SET 1

IN THE HIGH COURT OF NEW ZEALAND A. 539/83

AUCKLAND REGISTRY

BETWEEN M.E. TORBETT LIMITED

FIRST PLAINTIFF

A N D MURRAY EDWARD TORBETT

SECOND PLAINTIFF

A N D KEIRLOR MOTELS LIMITE

FIRST DEFENDANT

A N D HOWARD GASKIN

SECOND DEFENDANT

Judgment: 17 SEP 1984

Hearing: 13, 14, 15 and 16 March 1984 and further written submissions

Counsel: P.T. Finnigan for Plaintiffs
M.W. Vickerman for Defendants

FURTHER JUDGMENT OF CASEY J. RE SET-OFF AND COSTS

My attention has been drawn to the fact that I d not deal in my judgment of 30th March with the submission the Plaintiff that it was entitled to an equitable set-o against the debenture to Mr Gaskin of any damages awarde with a consequent effect on the calculation of intere thereunder. I overlooked this point. Plaintiffs' Couns relies on the judgment of Barker J. in Popular Homes Limit v. Circuit Developments Ltd. (1979) 2 NZLR 642. In t special circumstances of that case he found the claim of t Plaintiff and the Defendant were based on the same contra or flowed out of it and were directly connected with it, th satisfying the broader view on this right taken by t English Courts. However he thought that the facts met t more stringent test advocated by Spry on Equitable Remedi

(1971) p. 166 and in 43 ALJ 265, 268. He said in the latter:-

> " What must be established was such a relationship between the claim of the plaintiff at law and the claim of the defendant that the right of the plaintiff should be regarded in equity as dependent on satisfaction of the claim of the defendant. This would be the case where, for example, there had been not only fraud on the part of the plaintiff such as to give rise to a claim against him but that fraud had also led to the incurring of the obligation of the defendant."

In Parry v. Grice (1981) 2 NZLR 273 Thorp J. discussed the question at length, and I think demonstrated a preference for the logic of Spry's views. He was able to distinguish the facts in Circuit Developments, in which Barker J. had found that the mortgagor's loss had arisen directly from the breach by the mortgagee of its contract to make the funds available so that it could complete the project out of which repayment was contemplated. He found Samuel Keller Ltd. v. Martins Banks Ltd. (1970) 3 All E.R. 950 closer to the facts concerning him, and concluded that although the two claims arose out of the same transaction, the mortgagor's claim had no connection with the creation of the mortgage. It was simply a case in which the property purchased was less than its value as warranted by the vendor, to whom the mortgage was given to secure the balance of the purchase price.

I think rather different considerations apply here. The claim against the First Defendant, Keirlor Motels Ltd., succeeded in contract, and the damages were awarded in respect of the understatement of wages, which reduced the value of the business, resulting in an overpayment for goodwill in addition to the agreed overpayment for stock. Had the debenture been given back to that vendor company then the facts would have been similar to those in the last two cases cited and would have resulted in a similar finding

against equitable set-off. But the debenture was given to Mr Gaskin and I found fraud against him, which induced the Plaintiff to enter into the contract out of which the obligation to him arose. In the circumstances I think it would be unconscionable of him to enforce that security without making an appropriate allowance for the loss his conduct caused. Mr Finnigan accepted it should not be calculated at the full sum from day one of the Plaintiff taking possession because there was only an ongoing weekly loss due to the overstatement of wages. This strikes me as a fair approach and I accept his "averaging" calculation for an equitable set-off of one half the damages ($5,500), for the purpose of calculating the interest under that debenture. Plaintiffs' Counsel accepts this is the only relevance of the set-off claim. However, I do not think the stock overpayment and plant repairs are in the same category, as they are liabilities of the vendor company and cannot be said to "impeach" Mr Gaskin's debenture or make it unconscionable for him to enforce it without allowance for them. Counsel can doubtless make the necessary calculations and allowance of interest, but leave is reserved for any party to apply for further directions or orders as a result of this finding.

Costs

The Defendant's submissions on costs are misconceived. I confirm that my order is for High Court scale costs on $11,000. I fix the following amounts for those interlocutory items and disbursements on which Counsel could not agree:-

Costs	
Affidavit of documents	$ 75.00
Inspection	75.00

Application for further discovery and Bank Act orders	75.00
Injunction	100.00
Disbursements.	
Oath fees	5.00
Service fee subpoena	10.00
Photocopies	189.40

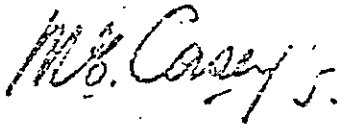
Witnesses' Expenses.

The Plaintiffs claim a substantial sum f witnesses' expenses. Undoubtedly specialist accountan investigation and advice was needed. Mace & Co. (the accountants) prepared two sets of accounts for use in t proceedings, the first dated 30th November 1983 anticipati a hearing on 14th November 1984, but adjourned at Defendant request pending the sale of the business. This delay w reasonable, but it meant that a further set had to prepared on 31st January 1984 for the hearing last March. The first set cost $639 and the second $992. Defenda make the point that the final set of accounts would have be needed anyway for tax purposes at the end of that financi year, when the business was sold. I think this is probab true; although the dates did not coincide with the end of t financial year they would have involved work that w eventually needed, although their special purpose sugges more attention might have been devoted to them than wou otherwise have been given.

The accounts were clearly needed to enable a tr position of the business to be presented to the Court. There is provision in para. 35(d) of Table C enabling t Court to allow "other necessary payments" by way disbursement and I award the Plaintiffs $850 under th heading.

The next dispute was over the expenses of Mr D.J. Ross, a Chartered Accountant called by the Plaintiff as an expert witness. They claimed his full fee of $1,825 plus disbursements of $24.23 for photocopying and postage. His charge-out rate was $64 per hour, and he spent 26.5 hours on preparation and two hours in Court. The Witnesses and Interpreters Fees Regulations, 1974 apply, and the amounts recoverable on his account are governed by the outdated figures in the scale. I have a discretion to authorise an increase if I consider that by reason of exceptional circumstances it is desirable to do so. I can find no such circumstances here and fix the appropriate maximum for Mr Ross' work in preparation and his attendance as a witness. I also allow the disbursements he claimed.

Finally, I reject the submission that the Defendants' undertaking to hold the proceeds of the debenture is analogous to a payment into Court justifying the exercise of a discretion about costs.



Solicitors:

J.T.H. Buxton, Auckland, for Plaintiffs
Keegan Alexander Tedcastle & Friedlander, Auckland, for Defendants