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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 353/82

File

BETWEEN MARAC FINANCE LIMITED a duly incorporated company having its registered office at Marac House, 107 Albert Street, Auckland, Financier

Plaintiff

A N D ALEXANDER SAMUEL PETERS of Auckland, Company Director and CLARK RICHARD THOMPSON of Auckland, Company Director and ARNOLD HUBERT SMITH of Auckland, Company Director

Defendants

Hearing: 27th and 28th August, 1984.

Counsel: M. C. Black and P. H. McCoskrie for Plaintiff.
A. C. Roberts for A. S. Peters.
A. Grove for C. R. Thompson.

Judgment: 12 NOV 1984

JUDGMENT OF TOMPKINS, J.

THE ACTION:

The Plaintiff claims from the three Defendants $18,811.97, being the outstanding balance, including interest, claimed to be due in respect of a loan made by the Plaintiff to Design Com Ltd. ("Design Com") and guaranteed by the three Defendants.

The third named Defendant, Mr. Smith, has not been served with the proceedings. He is now believed to be somewhere in Australia. He was therefore not represented at the hearing.

BACKGROUND:

All three Defendants were employees of Design Com. The second and third named Defendants were also directors.

On the 20th August, 1979, the Plaintiff lent $37,000 to Design Com. This loan was secured by an instrument by way of security bearing that date. The asset charged was printing machinery owned by Design Com. The three Defendants were parties to the instrument by way of security as guarantors.

The sum secured by the instrument was $58,275, being the principal sum advanced of $37,000 and the interest charge totalling $21,275. The sum secured was repayable by sixty monthly payments of $971.25, commencing on the 20th September, 1979. The interest charge represented an effective interest rate of 19.56%.

Design Com paid the monthly instalments up to and including that due on the 20th March, 1980. The amount thereby paid was $6,798.75. It defaulted on the monthly instalment due on the 20th April, 1980, and for each instalment thereafter.

On or about the 23rd April, 1980, Design Com was placed in liquidation. Mr. J. L. Vague was appointed liquidator. He proceeded to realise the Company's assets, including the printing machinery against which the Plaintiff's loan was secured. On the 16th June, 1980, the liquidator entered into an agreement with a Mr. Kale as trustee for a company to be formed, pursuant to which the bulk of Design Com's assets were sold as a going concern. Included in the sale was the printing machinery charged by the instrument by way of security. The price for that machinery is recorded in the agreement at $27,500.

The sale transaction having been settled, on the 11th August, 1980, the liquidator's solicitors sent to the Plaintiff $27,500 plus interest of $446.08 from the 1st July, 1980, to the 8th August, 1980. In return they sought and in due course obtained a memorandum of satisfaction releasing the instrument by way of security. This memorandum was registered

in the Companies Office on the 10th September, 1980.

The Plaintiff then sought from the Defendants payment of the balance of the principal sum and interest still outstanding. The Defendants having declined to pay, these proceedings were commenced.

DEFENCES:

The defences put forward on behalf of Mr. Peters and Mr. Thompson were these:-

(1) The liability of the Defendants under their guarantee was extinguished by the registration of the memorandum of satisfaction.

(2) That in February, 1980, it was represented to Mr. Peters by the Plaintiff's agent that he would be released from his personal guarantee.

(3) That on or about the 28th August, 1979, it was represented to Mr. Thompson by the Plaintiff's agent that he would be released from his personal guarantee.

(4) If the Defendants be liable to the Plaintiff, the amount of their liability should be reduced because the Plaintiff acquiesced in the liquidator selling the printing machinery secured by the instrument by way of security at less than its market value.

THE REGISTRATION OF THE MEMORANDUM OF SATISFACTION:

The memorandum of satisfaction made available by the Plaintiff to the liquidator and registered in the Companies Office on the 10th September, 1980, is dated the 8th August, 1980, was executed under the Plaintiff's common seal, and reads:-

" MEMORANDUM OF SATISFACTION OF CHARGE.

MARAC FINANCE LIMITED, a duly incorporated company having its registered office at Auckland, the grantee under and by virtue of an Instrument by Way of Security dated the 20th day of August 1979 a copy of which was registered in the Companies Office at Auckland on the 29th day of August 1979 HEREBY

> ACKNOWLEDGES that it has received all moneys intended to be secured thereby and HEREBY CONSENTS to the entry of a Memorandum of Satisfaction of such charge. "

Mr. Roberts, for Mr. Peters, and Mr. Grove, for Mr. Thompson, in support of their contention that the registration of this memorandum of satisfaction extinguished the Defendant's liability under their guarantee, relied on s.43 of the Chattels Transfer Act, 1924. It provides:-

> " 43. From and after the filing of any such memorandum, the debt or charge created by the instrument shall be vacated to the extent specified in the memorandum and the interest of the grantee in the chattels expressed to be discharged shall vest in the person for the time being entitled to the equity of redemption therein, but so far only as such interest is expressed by the memorandum to be determined and subject to any lien or equity affecting the chattels. "

The reference in s.43 to "such memorandum" refers to s.42. Subs.(1) provides:-

> " (1) In the case of an instrument by way of security, upon the production to the Registrar of a memorandum of satisfaction in the form numbered (5) in the First Schedule hereto or to the like effect, signed by the grantee thereof or his attorney, discharging the chattels comprised in such instrument or any specified part thereof from the moneys secured thereby or any specified part thereof, or from the performance of the obligation thereby secured or any specified part thereof, and on production of such instrument . . ., the Registrar shall file such memorandum and make an entry thereof in the register book on the page where the instrument is registered. "

Counsel for Mr. Peters and Mr. Thompson pointed to the wording of the Memorandum of Satisfaction and in particular the acknowledgment that the Plaintiff "has received all moneys intended to be secured thereby". That was "the extent specified in the memorandum" for the purposes of s.43 with the result that the whole debt or charge created by the instrument was vacated.

It was acknowledged that the Memorandum of Satisfaction did not correctly state what had occurred since, of course, the Plaintiff had not received all moneys intended to be secured by the instrument by way of security. But it was contended that s.43 had the result submitted despite the apparent error in the Memorandum of Satisfaction.

There was considerable argument concerning the effect of s.43 and the wording of the Memorandum of Satisfaction. But I am satisfied that this defence cannot succeed for a reason not referred to by any counsel in argument.

The charge with which the Memorandum of Satisfaction was concerned was a charge created by a company incorporated under the Companies Act, 1955. S.2 of the Chattels Transfer Act, 1924, expressly provides that "instrument" does not include charges created by a company incorporated under the Companies Act, 1955. So when s.43 refers to the debt or charge created "by the instrument", it can only be referring to an instrument under the Chattels Transfer Act, 1924. The instrument by way of security in the present case was not such an instrument. Therefore s.43 cannot apply in the circumstances of the present case.

Where the charge is created by a company the position is governed by s.102 of the Companies Act, 1955. Subs.(2) provides that the section applies to charges created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act, 1924. S.107 provides for the entry of a memorandum of satisfaction on the register, but it does not contain nor is there elsewhere in the Companies Act a provision equivalent to s.43 of the Chattels Transfer Act.

Since this aspect was not argued before me, on the

7th September, 1984, I issued a memorandum to counsel inviting their submissions on whether s.43 can apply to this memorandum of satisfaction. This invitation has not been accepted. In the absence of any submissions to the contrary I conclude that s.43 does not apply.

Alternatively, it was pleaded by the second named Defendant that the giving by the Plaintiff and the subsequent registration of the memorandum of satisfaction resulted in the Plaintiff being estopped from claiming that there is any money still due under the instrument by way of security. This allegation was not pursued by Mr. Grove in his submissions, presumably because the only type of estoppel to which the memorandum of satisfaction could relate was estoppel by deed. Such an estoppel can only bind the parties to the deed, or one or either of them: 16 Halsbury's Laws of England, 4th Ed., 1577. None of the Defendants were parties to the memorandum of satisfaction.

The first defence arising out of the memorandum of satisfaction therefore fails.

THE DEFENDANT ALEXANDER SAMUEL PETERS:

It was contended on behalf of Mr. Peters that in February, 1980, the Plaintiff's agent represented to him that if he obtained a letter of indemnity from Arnold Hubert Smith, a director of Design Com, Mr. Peters would be released from his personal guarantee. This letter of indemnity was obtained. Mr. Peters claimed to have acted in reliance on the representation. He pleaded estoppel as a defence to the Plaintiff's claim.

In February, 1980, Mr. Peters resigned from his position with Design Com. He thereupon set up a new company, also involved in the typesetting business, called A. & J. Typesetters Ltd.

In the course of setting up the new company Mr. Peters was advised by his solicitor that if he had guaranteed any loans with Design Com then he ought to seek a release from those guarantees.

Mr. Peters got in touch with Mr. Reid, an employee of the Plaintiff. During 1979 he was the Plaintiff's senior finance representative at its Newmarket Branch. It was he who was responsible for negotiating on behalf of the Plaintiff the original advance to Design Com. By February, 1980, he had been transferred to the Plaintiff's New Lynn Branch as manager. Mr. Peters went to see him because he knew him as the result of the Design Com transaction. The primary purpose of the visit was to negotiate finance for A. & J. Typesetters Ltd. But while he was there there was a discussion between him and Mr. Reid concerning his guarantee of the Design Com advance. Mr. Peters raised the possibility of a release of this guarantee. There was a conflict of evidence on what followed. Mr. Peters says that Mr. Reid told him that to be released from his guarantee he would need to get a letter from the third named Defendant indemnifying him (Mr. Peters) against any recourse the Plaintiff might have. Mr. Reid denies that he gave to Mr. Peters any indication that the guarantee would be released. On the contrary, he says that he told Mr. Peters that the guarantee could not be released but that if Mr. Peters wanted to protect himself then the best way would be to obtain an indemnity from the third named Defendant.

Mr. Peters then arranged for this indemnity. It was prepared by Mr. Smith's solicitors. It is in these terms:-

" TO: Alexander Samuel Peters,
Unit 12,
48 McLeod Road,
HENDERSON.

In consideration of your resigning as a Director of Design Com Limited and transferring your shares in that company.

I, ARNOLD SMITH of Auckland, Company Director hereby will save harmless and keep indemnified you and your estate from and against all debts and liabilities whatsoever arising from personal guarantees that you have given in your capacity as a Director of Design

Com Limited including but not exclusive of personal guarantees given to MARAC FINANCE LIMITED and the A.N.Z. BANK.

DATED this 29th day of February, 1980.

(Signed) ARNOLD SMITH. "

Armed with this indemnity Mr. Peters returned to Mr. Reid. He showed the indemnity to Mr. Reid who read it. According to Mr. Reid he then said that the indemnity was all right. According to Mr. Peters, Mr. Reid said that that is what he needed. In any event the indemnity was left with Mr. Reid and remained on the Plaintiff's files.

Early in 1981 (the evidence does not establish the date) Mr. Peters was approached by Mr. Lategan, the Plaintiff's credit manager, who indicated that the Plaintiff may be calling on Mr. Peters under his guarantee. By letter dated the 11th February, 1981, Mr. Peters' solicitors wrote to the Plaintiff reciting the events as Mr. Peters considered them to be, claiming that Mr. Reid had represented that upon the indemnity from Mr. Smith being obtained, Mr. Peters would be released from his guarantee. The Plaintiff replied by letter of the 12th May, 1981, denying that there had been any representation that Mr. Peters was to be released.

I make these findings of fact. There were discussions between Mr. Peters and Mr. Reid concerning the possible release of Mr. Peters' guarantee. Mr. Reid did not accede to this request. I accept his evidence that he told Mr. Peters that the guarantee could not be released and that all Mr. Peters could do was to obtain an indemnity from Mr. Smith. I make this finding primarily because of the events that occurred. To release Mr. Peters from his guarantee and at the same time to require Mr. Peters to obtain from Mr. Smith an indemnity against Mr. Peters' liability does not make sense. If the guarantee were to be released Mr. Peters would have no liability. So obtaining the Smith indemnity would be a waste of time. But, on the contrary, if the Plaintiff was not prepared to release its guarantee, then the

advice Mr. Reid gave to Mr. Peters certainly makes sense. In the absence of a release the next best thing Mr. Peters could do would be to endeavour to protect himself by the Smith indemnity. I accept that on these findings it is a little difficult to understand why the Smith indemnity was handed over to Mr. Reid. A possible explanation is that if the Plaintiff were required to call on the Peters guarantee they would then at least be aware that Mr. Peters was entitled to be indemnified by Mr. Smith. In any event, I do not find the passing of the Smith indemnity to Mr. Reid to be a reason to depart from what I otherwise consider the effect of those discussions to have been.

Mr. Peters has thus failed to establish the representation upon which this defence relies. It therefore fails.

THE DEFENDANT CLARK RICHARD THOMPSON:

It was contended on behalf of Mr. Thompson that on or about the 28th August, 1979, the Plaintiff's agent represented that he would be released from his personal guarantee.

The advance to which the guarantee is related was made on the 20th August, 1979. Four days later, on the 24th August, 1979, Mr. Thompson was handed a letter signed by Mr. Smith as Governing Director of Design Com advising him that at a meeting of directors that day it was decided that he would be removed from office as a director. The letter also advised that Mr. Thompson's services as financial adviser and consultant were terminated as from that day. He was asked to leave his key with Mr. Smith as he left.

Mr. Thompson was naturally concerned about the guarantee he had given on behalf of the company four days before. He spoke to Mr. Reid who, as I have said, was then the senior finance representative of the Plaintiff at its Newmarket branch. He, of course, knew Mr. Reid as the result of the negotiations

that had led up to the advance just completed. He told Mr. Reid what had occurred. He asked what he could do to be released from his guarantee. He expressed to Mr. Reid his very considerable concern because, of course, he was no longer going to have any involvement in Design Com. Mr. Reid suggested to him that he should prepare a letter withdrawing his guarantee, then call to see Mr. Reid with it. This Mr. Thompson did. The letter he wrote reads:-

"

28 August 1979

The Manager,
Marac Finance Ltd.,
NEWMARKET

Attention Michael Reid

DESIGN COM LTD

Dear Michael,

The undersigned no longer has any financial interest in the above named company and accordingly withdraws his guarantees given in respect of a yellow Mirage Registered No. - , a Bill of Sale over 2 keyboards, a Correctem, a V-I-P unit and a Camera Processor.

This withdrawal is effective from the 24th August 1979.

Yours faithfully,

Clark Richard Thompson

"

He called to see Mr. Reid. He said they discussed the position for about an hour and a half. He said that Mr. Reid told him that he was now released from his guarantee and that the letter would be held on the Plaintiff's file evidencing this.

Mr. Reid acknowledged the initial approach from Mr. Thompson and his concern about the guarantee. He could not expressly recall the subsequent interview that Mr. Thompson described - he thought that the letter had been left at the office, but added that he was not clear. He acknowledged that he did not say anything to Mr. Thompson to indicate to him that

the withdrawal of the guarantee set out in the letter was ineffective.

I accept Mr. Thompson's account of the events that occurred. Having been peremptorily dismissed from his position, both as a director and an employee of Design Com, it is natural that he would have been concerned about the guarantee he had given only a few days before. Then the letter of the 28th August, 1979, accords with his account of the events that occurred. The only purpose in writing the letter would be in support of his request to be released. Mr. Reid retained the letter. He did not reply to it in writing. This was, I find, because he had no reason to since he had verbally acceded to the request by Mr. Thompson to be released. After August, 1979, Mr. Thompson took no further part in the management of Design Com, nor did he evince any interest with the Plaintiff concerning the state of Design Com's indebtedness. This too is consistent with his belief that he had been released from his guarantee. Further, in August, 1979, the Plaintiff believed Design Com to be a good risk. It was also apparent that of the three guarantors it was Mr. Smith who was financially the most substantial and whose guarantee at that time was considered the most significant.

Mr. Reid said that he did not have authority from the Plaintiff to release the guarantee. The relevant principle is as stated in 16 Halsbury's Laws of England, 4th Ed., para. 729:-

> " Where an employee, whilst acting in the ordinary course of his employment on his employer's behalf, makes a contract which falls within the apparent scope of his authority, the employer cannot escape liability on the ground that he did not authorise the making of the contract, nor even on the ground that he forbade his employer to make it. "

Mr. Reid, when he made the representation that Mr. Thompson was released from his guarantee, was acting in the

ordinary course of his employment on the Plaintiff's behalf. He was the person, as far as Mr. Thompson was concerned, who had set up the whole transaction on behalf of the Plaintiff. When the representation was made he was the Plaintiff's finance representative at the Newmarket branch. In my view the making of a statement such as that falls within what would have been the apparent scope of Mr. Reid's authority at the time it was made. Indeed it was not submitted by Mr. Black, for the Plaintiff, that the Plaintiff was not bound by this representation - rather it was the Plaintiff's contention that the representation was not made.

For these reasons I am satisfied that on or about the 28th August, 1979, Mr. Reid, as agent of the Plaintiff, represented to Mr. Thompson that he would be released from his personal guarantee. The Plaintiff is bound by whatever may be the legal consequences of that representation.

The issue, therefore, is whether the representation gives rise to a promissory estoppel upon which Mr. Thompson can rely as a defence to the Plaintiff's claim.

Mr. Thompson in his statement of defence did not plead a promissory estoppel as an affirmative defence. But the issue was clearly raised in evidence and submissions. No objection was taken by the Plaintiff to the absence of an express pleading. If a promissory estoppel is the logical consequence of the facts put forward and proved without objection at the hearing, then I do not consider that the Court should reject the defence because of a defect in the pleadings (Harnam Singh v. Jamal Pirbhai (1951) A.C. 688, J.C., Lord Radcliffe at 700).

In my view the representation by Mr. Reid to Mr. Thompson that Mr. Thompson was now released from his guarantee was a clear promise, the making of which by Mr. Reid on behalf of the Plaintiff and the reliance placed on it by Mr. Thompson,

makes it inequitable to allow the Plaintiff to insist on its strict legal rights under the guarantee. It was a statement that was intended to affect the legal relations between the Plaintiff and Mr. Thompson in that it was intended to release him from the legal obligation he would otherwise have to the Plaintiff under the guarantee.

For the defence to succeed Mr. Thompson must show that he was led by the attitude of the Plaintiff to alter his own position (Commissioner of Inland Revenue v. Morris (1958) N.Z.L.R. 1126, C.A. at 1136).

Mr. Thompson holds a Bachelor of Commerce degree. He is an accountant by qualification and training. His position with Design Com involved responsibility for that company's finances. He had known Mr. Smith for a number of years. He regarded Mr. Smith as a good salesman, but he needed financial assistance and administrative control. At the interview with Mr. Reid at which the representation was made, he suggested to Mr. Reid that the Plaintiff might be well advised to keep a close look on Design Com's financial position, particularly because of his departure.

Following receipt of Mr. Reid's assurance at the interview on the 28th August, 1979, Mr. Thompson took no further interest in Design Com's fortunes generally, nor in the plant the subject matter of the security in particular. Since his direct connection with the company had been severed, and since he considered himself released from any possible obligation as guarantor of the instrument by way of security, he had no reason to do so. He said in evidence, and I have no reason to doubt, that had he not received what he considered to be a release from his guarantee, then he would have conducted himself differently over the period from August, 1979, until the Plaintiff claimed against him under the guarantee. Without the release he would

have had a real interest in Design Com's finances and, as he said, he would have wanted then to know what was going on with Design Com itself and also with that company's dealings with the Plaintiff.

In Grundt v. The Great Boulder Pty. Gold Mines Ltd. (1938) 59 C.L.R. 641, Dixon, J. said in a passage at p.674 that has been frequently cited subsequently -

> " One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. "

I consider that Mr. Thompson has established that in taking no further interest in the affairs of Design Com and its dealings with the Plaintiff over the period from the 28th August, 1979, until the claim was made on him by letter dated the 12th May, 1981, for the deficiency still due following the sale of the plant by the liquidator, Mr. Thompson did act to his detriment in the sense explained by Dixon, J. in the passage I have cited. Design Com had gone into liquidation on the 22nd April, 1980. The plant had been sold by the liquidator on the 16th June, 1980, after consultation with, and obtaining the approval of, the Plaintiff. Had Mr. Thompson not believed that he had been released from his guarantee, then I consider it likely that he would have endeavoured to play some role in these events if only

in an attempt to protect his own position. But he did not do so in reliance on the promise he had received.

For these reasons I consider that Mr. Thompson's defence based on a promissory estoppel succeeds. The Plaintiff's claim against him therefore fails. This conclusion makes it unnecessary for me to deal with Mr. Grove's alternative submission that the contract between the Plaintiff and Design Com, and including the guarantee, should be re-opened as oppressive within s.10 of the Credit Contracts Act, 1981.

THE SALE OF THE PLANT SECURED BY THE INSTRUMENT:

It was submitted by both Defendants (a submission that remains relevant to Mr. Peters' liability) that the amount of their liability should be reduced because the Plaintiff acquiesced in the liquidator selling the printing machinery secured by the instrument by way of security at less than its market value.

The printing machinery is thus described in the schedule to the instrument:-

" 1 x Mergenthaler Veriable Input Photosetter
Model 4836-1X Serial No. 175

1 x Mergenthaler Correcterm Model M/100
Serial No. 699

1 x Linotype - Paul Ltd Calculating Key Board
plus punch and accessories Serial No. 1110

1 x Linotype - Paul Ltd Calculating Key Board
plus punch and accessories Serial No. 1022

1 x Kodak Redimatic Processor Model 420A
Serial No. 2149.

"

Eleven days before the making of the advance, and apparently for the purposes of establishing the value of the plant to be secured, Design Com had obtained from A. M. Satterthwaite & Co. Ltd. a letter dated the 9th August, 1979,

valuing the machinery at a total of $63,000. This valuation was provided to the Plaintiff and accepted as evidence of the value of the equipment for security purposes.

On the 16th June, 1980, Morrison Printing Inks & Machinery Ltd. prepared a valuation of all the assets of Design Com valued as a going concern. Included in the assets valued was the machinery subject to the instrument. The valuation valued that machinery at $49,630. This valuation was obtained by the persons who were then considering purchasing the business of Design Com from the liquidator.

On the same day, the 16th June, 1980, the liquidator entered into an agreement with Donald Terence Kale, as trustee for a company to be formed, selling the business of Design Com as a going concern. Included in that sale is the machinery charged by the instrument, the price for which is recorded in the agreement at $27,500. The liquidator, prior to entering into the agreement, obtained the assent of the Plaintiff to the total price and the prices allocated to the different aspects of the business, including the secured machinery. The liquidator, Mr. Vague, gave evidence. He is a chartered accountant, experienced in liquidations and receiverships. Following his appointment as liquidator of Design Com he set about endeavouring to sell the business as a going concern. He considered that a sale of that kind is likely to produce better results than selling the assets individually. He dealt with about a dozen potential purchasers. He received an initial offer for the secured machinery of $20,000. He was then negotiating at $24,000. He finally entered into the agreement including the sale of the machinery at $27,500. He considered that that was the best price obtainable for the machinery in the circumstances.

Mr. Swift, the author of the Satterthwaite valuation, also gave evidence. He said that the value of machinery of this

kind can fluctuate considerably, particularly if new improved models have come on to the market. He expressed the opinion that the price obtained by the liquidator of $27,500 a year after he had valued the machinery at $63,000, was reasonable.

Mr. Buchanan, the author of the Morrison valuation, also gave evidence. It transpired that Mr. Buchanan himself did not assess the valuations contained in the Morrison valuation. He arrived at the figures after discussions with others in his company. Also he did not inspect the machinery. Placing a valuation on machinery of that kind was not within his area of expertise. In these circumstances I cannot place much weight on the Morrison valuation.

Looking at the whole of this evidence, I do not consider that it has been established that the Plaintiff acquiesced in the liquidator selling the machinery at less than its market value. I am satisfied that Mr. Vague, faced with the task of realising the assets of a business in liquidation, went about that task in a proper professional manner and that he obtained the best price that he then could. Hence I find no reason to reduce the amount claimed on this ground.

CONCLUSION:

There was otherwise no challenge to the Plaintiff's calculation that the balance due under the instrument as at the 20th April, 1982, was $18,811.97. There was no argument addressed to me on whether the Plaintiff is also entitled to interest accruing on that sum from the 20th April, 1982, to the date of judgment at a daily rate of $10.08 as claimed in para. 13 of the statement of claim, or whether the Plaintiff is restricted to interest at the rate prescribed in the Judicature Act, 1908. If the Plaintiff's right to interest at the rate claimed is challenged by Mr. Peters, then counsel may submit written

submissions. If not, then the judgment for the Plaintiff against Mr. Peters will be for $18,811.97, plus interest calculated as claimed. The formal entry of judgment is deferred until this interest issue is resolved. In addition the Plaintiff is entitled to costs according to scale, and witnesses expenses and disbursements to be fixed by the Registrar.

Mr. Thompson is entitled to judgment against the Plaintiff, together with costs calculated on the same basis.

Solicitors:

Rudd, Garland & Horrocks, Auckland, for Plaintiff.

Howard-Smith & Co., Auckland, for A. S. Peters.

Anthony Grove & Darlow, Auckland, for C. R. Thompson.