Anderson v Burbery Fin 5.8.88

SDW

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 77/86

SET 2

BETWEEN: REX ALBERT ANDERSON and PATRICIA ANN CAMERON as executors of the estate of KELVIN WILLIAM CAMERON

Appellants

AND: BURBERY FINANCE LIMITED

Respondent

Coram: Richardson J
Somers J
Bisson J

Hearing: 28 June 1988

Counsel: T C Weston for appellants
D I Jones for respondent

Judgment: 5 August 1988

JUDGMENT OF THE COURT DELIVERED BY BISSON J

This is an appeal from the judgment of Gallen J delivered 23 August 1985 in the High Court at Christchurch. The case concerns finance provided by the respondent for the late Mr Kelvin William Cameron. The questions were whether the respondent as a financier had complied with the requirements of the Credit Contracts Act 1981 as to disclosure and in the event of a breach of that Act, whether the appellants as the executors and trustees of the late Mr Cameron were entitled to the penalties provided under the Act or whether the respondent was entitled to relief from

the operation of the penalty provisions. There was a further question whether any credit contract should be reopened by the Court as oppressive.

The first advance was one of $35,000.00 (plus legal costs of $213.00) for a term of six months and was made on 8 July 1982. The loan agreement and the memorandum of mortgage are to be read together as comprising the disclosure documents. On 15 November 1982 Mr Cameron repaid the sum of $10,000.00. On 24 December 1982 the respondent advanced the sum of $10,000.00 to Mr Cameron so that the principal then outstanding was again $35,000.00. No new documentation evidenced that transaction.

In 1983 Mr Cameron sought a further $10,000.00 advance. The respondent required the existing advance of $35,000.00 to be repaid and a new advance of $45,000.00 (plus legal costs of $213.00) for a term of four months was made on 15 June 1983. Again the loan agreement and the new memorandum of mortgage are to be read together as comprising the disclosure documents.

Mr Cameron died of injuries sustained in a motor racing accident in October 1983. On 10 February 1984 the appellants made a payment to the respondent of $20,000 in reduction of the principal sum. On or about 30 May 1984 the respondent made demand for payment by the appellants of the sum of $27,190.94 being the amount required to repay the balance of the loan monies and for payment of interest of

$28.36 per day from 25 May 1984 down to the date of repayment. The plaintiffs declined to make payment because they contended that pursuant to s.25 of the Act their liability to repay was wholly or partially extinguished by the penalty payable by the respondent as a consequence of its failure to make full initial disclosure required by the Act. Upon the sale of the farm property over which security had been given the appellants were obliged to pay to clear the mortgage on 7 February 1985, the sum of $35,585.94 which included interest on the balance owing down to that date, the respondents having refused to accept proposals made by the appellants to have the mortgage discharged on their payment of the amount due to a stakeholder or into court with a denial of liability pending resolution of the dispute. It was further alleged against the respondent that the respondent's refusal to accept repayment on these terms was an oppressive exercise of its rights. The respondent did however on receiving repayment in full undertake to pay whatever sum might be held by the court as payable to the appellants.

The findings of Gallen J can conveniently be set out as follows from the sealed judgment of the Court.

> "1. THE Defendant failed to comply with the disclosure provisions of the Credit Contracts Act 1981 ("the Act") in respect of the credit contract it entered into with KELVIN WILLIAM CAMERON deceased ("the deceased") on the 8th of July 1982. Such failure by the Defendant resulted from errors made in documentation and was not a deliberate attempt to avoid the consequences of the Act or to deceive the deceased.

2. THE advance of $10,000.00 made by the Defendant to the deceased in December 1982 was a modification contract in respect of which the Defendant failed to make disclosure as requried by Sections 17 and 20 of the Act.

3. IN all the circumstances of the case there was no oppression in respect of the credit contracts entered into between the Defendant and the deceased or any of them sufficient to justify a re-opening thereof pursuant to the Act.

4. PURSUANT to Section 32 of the Act the Defendant is entitled in all the circumstances of the case to full relief from the operation of Sections 25 and 26 of the Act provided:

(i) that no penalty interest payable pursuant to the credit contracts or any of them shall be charged by or paid to the Defendant

(ii) any penalty interest paid to the Defendant by the deceased or by the Plaintiffs shall be refunded to the Plaintiffs."

There is no appeal from the refusal of the judge to reopen the credit contracts on the ground of oppression and there has been no cross-appeal by the respondent from the judge's findings of a failure to comply with the disclosure provisions of the Act. In summary the judge described the errors made in the documentation as errors in drafting or clerical errors giving rise to breaches of a "technical" nature and of minimal significance to Mr Cameron who, as an experienced borrower, dealt with the respondent as a financier on equal terms. The appellants contend, in particular, that the judge was wrong in the way he regarded the finding of an error in the finance rate, as disclosed, and had wrongly exercised his discretion under s.32(1) in favour of the respondent.

The initial advance of $35,000 and the final advance of $45,000 were controlled credit contracts as defined in s.15, the creditor being a financier and the credit contract having been prepared by its paid adviser. The advance of $10,000 being a contract the only effect of which was to modify the terms of a controlled credit contract was not itself a controlled credit contract (s.15(1)(h)) but modification disclosure was required under s.17(1). There was a clear breach of this requirement and of ss.20 and 21 as no disclosure documents at all were supplied to Mr Cameron.

Turning now to the intitial disclosure of the two controlled credit contracts required by s.16(1) and the method of disclosure. In each case disclosure was made by two documents comprising a loan agreement with an attached mortgage. The loan agreement included the statement,

> "Incorporating initial disclosure under sections 16, 20 and 21 of the Credit Contracts Act 1981"

The mortgage document contained various references to the Credit Contracts Act and a clause which read,

> "The terms of this mortgage are to be read in conjunction with the Loan Agreement (incorporating Initial Disclosure under Sections 16, 20 & 21) and together constitute the disclosure required under s.21 of the Credit Contracts Act 1981."

The relevant provisions of s.21 are as follows,

"Disclosure documents - (1) Disclosure documents shall consist of one or more legible documents (which may be or include a copy of the contract) that -

(a) In the case of initial disclosure, modification disclosure, and continuing disclosure, contain all the information, statements, and other matters specified in the Second Schedule to this Act as disclosure requirements in respect of that kind of disclosure and contract; and

(b) ...

(c) Are not likely to deceive or mislead a reasonable person with regard to any particular that is material to the cntract; and

(d) ... "

The matters set out in the Second Schedule to the Act which require consideration in this case are the "finance rate" and the particulars in respect of "payments required".

The finance rate is defined in s.6. The relevant part of that section being as follows,

"6. Definition of "finance rate" - (1) in this Act, the term "finance rate", in relation to a credit contract, means the rate that expresses the total cost of credit as a percentage per annum of the amount of credit and that is -

(a) The annual finance rate, as defined in the First Schedule to this Act, for that contract (which may be rounded to the nearest quarter of one percent);"

It is necessary to set out at some length the relevant provisions of the first loan agreement and of the mortgage. The loan agreement,

"2. AMOUNT OF CREDIT:

Being:-

Principal Advanced	$35,000.00
Legal Fees	$ 213.00
Total Advanced	$35,213.00

I/We hereby accept a mortgage of $35,213.00. The date of advance shall be 8th July 1982 or the actual date the funds are uplifted whichever is earlier.

Interest runs from the date of the advance.

3. TOTAL COST OF CREDIT (OTHER THAN INTEREST):

Legal and charges (payable by the borrower at the time the loan is made to the creditor) $213.00.

4. INTEREST RATE:

Interest is charged at a flat rate of 7% per month and is payable monthly in advance and is due on the commencement date and on the same day of each calendar month thereafter. If payment is received within one calendar month of the dates on which each payment is due the interest rate is reducible to 3½% per month.

Finance rate: - Full rate 84% per annum
Reduced rate 42% per annum."

5. PAYMENTS REQUIRED:

The amounts, number and frequency of payments and due dates thereof (as ascertained at the date of the preparation of the disclosure):

(1) The following amounts are to be paid by the borrower to the creditor at the time the loan is made.
(i) Legal charges $213.00
(ii) Administration charges $ Nil

(2) Interest payments shall be paid by equal monthly instalments of $2,464.92 reducible to $1,232.46 if paid by the day of each month with a final payment of outstanding principal due on the 9th day of January 1983.

(3) The total advance namely $35,213.00 shall be paid on the day of 198 "

The loan agreement also contained the following default clause,

> "Default I/We agree to pay additional interest on any instalments in arrears at the rate of % per annum calculated from the date upon which any instalment should have been paid until actual payment, as that the whole of the moneys owing fall due for payment on default by the borrower in respect of any covenant contained in the security."

The loan agreement stated,

> "The terms of the contract not disclosed in Items 1 to 7 of this Disclosure (other than terms implied by law) are the terms contained in the attached mortgage."

The relevant provisions of the mortgage,

> "Principal Sum (being the amount of credit disclosed pursuant to the Credit Contracts Act 1981) $35,000.00
>
> Date of Advance: 8th July 1982
>
> The principal sum shall be available for uplifting by the mortgagor from the mortgagee on the date of advance, subject only to the mortgagor satisfying all security and other requirements of this mortgage. Interest shall commence on the date of advance whether or not the mortgagor uplifts the principal sum on that date.
>
> The amounts and descriptions of the components of the total cost of credit (other than interest):
>
> | | |
> |---|---|
> | Advance: | $35,000.00 |
> | Legal & administration charges | 213.00 |
> | | 35,213.00 |
>
> Interest rate: 3½ per cent per annum
> Penalty rate: 7 per cent per annum
> Finance rate: at reduced rate 42% per annum
> at full rate 84% per annum
>
> If the mortgagor fails to make any payment within 14 days after it has fallen due, then the mortgagor shall pay interest at the penalty rate instead of the interest rate as more particularly set out in clause 4."

The provisions of Clause 4 were as follows,

"Penalty Rates

4. If (1) the mortgagor fails to comply with the following specified terms of this mortgage, namely those terms which require payment of principal, interest, or other money due under this mortgage,

and (2) that failure to comply continues for 14 days after the date upon which compliance was due,
then (3) interest payable by the mortgagor on the principal sum is increased to the penalty rate.

(4) Interest at the penalty rate calculated as above is determined on a daily basis for the period beginning -

(a) Where the mortgagor has paid none of the payments required under this mortgage, on the date on which the mortgagee provided or stood ready to provide the principal sum; and

(b) In any other case, on the due date of the last payment required that (at the time the rate is increased) has been paid by the mortgagor,
and ending on the date on which failure to comply is remedied.

(5) To remedy failure of compliance, the mortgagor shall pay to the mortgagee all arrears calculated as aforesaid together with the mortgagee's legal costs (determined in accordance with clause 17) incurred in obtaining the remedy of the failure to comply."

The mortgage provided for the following payments to be made,

"Payments required Payments required to be made by the mortgagor to the mortgagee.

The amount of each payment is as follows:
First payment. One initial payment of $1,232.46 shall be made on the 8th day of July, 1982 ("First specified payment date")

Subsequent equal payments. Subsequently a total of six consecutive monthly each of $2464.92 reducible to $1232.46 if paid by due date.

Dates when those subsequent payments shall be made: ("subsequent specified payment dates")
on the 8th day of the months of August, September, October, November and December.

The final of those subsequent payments shall be made: On the 8th day of the month of January, 1983

Due Date (coincides with date of last subsequent payment): The principal sum (or as much of it as remains owing) shall be repaid by the mortgagor to the mortgagee on the 8th day of January, 1983."

Putting to one side for the moment whether the correct finance rate is shown in the disclosure documents, they are unsatisfactory in a number of respects, namely,

(a) there is a conflict between the provisions for payment of interest under the loan agreement and those under the mortgage. In the former document interest at 7% per month is payable monthly in advance but is reducible to 3½% per month if paid within one month. In the latter document interest is payable at 3½% per annum (sic) but if not paid within 14 days of due date, interest at the penalty rate of 7% per annum (sic) is payable. The rates of interest shown in the mortgage as "per annum" obviously should read "per month". Errors of this nature are in the category of drafting or clerical errors but the conflict in the periods of grace is not in that category;

(b) the loan agreement provides for a total advance of $35,213.00 and for payment by the borrower of the legal charges of $213.00 at the time the loan is made and also for the total advance including the said $213.00 to be paid on some date not stated in paragraph 5(3). The dates left blank in paragraph 5 of the loan agreement may be due to the advance not having been made at the time the agreement form was prepared but are not crucial

as the dates are supplied in the mortgage. The mortgage does not show the legal charges of $213.00 as included in the principal sum nor does it expressly provide for that amount to be advanced and then paid by the mortgagor at the time the loan is made. The mortgage does however show the total cost of credit as $35,213.00. The monthly payments of $2,464.92 reducible to $1,232.46 are calculated at the respective rates of interest on a total advance of $35,213.00 and not on the principal sum of $35,000.00;

(c) paragraph 4 of the loan agreement provides for interest to be paid in advance on the "commencement date" which is presumably the date of advance 8 July 1982 and each calendar month thereafter with it seems, according to paragraph 5(2), a final payment with outstanding principal on 8 January 1983. This makes a total of seven monthly payments of interest for a term of six months. The mortgage also provides for a total of seven monthly payments none being referred to as "interest" as they are in the loan agreement. The mortgage also makes no reference to interest being paid "in advance". Furthermore, while the loan agreement provides for a reduction in the interest rate if the interest due in advance is paid within one calendar month, the mortgage provides for an initial payment of $1232.46 on the date of advance and for six subsequent consecutive monthly payments of $2,464.92 reducible to

$1,232.46 commencing one month after the date of advance, the last being due on repayment of the principal sum (or balance owing) on 8 January 1983. There is a conflict in the mortgage itself as to payments being made at the "reduced rate". Initially it is said,

> "If the mortgagor fails to make any payment within 14 days after it has fallen due,"

then the penalty or full rate of interest applies (clause 4 is in similar terms) but under the heading of "Payments required" the monthly payments are reducible "if paid by due date";

(d) The loan agreement provided that the borrower shall have the right to repay the advance in full together with interest thereon for that calendar month on any monthly date provided for the payment of interest but the mortgage provided that the mortgagor has no right to make optional reductions of principal. Gallen J referred to these provisions as conflicting but while they can be read together it would have been preferable to combine these provisions in the mortgage. However, nothing turns on this as the respondent did in fact accept a payment of $10,000.00 in reduction of principal.

Turning now to the loan agreement and mortgage which relate to the second controlled credit contract, the loan agreement was the same basic form but the interest rates under paragraph 4 were 4½% and 3½% per month respectively and the finance rate 54% per annum "full rate" and 42% per annum "reduced rate". The advance of $45,213.00 was made on 15 June 1983, and $213.00 was payable by the borrower at the time the loan was made. The interest payments payable on the 15th day of each month were $2,034.59 each reducible to $1,582.46 each if paid by the 15th day of each month with a final payment on 15 October 1983 when the total advance of $45,213.00 was to be repaid. There is no conflict with the mortgage as it simply gives security for, in brief, all monies advanced by the mortgagee to the mortgagor in terms of the loan agreement. However, the loan agreement while providing for interest to be paid monthly in advance commencing on the date of advance with a reduction in the rate if paid within one calendar month, also provides for payment of interest at the lower rate if paid by the 15th day of each month and requires five payments in respect of a loan for a term of four months. Some of the criticisms which applied to the disclosure documents for the first controlled credit contract apply again.

The first loan agreement left blank the rate of interest in the default clause already set out but in the second loan agreement the rate is shown as 20% per annum. Gallen J did not make an express finding whether or not the penalty rates complied with s.40 of the Act but the appellants have

submitted that he must have found there was a breach as his judgment stated "that no penalty interest of any kind is to be charged or paid and if paid is to be refunded." Such an order is in keeping with s.40(4) and as it is not challenged we need not consider the matter further.

The principal issue in considering whether there had been disclosure as required by the Act in each of the two controlled credit contracts was whether the finance rates were correctly stated. For the appellants Mr E E Jones, "Fellow of the Institute of Actuaries of London and of Australia and a consultant actuary in Wellington for 15 years gave evidence that in his opinion based on the provision that interest was payable in advance the 7% monthly rate of interest gave a finance rate of 90.32% not 84% and the 3½% monthly rate of interest gave a finance rate of 43.5% not 42% for the first controlled credit contract and similarly monthly payments in advance at 3.5% per month under the second controlled credit contract gave a finance rate of 43.5% per annum. He did not give a finance rate for the higher rate of 4½% per month. His point was that the finance rate must be calculated at the commencement of the transaction before any payments are made, that is, he ignored the periods of grace whether it be one calendar month or 14 days. If however, the finance rate was calculated on monthly payments not payable in advance then he agreed with the finance rates of 84% and 42% respectively as disclosed. The respondent called Dr M H Smith a senior

lecturer in the mathematics department of the University of Canterbury. In his opinion the finance rate could not be divorced from the period of grace. His calculation of the finance rates at 84% and 42% as disclosed was based on interest payable in arrears, as allowed by a period of grace. He did not refer to the second controlled credit contract but on the basis of his calculation for the first, he would have again given a finance rate of 42% per annum for interest at 3½% per month payable in arrears.

Both experts claimed to have applied the formula in the First Schedule for calculation of the annual finance rate. They both included six monthly payments not seven as stated in the disclosure documents for the first controlled credit contract, Mr Jones taking seven payments to be a drafting error. Gallen J referred to the differing opinions of the two expert witnesses in these terms,

> "In the end, the answer to the question depends upon making some sense of what are contradictory provisions in the documents themselves. Putting the matter rather more simply than is perhaps acceptable to the experts, the answer depends upon whether or not the interest is payable in advance. The documents clearly refer to it being payable in advance, but in fact it was paid and accepted in arrear. If it is payable in advance, then the rate is 43.5%. If it is payable in arrear, then the rate is as specified, 42%.
>
> The long title of the Act indicates that inter alia its purpose is to ensure that all the terms of contracts are disclosed to debtors before they become irrevocably committed to them and to ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition. The conclusion in this case I think is inescapable, that disclosure as contemplated by the Act was not made in respect of the first loan. I also conclude that the failure to

> disclose as required by the Act was not a deliberate attempt to avoid the consequences of the Act or to deceive Mr Cameron, but was the result of errors made in the documentation. These errors result in the finance rate being at best ambiguous and in addition, the number of instalments payable by Mr Cameron were not correctly stated."
>
> ..."Next, there is a dispute over the categorisation and consequences of the arrangement when the indebtedness was reconstituted by way of the $45,000 loan. As in the case of the first loan, the loan agreement refers to the interest being paid in advance with in my view, the same consequences."

The judge has not endeavoured to interpret the contradictory provisions of the documents themselves and then to determine the "annual finance rate" by application of the definition in the First Schedule to the Act. He concluded that errors in the documentation resulted in the finance rate "being at best ambiguous". As the difference in the lower finance rate was only 1.5% he may not have felt called upon to do more than to find, as he did, that the extent of the non-disclosure was minimal. However, as payments at the lower rate of interest were not payable in advance but on the expiration of a period of grace, the finance rate of 42% as agreed by both experts for payments not due in advance, would appear to be the correct finance rate as disclosed.

The judge after holding that there was no oppression sufficient to justify reopening the contracts in terms of the Act said,

> "However, I have already concluded that the disclosure provisions of the Act were not complied with and the Act provides certain consequences in respect of such failures.

> In the event of such a finding, the defendant seeks an order under the provisions of s.32 of the Act. That section gives to the Court a discretion, but a discretion which must be exercised within the guidelines contained within the section itself and as far as possible, to ensure that the objects of the Act are met."

Subject to ss.31 to 33 the penalty prescribed by s.25 for failure to make initial disclosure and claimed by the appellants amounts to $36,102.73. The Act is intended to be self-policing, that is, if there are breaches the penalties apply unless relief is granted by the Court. They are heavy penalties in keeping with the objects of the Act which are set out in the long title of the Act and include,

> "An Act to reform the law relating to the provision of credit under contracts of various kinds in order to -
> (a) Prevent oppressive contracts and conduct;
> (b) Ensure that all the terms of contracts are disclosed to debtors before they become irrevocably committed to them;
> (c) Ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition;"

The respondent in its counterclaim sought relief pursuant to ss.31 and 32 in the event of a finding of failure to make disclosure in terms of the Act. The former section under the heading "Relief for inadvertent non-disclosure" provides for the penalty sections of the Act not to apply if the creditor meets four conditions. As the judge makes no reference to this section in his judgment we conclude it was not pursued and the respondent relied only on s.32 which is as follows,

"32. Power of Court to reduce penalty - (1) The Court may, on the application of a creditor under a credit contract, order -

(a) That any of sections 24 to 28 of this Act shall not apply in respect of a credit contract, or modification contract, or any class or classes of such contracts; or

(b) That an amount for which liability has been extinguished pursuant to any of those sections be reduced to an amount specified by the Court.

(2) In deciding whether to make such an order, the Court shall have regard to the following matters:

(a) Whether the creditor is a financier:

(b) The extent of, and the reasons for, the non-disclosure:

(c) The extent to which a debtor or guarantor has been prejudiced by the non-disclosure:

(d) Such other matters as the Court thinks fit.

(3) Any order under this section may be made on such terms and conditions as the Court thinks fit."

This section gives the Court a discretion to order that the penalty sections do not apply or that the penalties which go to extinguish liability under a controlled credit contract, be reduced to an amount specified by the Court. The Court in exercising that discretion must have regard to the specific matters set out in para's (a),(b) and (c) to s.32(2) and to such other matters as the court thinks fit.

This is a wide discretion and should be exercised to do justice between the parties while at the same time setting standards which, particularly for financiers, ensure the objects of the legislation are promoted and achieved. The Act expects reasonable standards of commercial practice to be maintained and the Court should support that principle. It may be necessary in some cases where there has been a flagrant disregard for the provisions of the Act to give the

Act "teeth" by upholding the penalties as a deterrent to that creditor and others. On the other hand the breach may be excusable and justify complete remission of the penalties under s.32(1)(a). Of course, there will be cases where some relief will be appropriate. It is entirely a matter for the Court's discretion having regard to the matters set out in s.32(2) and to the facts of the particular case.

In this case the respondent is a financier as defined in s.2(1) being a person who carries on the business of providing credit. A high standard of performance might be expected of such a person. In this case the respondent sought and relied on its solicitor to comply with the Act which came into force on 1 June 1982, only a little over one month before the first contract. It is clear from the documents themselves that initial disclosure under ss.16, 20 and 21 of the Act was very much in the mind of the draftsman. Nevertheless, the standard of drafting was unsatisfatory in the respects we have mentioned and generally amounted to a failure to comply with the Act. When viewed objectively the conflicting provisions were confusing and in our view likely to deceive or mislead a reasonable person in terms of s.21(1)(c). However, we agree with the finding of Gallen J that the breaches were not "a deliberate attempt to avoid the consequences of the Act or to deceive Mr Cameron". Indeed, there is no evidence that Mr Cameron was deceived. He was a successful businessman, no stranger to borrowing, well able to deal with the

respondent on equal terms. During his lifetime he raised no objection to his dealings with the respondent. In fact he had a continuing association which indicates he was well satisfied with the finance provided for his business by the respondent. It is important to note that Mr D M Sheard who acted as Mr Cameron's solicitor for eight or nine years prior to the latter's death, gave evidence and admitted under cross-examination that there had been no prejudice to Mr Cameron by any non-disclosure. It appears from the evidence that interest payments were made and accepted in arrears in terms of a period of grace and not in advance. That being the case the finance rate of 42% as disclosed was in fact the rate which applied. As the judge said,

> "In this case, it seems to me that the parties bargained for a particular set of terms and in fact operated those terms over a period. Those seem to have been acceptable to Mr Cameron. There is no question or suggestion that he was misled in fact and for me now to substitute some other figure, would effectively be to impose what I might personally consider reasonable having regard to the circumstances. This would, I think, be an improper approach...
>
> ...in this case while the letter of the Act has in my view been broken, the spirit has not. The breaches were technical and did not result in any disadvantage to Mr Cameron."

The trial judge had the advantage of seeing and hearing Mr Sheard give evidence for the appellants and Mr Burberry a director of the respondent company.

The appellants have submitted that the judge acted under s.32(1)(b) which does not allow the penalty to be wholly remitted as may be ordered under s.32(1)(a). It is true

that the judge referred to this as an appropriate case for the Court "to reduce the penalty", but added, "the question then arises as to the extent to which this is proper". The order he made was within his powers under s.32(1)(a) and he did not refer to s.32(1)(b).

We have considered all the arguments of Mr Weston for the appellants, including what the judge described as the rather unco-operative attitude of the respondent to proposals regarding discharge of its mortgage without making repayment direct to the respondent. However, it was open to the appellants to make repayment to the respondent, save interest running and then make their claim against the respondent for the penalties under the Act. Our conclusion is that the judge considered each of the matters set out in s.32(2)(a)(b) and (c) and reached a decision which met the justice of the case. It has not been shown that he exercised his discretion on any wrong principle or gave undue weight to some factor or insufficient weight to another. We see no occasion to disturb his decision to grant the relief which he did to the respondent.

Finally there is an appeal from the judge's decision that it would be inappropriate for any order to be made as to costs. This again is an exercise of a discretion which we see no occasion to disturb. There were findings in favour of both parties but as the appellants failed to recover any penalties they may regard themselves fortunate that costs were not given against them. It is difficult to

see what real merit there was in their claim. Mr Burberry summed up the position of the appellants in these words in his letter of 15 May 1984 to their solicitors,

> "I would also place on record that Mr Cameron, who was a very capable and ethical businessman, had a very amicable relationship with this Company and would be really disgusted if he could read your letter."

The appeal is dismissed with costs of $1,500.00 to the respondent with reasonable disbursements including counsel's travelling and accommodation expenses (if any) as fixed by the Registrar.

G E Bisson J.

Solicitors

Brookman Stock, Christchurch for appellants
Rhodes & Co, Christchurch for respondent