* is to the same effect.[13]

[46] These conditions are not satisfied here. Greenshell is in receivership and there is nothing that the Court can do in the present circumstances about that. Nor can it be said that the provision in the agreements providing for termination in the case of receivership had as its primary object the securing of a stated result, or that the provision was added by way of security for the production of a stated result.

[47] In the circumstances, this is not an appropriate case for the grant of relief. That conclusion means it is unnecessary to consider the discretionary factors that might have been relevant if I had accepted the case was one in which the Court could grant relief.

Result

[48] The application, so far as it relates to KBMC is dismissed.

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12 *Halsbury's Laws of England* (4th ed, reissue, 2003) vol 16(2) Equity at [804].
13 *Halsbury's Laws of England* (5th ed, 2014) vol 47 Equitable Jurisdiction at [223] .

[49] KBMC is entitled to costs. If there is any issue as to the basis for calculation of costs I will receive memoranda from KBMC within ten working days and from Greenshell within five working days of receipt of KBMC's memorandum.