

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.16/82

783

BETWEEN

ROSS GRAEME WARE and
SHIRLEY JUDITH WARE both
of Katikati,
Horticulturists

First Plaintiffs

A N D

PETER DAVID ROMERIL MILLER
of Eltham, Solicitor and
NORMAN OWEN WELLS of
Motueka, Bank Manager

Second Plaintiffs

A N D:

BARRY ARTHUR JOHNSON and
AUDREY BERYL JOHNSON both
of Katikati, Orchardists

Defendants

Hearing: 28 June and 5 July 1984

Oral Judgment: 5 July 1984

Counsel: R S Chambers for 1st and 2nd Plaintiffs
R A Houston QC and T R Ingram
for defendants

(ORAL) JUDGMENT OF HENRY, J.

This motion came on for hearing before me on 28 June 1984 when, after it was part-heard, I adjourned it until today to enable the parties to investigate the possibility of achieving a resolution acceptable to the parties. That has not been possible, and it is therefore before me again today.

I record that I received, on behalf of the Plaintiffs, three affidavits which were only filed today and which Mr Houston, for the defendants, was only able to peruse shortly prior to this resumed hearing. He objected to their receipt but I decided that the interests of justice required this motion to be determined and that I should read those affidavits to assist me in its determination. I indicated to Mr Houston, and I record now, that in doing so I take into account that there has been no opportunity for him to obtain full instructions of their content or to make any answers which could possibly be required on any of the factual matters raised in them. Nevertheless, as I indicated, my view is that the motion should now be determined.

On 16 December 1983, following a lengthy hearing, Prichard J. gave judgment for the plaintiffs against the defendants in a total sum of \$158,913.42. The defendants have appealed against that judgment and now move for a stay of execution under R.35 of the Court of Appeal Rules 1955. That rule vests in the Court a discretion to order a stay. But the general rule - and one which I accept has been applied normally - is that a stay will not be granted unless there is a real danger that repayment will not be available should the appeal ultimately be successful. A common practice of which I am aware is to require a successful plaintiff to give

security for repayment so as to protect the defendant's position. As I mentioned, that is the general rule. There are, however, in this case, what are in my view unusual and special circumstances which have been urged upon me by the defendants as justifying some relief from the operation of that general rule.

The action involved the sale of a kiwifruit orchard from the Defendants to the Plaintiffs and part of the purchase price was secured by two mortgages back to the Defendants, the principals of which total \$250,000.00 and which are due for repayment in June of 1985. The defendants have offered to pay the whole of the judgment by way of reduction of the principal sums owing under those mortgages. This proposition is not acceptable to the Plaintiffs, who are concerned as to their own cash-flow situation and are said to be reliant on the damages awarded to ameliorate their present liquidity position which, it is contended, has arisen by reason of the factors which gave rise to the claim which was litigated.

It is submitted on behalf of the Plaintiffs that they are entitled to what has been referred to as "the fruits of judgment". In my opinion, there is merit in that submission, particularly when regard is had to the costs incurred in the litigation to

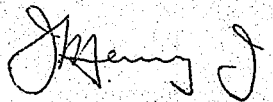
date and the responsibilities for those as well as other liabilities which are due by the plaintiffs. But I think that the Court should also take into account the unusual circumstances to which I have referred, and the existence of that cross-debt, as I term it, even though it is not presently payable.

I have given careful consideration to all that Mr Chambers has said and to all which has been urged upon me by Mr Houston on behalf of the Defendants. In these particular circumstances, I have come to the conclusion that the proper course to adopt in the exercise of the Court's discretion is to grant a stay, but to grant it on conditions.

There will accordingly be an order staying execution but conditional upon the Defendants paying to the Plaintiffs the sum of \$75,000.00 - and I interpolate here that in fixing that amount I have taken into account what I have been told from the bar as to a partial release of chattels being agreed to on payment of a sum of \$16,000.00. That payment of \$75,000.00 to which I have referred is required to be made by Friday, 10 August 1984. The order is further conditional upon the Defendants accepting, in reduction of the principal owing under the mortgages or either of them to the Defendants, from the Plaintiffs of an amount equivalent to

the balance of the judgment debt. Failing payment at that date, or failing acceptance of the second condition mentioned, the order for stay will be discharged but only upon the Plaintiffs first giving security to the satisfaction of the Registrar for the repayment of the judgment debt and costs. I accept what Mr Houston has told me as to the intention of the Defendants to prosecute the appeal without delay and to enable the Plaintiffs to monitor that, leave is reserved to apply further.

In the circumstances, it is appropriate for an award of costs to be made in favour of the Plaintiffs, and these I fix at \$500.00.



Solicitors:

Holland Beckett & Co., Tauranga, for 1st and 2nd Plaintiffs
Clark & Gay, Waihi, for defendants