SET 3

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 123/86

BETWEEN NIGEL PEMBERTON
of Auckland, Company Director

Appellant

A N D JOHN MARTIN CHAPPELL
of Auckland, Company Director

Respondent

Coram: Somers J. (presiding)
Casey J.
Hillyer J.

Hearing: 30 October 1986

Counsel: M.W. Vickerman for Appellant
Ms. Julie Goodyer for Respondent

Judgment: 12 December 1986

JUDGMENT OF SOMERS J.

Rules 135 to 142 of the High Court Rules which came into force on 1 January 1986, contain provisions new to this country about the entry of summary judgments. They are obviously important and from what we have been told much use has already been made of them. But that use has to some extent been attended by some differences in the way they have been applied. That is undesirable and may lessen their value.

The general object of the rules about summary judgments is clear. It is to enable a plaintiff to obtain

judgment where there is really no defence to the claim made and so put an end to the spectacle of a worthless defence being raised and pursued for the purposes of delay. It has been expressed in various ways all amounting to the same thing. In Wallingford v. Mutual Society (1880) 5 App.Cas. 685, 693 Lord Selborne L.C. said that 'the means should exist of coming by a short road to a final judgment, when there is no real defence to an action. But it is of at least equal importance, that parties should not in any such way, by a summary proceeding in Chambers, be shut out from their defence, when they ought to be admitted to defend'. Two years earlier in Anglo-Italian Bank v. Wells (1878) 38 L.T. 197, at 199, Sir George Jessel M.R. said of the English rule then in force that 'It is intended to prevent a man, clearly entitled to money, from being delayed when there is no fairly arguable defence to be brought forward'. More recently in European Asian Bank A.G. v. Punjab and Sind Bank [1983] 2 All E.R. 508, at p.516, Robert Goff L.J. said 'The policy of Order 14 is to prevent delay in cases where there is no defence'. Although the English rules differ in some important ways from those now in force in New Zealand these statements about their purpose apply equally in this country.

The means adopted to achieve that object are essentially contained in R.136 which provides -

> 'Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has

> no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant'.

The outstanding feature of this provision is that the onus of establishing that there is no defence is cast on the plaintiff. I describe it as outstanding because it requires the plaintiff to establish a negative in circumstances in which, in general, the existence and nature of any defence is within the knowledge of the defendant. In England O.14 r.2 requires the plaintiff, as does R.138 in New Zealand, to verify the allegations in the Statement of Claim and to depose to his belief that there is no defence to the claim. Then O.14 r.3 provides that unless the defendant satisfies the Court that there is 'an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial' the Court may give judgment for the plaintiff. The defendant is expected to state clearly and concisely what the defence is and what facts are relied upon as supporting it: see the note in 1 Supreme Court Practice 1982, 14/3-4/4.

In many cases the difference between the English and New Zealand provisions will be more apparent than real. If the defendant in New Zealand does not particularise his defence so as to show an issue of fact which ought to be tried, or if the plaintiff's pleading, whether or not

supplemented by an affidavit by the defendant, does not show an arguable question of law worthy of trial, the plaintiff's statement of claim verified by or for him and the sworn belief that there is no defence will be sufficient to discharge the onus on him. If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

At the end of the day Rule 136 requires that the plaintiff 'satisfies the Court that a defendant has no defence'. In this context the words 'no defence' have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See e.g. Wallington v. Mutual Society (1880) 5 App.Cas. 685, 693; Fancourt v. Mercantile Credits Ltd. (1983) 154 C.L.R. 87, 99; Orme v. De Boyette [1981] 1 N.Z.L.R. 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further facts the Court should normally decide it on the application for summary judgment, just as it will do so on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence: cf. R. R. Lucas & Son (Nelson Mail) Ltd. v. O'Brien [1978] 2 N.Z.L.R. 289; and see European Asian Bank v. Punjab and Sind Bank (1983) 2 All E.R. 508, 516. Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident - that is to say, satisfied - that the defendant's statements as to matters of fact are baseless. The need to scrutinise affidavits, to see that they pass the threshold of credibility, is referred to in Eng Mee Yong v. Letchumanan [1980] A.C. 331, 341 and in the unreported judgment of Greig J. in Attorney-General v. Rakiura Holdings Ltd. (Wellington CP 23/86; judgment 8 April 1986).

It is in this last area of the instant case that I have found the most difficulty. I am disposed to think that Doogue J.'s assessment of the evidence in the High Court was justified; that as it then stood there was no arguable defence. In this Court further evidence was admitted. That evidence together with the material before the High Court

has been sufficiently referred to in the judgment of Casey J. which I have had the advantage of reading.

I am satisfied, for the reasons given by Casey J., that the suggested defences under the Credit Contracts Act are without foundation. The only projected defence requiring consideration is that of misrepresentation. In substance it is that a misrepresentation was made at the time of the sale to Mr. Pemberton which is actionable under s.6 of the Contractual Remedies Act 1979. An actionable representation if made out would I consider constitute an equitable set-off if so pleaded. See e.g. D. Galambos & Son Pty. Ltd. v. McIntyre (1975) 5 A.C.T.R 10; Popular Homes Ltd. v. Circuit Developments Ltd. [1979] 2 N.Z.L.R. 642; and the wider examples of such a set off in Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd. [1949] 1 K.B. 107 and Hanak v. Green [1958] 2 Q.B.9 the last two of which cases are criticised in Meagher Gummow and Lehane Equity Doctrines and Remedies 2nd Ed., para. 3710.

The question then is whether the unacceptable evidence of a representation put before Doogue J. has been improved by the new evidence admitted in this Court. Although Mr. Pemberton added nothing to his evidence about the making of the representation alleged by him nevertheless I agree with Casey J. that the additional evidence lends a sufficient degree of credence to the claim to make the case

one which should go to trial.

The Court being unanimous the appeal is allowed. The judgment in the High Court is set aside and the case is remitted to the High Court for such directions as ought to be given under Rule 142. Having regard to the matters mentioned in the judgment of Casey J. and the course the case has taken there will be no order as to costs in this Court or in the High Court.

A stay of execution of the summary judgment was ordered by this Court on 17 September 1986 pending the outcome of this appeal on terms that the appellant pay the amount in dispute and interest to the Registrar of the High Court. The sums so paid by the appellant will now have to be repaid to him.

Solicitors

Keegan Alexander Tedcastle & Friedlander, Auckland for Appellant
Chapman Tripp Sheffield Young, Auckland for Respondent

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Coram: Somers J (Presiding)
Casey J
Hillyer J

Hearing: 30 October 1986

Counsel: M W Vickerman for Appellant
Ms Julie Goodyer for Respondent

Judgment: 12 December 1986

JUDGMENT OF CASEY J

On 24 July 1986 Doogue J gave summary judgment for the Respondent, Mr Chappell, under R.136 for $152,039.72 together with interest and costs in respect of the amount due under a Memorandum of Second Mortgage given by the Appellant (Mr Pemberton) over a kiwifruit farm near Bombay on 22 July 1982 to secure the balance of purchase price. The latter had bought the property from Mr & Mrs Chappell in May 1982 for $350,000, paying $250,000 cash, partly provided by raising a first mortgage of $170,000. The application for summary judgment was opposed, Mr Pemberton maintaining that he had an equitable set-off or counterclaim likely to exceed $250,000 arising out of misrepresentation, breach of implied term and negligence in relation to the sale of the farm.

Allegedly faulty planting of the vines resulted in the production being substantially less than expected, leading Mr Pemberton to abandon his plans to syndicate the property at a substantial profit. Instead he disposed of it about October 1983 through a company by means of a property and share exchange for an expressed consideration of $450,000, subject to the two mortgages for which he expected the new proprietor (Mr Stenning) to be responsible. He was well aware that his liability to Mr Chappell was preserved.

In April 1986 the first mortgagees sold the property under their power of sale for $150,000. This being a default under the second mortgage (no payment was otherwise due until July 1986) Mr Chappell promptly gave notice and sued Mr Pemberton for the debt. As Doogue J pointed out, the first intimation of any problem with the farm was not given to Mr Chappell until Mr Pemberton's affidavit of 9 July 1986, some four years after the transaction was completed. He found this course of events so incredible as to indicate a complete lack of bona fides, and relied on this and the totally inadequate affidavit evidence to reject any counterclaim or set-off.

He also rejected further defences of waiver or novation (which were not pursued) and of non-disclosure under the Credit Contracts Act 1961. In the document "Disclosure Requirements" associated with the mortgage, the place where payments were to be made was stated to be "by automatic payment authority." The appellant (even though his

solicitors had prepared this form) contended that this did not comply with Cl.5 of the Second Schedule to the Act. The Judge thought that the defence was not arguable but said in any event he would have no hesitation in ordering relief under Sections 31 and 32 of the Act. Mr Vickerman tried to persuade us he could not take this course in a summary judgment application. There is nothing to prevent it in the Act or Rules and if the Judge thinks it inevitable that such a discretion will be exercised, there is every reason to save time and expense by dealing with the matter on the spot. This ground of defence must be rejected.

The other point of non-disclosure alleged by Appellant (and also rejected by the Judge) was the failure of the "Disclosure Requirements" document to contain all the stipulated terms of the contract. There was a paragraph to the effect that other terms not disclosed were those in the attached mortgage. Mr Vickerman submitted that this was not compliance with the need for the disclosure document to contain all the terms. I agree with the Judge that the mortgage was made part of the document and this point has no merit whatsoever.

I turn now to the substantial ground of appeal relating to the defence of equitable set-off or counterclaim. R.136 reads :

"136. Judgment where no defence -

Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant

> has no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant."

While the word "may" suggests a general discretion, I agree with the views of Robert Goff LJ in European Asian Bank v Punjab and Sind Bank [1983] 2 All ER 508, 515, on the corresponding provisions of Ord.14 r3(1) - once the plaintiff has complied with the requisite formalities and has satisfied the Court there is no defence, "it is very difficult indeed to conceive of circumstances where the Court should not give judgment for the plaintiff ..... it can only be a discretion of the most residual kind."

A counterclaim is not a defence. It was always open to Mr Pemberton to bring one, notwithstanding the application for summary judgment and that he might have had no defence to the claim. However, once judgment is entered he would appear to be too late, and he is then confined to bringing a separate action. On a counterclaim being brought, Rules 534 and 535 enable the Court to give one judgment for any excess to which the plaintiff or defendant may be entitled, whereas a successful plea of set-off results only in reducing or extinguishing the claim. While the normal practice is for claim and counterclaim to be heard together, under R.151(2) the Court may order the latter to be tried at some other place or time subject to such conditions as it thinks fit, if it appears they can more fairly or conveniently be tried separately.

There are also provisions affecting counterclaims in the summary judgment procedure. R.142 states :

"Disposal of Application

(1) On hearing an application for judgment under rule 136 or rule 137, [this provides for judgment to be given for liability only, and directions for a trial on amount], the Court may exercise any of the powers conferred on it by those rules; but, if it is not satisfied that it can exercise any of those powers, it shall dismiss the application and give such directions as to the time for filing a statement of defence and otherwise as may be appropriate.

(2) Notwithstanding subclause (1), if it appears to the Court on an application for judgment under rule 136 or rule 137 that the defendant has a counterclaim that ought to be tried, the Court -

(a) May give judgment for such amount as appears just on such terms as it thinks fit; or
(b) May dismiss the application and give directions under subclause (1)."

A first impression of subclause 2(a) is that the discretion to enter judgment on terms protects a defendant having no defence while he brings his counterclaim. However, on a literal interpretation, the discretion might also arise if the set-off - even though constituting a defence - can also be brought as a counterclaim. This point was not argued, the appeal proceeding on the basis that unless the Court was satisfied there was no defence, the application must be dismissed. The question is therefore whether Doogue J was right about the absence of a genuine defence, the onus of satisfying him being on Mr Chappell.

Each side applied to adduce further evidence. In spite of their mutual opposition we allowed it all to be admitted; as a result we had more detailed (and, in some areas, additional) material than that available in the High Court. There Mr Pemberton deposed that the farm had been represented to him by the vendor's agents as a very good block where the shelter and planting had been done to the highest standard, and it appeared so to him. He engaged a Mr Hill to manage and supervise the property pending his proposed syndication, but in late spring 1982 after settlement, he became very concerned with the growth and then learnt from Mr Hill the vines had not been planted in accordance with good practice and there could be problems with their future development.

A report obtained from a horticulture expert confirmed these problems, as did a neighbour, and this put paid to his syndication plans from which he expected to make $200,000. He then outlined the transfer to Mill Road Horticulture Ltd. in 1983 but was vague on detail because of lack of records held by the solicitor then acting for him. He said the sale of its shares to Mr Stenning was a last resort and was for some $250,000 less than he could otherwise have expected. There were discussions with Mr Chappell's solicitors about this transaction to ensure compliance with the mortgage, but no complaint was made about the farm. He was later told by Mr Stenning the crops were a failure.

There was a supporting affidavit from Mr Hill confirming the problems and repeating information he was given by the neighbour (Dr Scher) about defective planting, resulting in the plants being rootbound and poor producers. He believed him to be an expert. Mr Hill's efforts to remedy the position were ineffective.

These allegations were anwered by Mr. Chappell who detailed the development work and planting carried out by an experienced contractor. He maintained that Mr Pemberton's decision not to syndicate was the result of tax amendments in 1983 and he then put the property on the market, commissioning a report from a Mr Sissons, a commercial grower, to assist in the sale. He alleged any failure was due to Mr Hill's inexperience in managing the block. He described Mr Pemberton as evasive in disclosing his dealings over the sale to the company, and said he made no complaint until opposing this present application. He exhibited an advertisement published by Mr Pemberton in January 1986 to sell the farm for $585,000, describing it as "absolutely perfect in every detail." In an affidavit in reply the latter traversed many of Mr Chappell's assertions and explained that the advertisment was inserted by his staff at Mr Stenning's request.

It was on this evidence that Doogue J reached his conclusion about lack of bona fides and inadequacy of supporting evidence. However, we now have rather more

material, including a detailed affidavit from Dr Scher which adds considerably to the sketchy outline presented to the High Court. Although answering affidavits have been filed - in particular one from the Appellant's previous advisor, Mr Sisson - his claim of defective planting must now be regarded as genuinely arguable. Mr Vickerman explained the absence of any earlier complaint as due to his client's belief that Mr Stenning would meet the liabilities after learning he was in default in July 1984, but Mr Pemberton has not gone on oath to say so in this application.

He contended that the sale by the first mortgagees was at a gross under-value. It is in relation to the latters' claim to recover the deficiency from him that very real doubts about Mr Pemberton's credibility arise. A copy of his affidavit in opposition to their summary judgment application was produced to us in an affidavit sworn by Mr Bartlett. In it he described obaining a valuation of $320,000 from a Registered Valuer (Mr Young) before buying the farm. It described the property "as exceptionally well laid out with infinite care taken with every detail." Mr Pemberton also referred to a report he obtained from a specialist mangement consultant, Mr Souster, for the purpose of syndication. It was undated but must have been made before he changed his mind in 1983. That specialist described it as one of the best blocks in the district, with scientifically monitored shelter belts and with plants grown by a top grower. He valued it at $450,000. Finally

Mr Pemberton deposed that he would be confident of reselling the property for $500,000.

Mr Vickerman did not attempt to synthesise the contradictory approaches by his client manifest in these two sets of proceedings. In opposition to Mr Chappell's application Mr Pemberton said nothing about the pre-sale valuation by Mr Young, and the impression he gives of the value and saleability of the property in these proceedings is totally at variance with the views expressed in his affidavit just cited. Only very rarely will issues of credibility be decided in applications of this nature. However, it can be said that Mr Pemberton stands virtually condemned out of his own affidavits, as a man prepared to say whatever suits him at the time. This is further illustrated in his affidavit of 6 October 1986 where he seized on information in a letter referred to by Dr Scher, and which he said had been shown to him by Mr Chappell before the purchase. He claimed it represented a first-crop production of 1800 trays per acre. On the contrary, it is an estimate for the whole farm projected over some 15 acres. Estimates along the same general lines had been given to Mr Pemberton long ago in the report from Mr Souster for syndication purposes.

In concluding there was no genuine defence, Doogue J was influenced by two factors - (i) the delay in making any complaint, and (ii) the paucity of the evidence. As already noticed, Dr Scher's affidavit establishes an arguable

proposition that the kiwifruit vines were not properly planted; he said the method of post-hole boring, while suitable for the Bay of Plenty, led to root-bound plants in the different South Auckland soil. He also criticised Mr Chappell's actions in removing shelter-trees. He has impressive horticultural qualifications.

In his first affidavit Mr Pemberton alleged that the Chappells' agents on the sale - Messrs Williams and Hill - had said "that this was a very good kiwifruit block where shelter and kiwifruit planting had been done to the very highest standard." Later, in response to Mr Chappell's affidavidit, he acknowledged that Mr Hill was not the vendors' agent; he was only working at the Real Estate firm and Mr Pemberton engaged him to look after the property. This seems another instance of his carelessness with facts. However, I think it more than likely such a representation was made, since a lot of money had been spent by the vendors in a careful development of the property and these statements were echoed in the independent report obtained from Mr Young at the outset.

Accordingly, whatever doubts may be cast upon Mr Pemberton's truthfulness and reliability, at least two matters on which a defence could be based now appear to have independent support - namely, that a representation was made about planting and shelter having been done to a high standard; and the fact that they were not. Having got that

far with an arguable case, Mr Pemberton may be able to satisfy the Court that the representations were material and causative of loss. It would be a bold step to reject what he now says about these matters out of hand solely as a result of his dubious affidavit evidence. There is every reason to be suspicious of his good faith. But once the essential core of his complaint is shown to have some independent support, I cannot be satisfied that he has no defence. On the other hand, had the evidence remained in the state it was in the High Court, I would not have disagreed with the assessment made by Doogue J.

Counsel did not present any argument about whether these circumstances could amount to an equitable estoppel and this may also need resolution at a substantive hearing.

I would allow the appeal and set aside the judgment, dismissing the application and remitting the matter to the High Court for directions under R.142(1). As the Appellant succeeded substantially as a result of new evidence from Dr Scher, I do not think he should have costs on the appeal or in the High Court.

Solicitors: Keegan Alexander Tedcastle & Friedlander, Auckland, for Applicant

Hamerton Chappell Dunbill & Moore, Whakatane, for Respondent

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BETWEEN NIGEL PEMBERTON

Appellant

AND JOHN MARTIN CHAPPELL

Respondent

Coram: Somers J (presiding)
Casey J
Hillyer J

Hearing: 30 October 1986

Counsel: M.W. Vickerman for appellant
Ms J. Goodyer for respondent

Judgment: 20 November 1986

JUDGMENT OF HILLYER J

I have read the judgments to be delivered by the other members of the Court and am in agreement with them. I wish to add only this. Under the New Zealand Rules, the onus is on the plaintiff to establish that there is no defence to an action. That will normally be satisfied by the plaintiff's affidavit verifying the allegations in the statement of claim, and his oath that he believes the defendant has no defence to the claim.

A question of law may however be apparent from the statement of claim or the plaintiff's affidavit. If that question can be resolved without determining disputed facts, the Court in its discretion may do so and normally will. If however, a defence may depend upon some fact not established by the plaintiff's affidavit, the obligation is on the defendant

to go on oath to establish that fact. It will not be sufficient to say at the summary hearing that the action will be defended on the basis of facts which are not deposed to by or on behalf of the defendant.

The summary judgment procedure is not intended to allow hypothetical defences to be raised.