

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2006-404-6618

BETWEEN	HENRY DAVID LEVIN AND BARRY PHILLIP JORDAN Plaintiffs
AND	STUART DOUGLAS ROBERTSON Defendant
AND	CONTRIBUTORY MORTGAGE NOMINEES LIMITED Third Party

Hearing: 3 October 2007

Counsel: N Malarao for Plaintiffs
D Smythe for Defendant
R S Jamieson, Director of Contributory Mortgage Nominees Ltd

Judgment: 3 October 2007

(ORAL) JUDGMENT OF HEATH J

Solicitors:

Meredith Connell, PO Box 2213, Auckland
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Counsel:

D Smythe, PO Box 105-270, Auckland

Copy to:

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Introduction

[1] This proceeding involves a claim by liquidators of Trans Tasman Hotel Corporation Ltd (in receivership) and (in liquidation) for recovery of moneys from a former receiver of the company, Mr Robertson.

[2] Mr Robertson used moneys realised in the course of administration of the receivership to apply to a debt owed by the secured creditor by which he was appointed as receiver. The appointing creditor was Contributory Mortgage Nominees Ltd. That company appointed the receiver under a General Security Agreement dated 7 October 2004.

[3] In short, the allegation is that Mr Robertson ought to have applied the money received to payment of preferential debts rather than to the secured creditor under the General Security Agreement. The duty to pay preferential debts is to be found in s 30 of the Receiverships Act 1993.

[4] The proceeding was set down for a hearing this week over three days. Originally, that was to encompass both the liquidators' claim against the former receiver and the former receiver's claim against Contributory Mortgage Nominees Ltd under an indemnity executed contemporaneously with his appointment.

[5] On 15 August 2007, Associate Judge Abbott recorded receipt of a memorandum from counsel then acting for Contributory Mortgage Nominees Ltd to advise that the company did not intend to take any further steps in the proceeding. The solicitors sought leave to withdraw, which was granted.

[6] The Minute issued by Judge Abbott made it clear that Contributory Mortgage Nominees Ltd could only file further documentation through a solicitor and could only appear in Court if represented by counsel. The latter observation was made in reliance on *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA).

Plaintiffs' claim against defendant

[7] On that basis, the plaintiffs and the defendant proceeded to discuss resolution of the proceeding. They have reached a settlement which they seek to be incorporated into a consent order I will make today.

[8] The defendant, Mr Robertson, sought a formal proof hearing to obtain judgment under the indemnity against Contributory Mortgage Nominees Ltd. The fixture for three days that was to commence last Monday was vacated and instead a formal proof hearing set down for today.

[9] So far as the claim between the liquidators and Mr Robertson is concerned, judgment is entered by consent as follows:

- a) The sum of \$45,000 shall be paid by Mr Robertson to the liquidators of Trans Tasman Hotel Corporation Ltd (in receiver and in liquidation), together with interest of \$7,887.33 and costs on a 2B basis of \$20,640 (inclusive of disbursements).
- b) Judgment may be sealed in the form of the draft order handed to me by counsel for the plaintiffs.

[10] That resolves the proceeding as between the plaintiffs and the defendant. Counsel for the plaintiffs need take no further part in the proceeding.

Defendant's claim against Third Party

[11] That leaves for determination the proceeding between Mr Robertson and Contributory Mortgage Nominees Ltd.

[12] Mr Jamieson sought an adjournment. He is a director of Contributory Mortgage Nominees Ltd. Having heard of the settlement reached between the

liquidators and Mr Robertson, the company wishes to reappraise its position and to be heard on the claim under the indemnity.

[13] I gave leave for Mr Jamieson to address the Court but made it clear that, if I were minded to grant an adjournment, it would be on the basis that a sum of money would be paid into Court pending determination of the third party proceeding.

[14] I then heard from Mr Smythe, for Mr Robertson. I identified a number of issues arising from the affidavit of Mr Robertson on the formal proof application. In particular, I referred to cl 2.4 of the Deed of Indemnity. There is a question as to whether Mr Robertson committed “a breach of duty” disentitling him from indemnity under the agreement. I express no opinion on that issue but simply leave it to Mr Smythe to consider the point further. It may be if this matter goes further, further evidence will be required to deal with specific factual matters in issue.

[15] I am satisfied that it is in the interests of justice for Contributory Mortgage Nominees Ltd to be given the opportunity to defend itself on the indemnity claim. However, given the stance that was indicated clearly to Judge Abbott in August, any adjournment must be on strict terms.

[16] The third party proceeding will be adjourned on the following basis:

- a) By 5pm on 7 November 2007, Contributory Mortgage Nominees Ltd shall pay to the Registrar of the High Court at Auckland the sum of \$30,000 to abide the outcome of the third party proceeding. That money shall be placed on interest bearing deposit by the Registrar pending determination of the third party claim.
- b) Unless that sum is paid into Court by that time on 7 November 2007, Contributory Mortgage Nominees Ltd shall be debarred from defending the proceeding and Mr Robertson may seek a further hearing by way of formal proof in respect of his claim.

[17] There are also questions of wasted costs arising out of today's hearing. While not all costs will be wasted (because of the preparation of evidence which will be required in any event) I am satisfied that it is appropriate for an order for costs to be made on today's hearing in any event.

[18] Contributory Mortgage Nominees Ltd is ordered to pay costs on a 2B basis, together with reasonable disbursements to Mr Robertson by 5pm on 21 November 2007. Those costs and disbursements shall be fixed by the Registrar.

[19] The proceeding is adjourned for a case management conference before me at 9am on the first available date after 21 November 2007. That date is to be fixed by the Registrar and notified to counsel.

[20] At that conference, I will consider what, if any, further directions are required so that the proceeding may be dealt with on a defended basis or for determination of the claim of formal proof, whichever is necessary.

[21] I make it clear that this Court will not hear from Contributory Mortgage Nominees Ltd unless represented by counsel. Solicitors should be instructed and counsel should appear at the case management conference I have directed. If counsel were not to appear, I would not be prepared to hear from any director or manager on behalf of the company. Mr Jamieson has indicated to me today that the company does intend to instruct counsel to defend the claim and I proceed on that assurance.

[22] As I have dealt with the claim as between the plaintiffs and the defendant, the proceeding is to be regarded as part-heard. I will make directions as to the way in which it is to be concluded at the case management conference which the Registrar will convene.