IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

File

Set 3

A. No. 821/84

BETWEEN LANCE YUILL BAILLIE of Auckland, Company Director

PLAINTIFF

s4(1) Compromise

A N D CBA FINANCE LIMITED a duly incorporated company having its registered office at 100 Symonds Street, Auckland, 1, Financier

FIRST DEFENDANT

A N D ALLAN ROBERT HAWKINS of Auckland, Company Director

SECOND DEFENDANT

A N D PETER REGINALD HOWELL and JOHN GORDON FORSYTHE both of Auckland, Chartered Accountants

THIRD DEFENDANTS

Hearing : 16th August 1984.

Counsel : Jenkins for Plaintiff
Curry and Catran for Defendants

Judgment : 22 November 1984

JUDGMENT OF SINCLAIR J.

On the 13th August 1984 the plaintiff obtained an injunction against the defendants restraining the defendants from :-

(a) Taking any step to exercise any of its rights or remedies pursuant to an Instrument by Way of Security over the motor launch Manana.

(b) Taking steps to file confessions of judgment signed by the plaintiff in certain stated actions.

(c) Applying to enter judgment by default in respect of the actions referred to in (b) above.

(d) Taking steps to file confessions of debt signed by the plaintiff in respect of the plaintiff's guarantees of certain specified loan account with the first defendant.

The application for injunction was adjourned for hearing until the 13th August 1984 but when the order was originally made it was stated by the Judge who made the order that it was without prejudice to any parties' rights. When the matter came before the Court again on the 13th August 1984 the hearing of the injunction was adjourned until the 16th August 1984 and the interim was extended until that date.

On the 16th August 1984 I heard the application for an injunction and it was part heard and adjourned by reason

of the fact that there was insufficient time to complete the hearing on that date. Due to the pressure of other fixtures I was unable, on the 26th August 1984, to fix another date to complete the hearing and as the plaintiff's counsel had completed his submissions I required the defendants' counsel to file his submissions in writing indicating that if the plaintiff wished to file any submissions in reply they ought to be filed within a reasonable time, after the filing of the defendants' submissions. The defendants' submissions were filed on the 29th September 1984 and on the 9th October 1984 enquires were made to ascertain the whereabouts of any submissions in reply from the plaintiff and the Court was advised that they would be filed the following week. They were not, in fact filed until the 9th day of November 1984.

However, on the 16th August 1984 I directed that the interim injunction continue until the further order of the Court subject to the plaintiff not dealing with any further assets supporting his undertaking as to damages without the leave of the Court. The necessity for the proviso was due to the fact that it was brought to the attention of the Court that the plaintiff had, since the original interim injunction had been made, disposed of one asset which was referred to as supporting the undertaking as to damages.

To deal with the present application it is necessary to have some regard to the writ which has been issued. The

plaintiff was a director of a number of companies referred to as the Lemmington Group and on the 20th May 1982 the first defendant entered into a loan facility agreement by which it agreed to make available funds up to a maximum of $360,000. The plaintiff guaranteed the performance of the terms of the loan facility agreement but by reason of difficulties which were suffered by the group of companies, on the 28th January 1983 the first defendant appointed the third defendants to be the receivers and managers of the three specified companies. At the particular time the second defendant was the managing director of the first defendant. Subsequently demand was made by the first defendant upon the plaintiff for payment of $384,950.69 being the amount outstanding under the loan facility agreement.

The plaintiff then issued proceedings against the first defendant at Auckland under A.No. 470/83 alleging breaches of an agreement made contemporaneously with the loan facility agreement. On the 29th September 1983 that action was compromised and the parties entered into a memorandum of settlement, with a supplementary memorandum amending the first settlement being entered into on the 19th October 1983.

As a first cause of action in the present proceedings it is alleged that CBA Finance Ltd. breached the terms of settlement in that it failed to take steps to sell certain dies and that it sold others for a price less than

best obtainable. As a result of the breach the plaintiff alleges that the amount which ought to have been recovered, had the dies been sold to the best possible advantage, has been diminished by $110,000 and he seeks to recover that amount plus a further estimated loss of $100,000 as damages. It is to be noted that that cause of action has, as its foundation, the settlement finally arrived in September and October 1983.

As a second cause of action it is alleged that the third defendants, as receivers, failed to exercise reasonable skill and care in carrying out their receivership with the result that certain machinery and equipment, which came into the hands of the receivers, has not been disposed of to the best advantage. In consequence, there has been a loss, according to the plaintiff, of $366,000. He seeks to recover that amount from the third defendants together with a further $100,000 which he estimates may be further losses which he will suffer as a result of the actions of the third defendants.

As a further cause of action the plaintiff alleges, as against the first and second defendants, that they were under a duty of care to the plaintiff to ensure that the receiverships were managed with all reasonable skill and care and that the best possible prices were obtained for the assets of the companies in receivership at the time those

assets were sold. The plaintiff alleges certain specific breaches of that duty and claims to recover a total sum of $466,000as damages as against the two defendants.

As a further cause of action it is alleged against the first defendant that the settlement memoranda referred to contained a term that the first defendant would continue with the orderly receiverships of the companies referred to in the statement of claim and that, in certain specified respects, the first defendant is in breach of that term. Accordingly, the plaintiff seeks to recover damages in the sum of $256,000 under that cause of action.

For the sake of clarity I repeat that which I earlier referred to in relation to the first cause of action, namely, that all the causes of action have, as their foundation, the securities which were entered into by the plaintiff with the first defendant and which were connected with or related to the memoranda of settlement entered into on the 29th September 1983 and the 19th October 1983.

The affidavits disclosed that there had been a considerable amount of dealing between the plaintiff, his companies and the first defendant and that for various reasons, by early 1983, the Lemmington Group was in default in respect of its obligations to the first defendant in respect of the various securities which the first defendant

held and the facility agreement which had been entered into. In accordance with powers given to the first defendant under various securities the third defendants were appointed receivers over Dina Plastics Ltd., Steel Tool and Die (N.Z.) Ltd and Film Management (N.Z.) Ltd. During the course of receivership it apparently became plain that there was going to be a shortfall and the first defendant made demand of the plaintiff under the guarantee. The plaintiff thereupon issued proceedings and, as earlier referred to, those proceedings were compromised on the 19th September 1983. The compromise, or settlement, was in the following terms :-

MEMORANDUM OF TERMS OF SETTLEMENT

This Memorandum records terms of settlement reached as between Plaintiff and Defendant and is expressly subject to settlement being effected as between those parties and the four partnerships known to the parties as Anderson and others, Hunt and others, Beaumont and others, and Taylor and others.

Counsel for the Plaintiff hereby undertakes that he has reached express terms of settlement with Counsel retained on behalf of the four partnerships aforesaid, Mr R.J. Craddock Q.C. who will execute such documents as might be required to be executed to implement and give effect to the settlement on 21st October 1983 or such earlier date as might be agreed upon.

The following terms of settlement shall apply:

1. On 21st October 1983 or such earlier date as aforesaid the four partnerships and the Plaintiff

shall cause to be paid to the Defendant the sum of125,000.00 PROVIDED THAT in the event of the Plaintiff finding himself unable to perform his part of the obligation to pay the sum of $125,000.00 solely on the grounds that he has been unable to uplift monies to be advanced on Mortgage by virtue of his inability to take title to the land adjoining C.T. Nos. 3C/348, 3C/349 and 1154/12 (North Auckland Registry), then the Defendant will extend the time for payment of the sum of $125,000.00 for a further 28 days from 21 October 1983.

2. The Plaintiff's guarantee is to continue for loan accounts 315325, 315537, 369954, 336100 and 3113821 totalling $460,468.79.

3. Continuing interest on loan account number 369954 to be at the rate of 12% per annum as from the date of repayment of the sum of $125,000.00 save that interest on loan accounts 316099, 314276 and 315028 presently being charged to account 369954 will cease from the date hereof.

4. Upon settlement on the 21st day of October, 1983 or such earlier date as aforesaid, the Defendant will accept the said sum of $125,000.00 in respect of loan accounts 316099 (Anderson and others), 314276 (Hunt and others), 315028 (Beaumont and others) and that proportion of 369954 in respect of Taylor and others amounting to principal of $143,288.80 in full settlement of those four partnerships' liability to the Defendant.

5. The Plaintiff's motion for orders enlarging time for filing applications for leave to defend filed in A.115/82, A.155/82, A.833/82, A.1137/82,

6. The interlocutory injunction obtained by the Plaintiff in this action shall be dissolved.

7. The Defendant will withdraw its applications to enter judgment in each of the aforesaid actions in which the Plaintiff has sought orders enlarging the time for filing motions for leave to defend.

8. The Plaintiff will sign a confession of judgment in each of the said actions but it is expressly agreed that such confessions shall not in any case be dealt with in such manner to enable the Defendant to recover twice or to recover any sum more than is strictly due to it pursuant to this settlement.

9. The Defendant hereby undertakes not to seek to enter judgment or to file any of the said confessions of judgment in the said actions so long as the Plaintiff complies with the terms of this settlement.

10. The Defendant hereby undertakes not to enforce its securities or liquidate any of the Plaintiff's assets so long as the Plaintiff complies with the terms of this settlement.

11. Upon settlement on the 21st day of October, 1983 or such earlier or later date as aforesaid, the Defendant will release its securities over Certificates of Title 3C/348, 3C/349 and 1554/12 (North Auckland Registry) and shall provide a release in respect of the Agreement to Mortgage relating to certain property adjoining the aforesaid titles.

12. That the Plaintiff hereby guarantees payment of the said sum of $125,000.00 and hereby acknowledges that his existing guarantees under any advance from the Defendant including the Facility of 20th April, 1982 applies to such payment. Specifically, the Plaintiff acknowledges that his guarantee of payment of the said sum of $125,000.00 is secured by the existing securities held by the Defendant in respect of two Daimler motor vehicles, one Falcon Utility vehicle and the launch Manana.

13. The Defendant hereby acknowledges that it is a term of such settlement that upon the amount outstanding pursuant to this settlement being reduced to the sum of $100,000.00 all securities save that over the launch Manana shall be released.

14. All proceedings as between the Defendant and the four partnerships (more particularly described in the Schedule hereto) will be discontinued on settlement and it is a term of the settlement reached as between Counsel for the Plaintiff and Mr. Craddock Q.C. that the partnerships will undertake not to commence any future action against the Defendant in respect of the subject matter of that litigatiuon and in respect of any future claim that they may have had in respect of the sale of the dies to the partnerships by Lemmington Holdings Limited and any associated financial arrangement or assignments entered into.

15. The Defendant will continue with the orderly receivership and the collection of outstanding promissory notes under the Facility account other than those in respect of the four partnerships.

16. The Defendant will take such steps as might be necessary to recover for itself the proceeds of sale of the dies pursuant to its remedies existing under the Instruments by Way of Security granted by the four partnerships respectively in favour of Lemmington Holdings Limited and assigned to the Defendant.

17. Should the Official Assignee succeed in his claim or any future claim that he might issue concerning the repayment by the Defendant to Lemmington Holdings Limited of any moneys paid to it during a relation back period then the Plaintiff will repay that same sum to the Defendant.

18. All payments contemplated by this settlement are to be made within the nine months of the said 21st day of October, 1983 and in the event that such payments have not been so made they will be payable by the Plaintiff. Upon settlement the Plaintiff will sign a confession of debt in respect of all loan accounts with a recital that the Defendant will be able to enter judgment should the Plaintiff not comply with any term of this settlement. In no case shall the Defendant by such confession be entitled to make a double recovery as aforesaid.

19. This Plaintiff will make no submissions in opposition to the Defendant's position in any dispute or proceedings between the Liquidator of Lemmington Holdings Limited or any company in the Lemmington group and the Defendant in respect of any security held by the Defendant orpayment received by the Defendant, and will provide such information to the Defendant as it may require for

such proceedings. In like fashion the Defendant will not make any submission in opposition to any attempt of the Plaintiff to terminate the liquidation of Lemmington Holdings Limited.

20 Plaintiff and Defendant will bear their own costs of the litigation to date except to the event that those costs have been included in the sums payable as aforesaid. Counsel for the Plaintiff undertakes that it is a term of the settlement reached with Mr Craddock Q.C. that the four partnerships do not look to the Defendant for payment of any sum on account of costs or otherwise howsoever.

21. That upon settlement as aforesaid the Defendant will withdraw its proof of debt filed in the liquidation of Lemmington Holdings Limited.

22. It is a term of this settlement and the settlement reached as between the parties and the four partnerships aforesaid, that the terms of settlement shall remain absolutely confidential.

DATED at Auckland this 19th day of September 1983.

That settlement provided, inter alia, that the plaintiff would pay the first defendant $125,000 by the 21st October 1983 with the possibility of an extension of time and that he would continue to guarantee certain loan accounts up to $460,268.79 and that he would sign confessions of judgment of certain bill writ actions and he further agreed to give securities over two Daimler motor vehicles, a Falcon utility and a boat.

As the original terms of settlement did not apparently correctly record all of the terms agreed upon, negotiations for a variation were entered into and eventually an agreement was arrived at on the 29th October 1983 and the terms of the agreement so arrived at are as follows :-

SUPPLEMENTARY MEMORANDUM OF TERMS OF SETTLEMENT

This Memorandum is executed by Counsel to supplement that of 19 September 1983, and, in part, is to set forth correctly certain terms of settlement erroneously recorded, and further, is to record an express variation as a result of certain new circumstances.

1. Paragraph 1 of the Memorandum of 19 September 1983, shall be amended to provide in lieu of the expression "a further twenty-eight days from 21 October 1983" the expression "a further seven weeks from 21 October 1983".

2. The Plaintiff acknowledges that the correct amounts outstanding as at 2 September 1983 were as follows:-

Account No.	Balance Outstanding 2/9/83
315325	29,042.64
315537	30,533.34
369954	371,303.97
316099	106,711.08
336100	1,465.00
3113821	3,123.84
314276	120,505.00
315028	99,522.50
	$ 762,207.37

3. Paragraph 2 of the Memorandum of 19 September 1983 shall be amended to provide in lieu of the expression "totalling $460,468.79" the expression "totalling $435,468.79 as at 2 September 1983".

4. Paragraph 12 of the said Memorandum shall be amended to provide:

That the Plaintiff hereby gurantees payment of the said sum of $125,000 and in consideration of settlement will guarantee payment of a further $50,000 in respect of loan accounts 316099, 314276 and 315028. Both of these guarantees are in addition to his guarantee in respect of loan accounts 315325, 315537, 369954, 336100 and 3113821. The Plaintiff hereby acknowledges that his existing guarantees under any advance from the Defendant including the facility of 20 April 1982 apply to such payments. Specifically the Plaintiff acknowledges that his guarantee of payment of the said sum of $125,000 and his guarantee of the further said sum of $50,000 as well as his continuing guarantee in terms of paragraph 2 of the Memorandum of 19 September 1983 as amended hereby, are secured by the existing securities held by the Defendant in respect of two Daimler motor vehicles, one Falcon Utility vehicle and the launch Manana.

5. This Memorandum shall be read with and deemed part of the Memorandum of 19 September 1983.

DATED at Auckland this 19th day of October 1983.

In essence, what occurred as a result of the second settlement was that the time for payment of the $125,000 was extended and the amount due under the recovery guarantee was reduced to $435,000 while a further $50,000 was added too the $125,000 already guaranteed by Mr. Baillie. The $50,000 was related to three specific loan accounts..

When the amendment to the original settlement was returned by Mr. Baillie's solicitor on the 21st October 1983 it was accompanied by a letter from that solicitor which purported to contend that Mr. Baillie had agreed to the terms of settlement on the basis that at least $300,000 would be realised from the receiverships and, as it appeared to Mr. Baillie that the receiverships were unlikely to yield the anticipated $300,000, he reserved all rights available to him. That situation was not accepted by the first defendant which was made plain to the plaintiff's solicitors by letter from the first defendant's solicitors dated 25th October 1983.

Consequently the plaintiff defaulted and, in particular, in respect of a loan in relation to the boat, and in mid November he informed the first defendaent that he was not able to settle within the extended date so far as the $125,000 was concerned because he could not get title to some of the land he required as security for the advance.

According to Mr. Hosking, the financial manager of the first defendant company, on the 17th November 1983 Mr. Baillie, through his counsel, sought to amend the settlement reached alleging mis-information, having been given to Mr. Baillie at the time of the earlier settlement. The first defendant rejected the offer and required performance of the agreement. Eventually, on the 13th December 1983, according to Mr. Hosking, the first defendant was informed that Mr. Baillie could not raise sufficient money to settle with both CBA Finance and other creditors and in due course Mr. Baillie's solicitor advised CBA Finance that the plaintiff needed an extra $60,000 to cover unforeseen expenses, including a $27,000 guarantee fee on loan being raised by the plaintiff, legal and survey expenses, interest and other incidental expenses. The plaintiff then sought that his two Daimler cars and the Falcon utility be released from the securities held by the first defendant to enable him to raise the $60,000.

Mr. Hosking's affidavit states that while CBA Finance Ltd. was reluctant to accede to any new arrangement it was prepared to consider the representations made if the plaintiff was prepared to accept and abide by the previous settlement terms without further argument. Accordingly, it was contended that the first defendant agreed to relinquish the securities as requested provided the

plaintiff acknowledged and accepted that the earlier settlement had been entered into in reliance on his own judgment and that the receiverships had been properly conducted.

As a consequence the solicitors for CBA Finance Ltd. wrote to Mr. Baillie's solicitors on the 16th December 1983 setting forth the terms upon which CBA Finance Ltd. was prepared to release its securities over the Daimler cars and the Falcon utility. That letter, or a copy of it, was returned duly agreed to by Mr. Baillie, but with two additions which were made by him, and his signature was stated to have been affixed on the 21st December 1983.

In accordance with the new terms of settlement arrived at, Mr. Baillie paid, on the 21st December 1983, the $125,000 agreed to be paid and the amounts outstanding on the loans referred to as the photocopier loan and the boat loan. Accordingly, CBA Finance gave the plaintiff discharges of certain mortgages it had over certain of his land and discharged the motor vehicle securities.

Following a course which had earlier been adopted by Mr. Baillie, on the 6th March 1984, he wrote to CBA Finance Ltd. alleging that the earlier settlements were worthless and that his acknowledgements on the letter of

the 16th December 1983 did not cover his complaints about the receivership. He sought to obtain a release of the first defendant's security over his boat to enable him to finance an application for the stay of proceedings in relation to the liquidation of Lemmington Holdings. That request was refused. On the 21st July 1984 the nine month period for Mr. Baillie's guarantees under the September and October settlements of 1983 expired.

In an attempt to meet the situation, the plaintiff, on the 6th June 1984, commenced another action, A.No. 565/84, against the present defendants alleging in the first cause of action certain representations having been made to him in relation to certain items of equipment subject to the receivership and that, in consequence thereof, he had agreed to pay the sum of $125,000 to the first defendant in accordance with the terms of settlement dated 29th September 1983. The first cause of action alleges that the representations referred to were false and a return is sought of the $125,000 which was paid in December 1983.

As a second cause of action the plaintiff alleges that the representations were made by the second and third defendants and that they were fraudulent and he, again, seeks, as against those defendants, a return of the $125,000 plus aggravated damages of $75,000.

As a final cause of action he alleges negligent advice against the second and third defendants and, again, seeks judgment for the $125,000 representing the amount paid in December 1983 plus exemplary damages of $75,000. Once again, that action is founded upon the original terms of settlement entered into on the 19th September 1983.

At the time the matter was argued before me, on behalf of the plaintiff, on the 16th August 1984, the time for filing a statement of defence had not expired and plaintiff's counsel did not, except in passing, refer to the further settlement which was arrived at between the parties in December 1983 and was content to maintain a standard that he would deal with that aspect in his reply if the terms of the letter of the 16th December 1983 were, in fact, relied upon by the defendants.

That was a course of which I am somewhat critical and is not one which I consider ought to have been followed. The document was before the Court and, to my mind, as the plaintiff was seeking an indulgence, that letter, which, if accepted by the Court, on the face of it, amounted to a complete compromise in December 1983, appeared to destroy the very basis of many of the plaintiff's argument which was founded on the settlement entered into on the 19th September 1983 as varied on the 19th October 1983.

It is now submitted, on behalf of the defendants, that, although it was patently evident, as I accept it was, that the defendants' case was to be centred around the settlement in December 1983, that the plaintiff, having ignored this factor, ought not now to be allowed to raise it in reply, not having raised it in his substantive argument. It may, however, be unfortunate that the statement of defence had not been filed as at the date of hearing and that plaintiff's counsel ought to have been more alive to the situation than he was, nevertheless, I intend to receive the plaintiff's submissions on this point, even, although, they are in reply.

The writ was filed on 31st July 1984 but I am uncertain as to the date upon which it was served. The statement of defence on behalf of the first defendant was filed on the 29th August 1984 within the 30 day period and, while generally denying the main allegations made by the plaintiff, it pleads specifically that in December 1983 the plaintiff acknowledged that the receiverships had been properly and correctly conducted. It goes on to state that the plaintiff agreed not to bring or continue any claim in respect of the management of the receiverships against the first or third defendants and that the plaintiff is now estopped from alleging that the receiverships had been managed without reasonable skill and care or that the best prices were not obtained for, or

upon, disposal of the assets of the companies in receivership.

As a further defence the first defendant pleads that the plaintiff entered into a accord and satisfaction of any claims he might have had against the first defendant in respect of the receiverships and is debarred from proceeding with the third and fourth causes of action. In respect of that defence it is stated that the representation, acknowledgements and agreements entered into by the plaintiff in December 1983 were give by him in return for good consideration from the first defendant.

When the December 1983 negotiations were entered into they arose by reason of the fact that Mr. Baillie was, himself, seeking an indulgence. At that time he either had to abide by the settlement which had been arrived at in September 1983 or attempt, in some manner, to get it varied or set aside. It was plainly put to Mr. Baillie that if he wished to obtain any indulgence from the first defendfant at all that he could do so, but on certain terms. He was under no compulsion to accept the terms in any way whatever and he was free to have declined to entertain the letter forwarded by the first defendfant's solicitors to his solicitor on the 16th December 1983.

This is not a case of a debtor dealing directly with a creditor and being threatened in some way by the creditor but it is a case where the debtor was receiving independent legal advice and he was entirely free to accept or reject the terms put forward on behalf of the first defendant. He was also free to negotiate on those terms which he, in fact, did by recording that he accepted that the receiverships had been properly and correctly conducted but restricted that acknowledgement in relation to the actions of the receivers to the date of the letter.

He undertook to comply fully with the terms of the compromise recorded in the memoranda of the 19th September 1983 and the 19th October 1983 and agreed not to bring or continue any claim or action against the receivers of the three companies named or CBA Finance Ltd., in respect of the settlement, or the events leading to it or consequent upon it. That undertaking was contained in paragraph (e) of the letter to which Mr Baillie added a term that it was limited to events "to date" provided that the acknowledgement was not to apply of any fraudulent or criminal transactions. Mr. Baillie received consideration for the variation to the terms of settlement and it was indeed acted upon by the parties by the payments which were made by Mr. Baillie and the subsequent release of securities by CBA Finance Ltd. That, to my mind,

effectively barred Mr Baillie from taking any action against any of the above Defendants in respect of matters arising prior to the 21st December 1983.

In the circumstances, as outlined, it would be quite improper now to permit Mr. Baillie to resile from the settlement which was entered into in September 1983 and varied by the memorandum of the 19th October 1983 and the letter dated 16th December 1983. By the letter of the 16th December 1983 the plaintiff has acknowledged that he entered into the settlement in reliance upon his own judgment and he is effectively estopped from suggesting otherwise. He is bound by the course of action which he voluntarily chose to adopt. If any legal authority is required for such an attitude it is to be found in the decision of Amalgamated Investment and Property Company Ltd. (In Liquidation) v Texas Commerce International Bank Ltd. [1982] 1 Q.B. 84.

It would be quite improper for a Court to permit a plaintiff to act as Mr. Baillie has done, namely, to raise allegations against defendants in an action, compromise that action, raise further allegations, compromise those, and then attempt to revive those allegations as a basis for setting aside the compromise.

The method whereby the settlements were arrived at cannot be subject to any criticism in relation to coersion or the like and having stated, as I have already stated, that they were freely entered into, it is my view that it is the Court's plain duty to uphold such settlements. Such an attitude effectively precludes the Court, in my view, from resorting to the provision of the Contractual Remedies Act 1979. In any event, I am of the view that the provisions of section 41(c) apply in so far as I consider it to be fair and reasonable that the terms of settlement should be conclusive between the parties. They resulted from arm's length negotiations with Mr Baillie being free to agree to accept or reject the final terms negotiated.

In so far as the defence of accord and satisfaction is concerned I am of the view that <u>if</u>, and the accent is on that word, Mr. Baillie did have any claim in respect of either the conduct or the receiverships or in relation to any representations which might have induced him to enter into the September 1983 settlement, as alleged in A.No. 565/84, then such claims were finally compromised and settled by his accepting the terms of the letter of the 16th December 1983 and as varied by him and as acted upon by the parties. He is not now entitled to raise any such claims against any of the defendants.

If one has regard to the judgment in British Russian Gazette and Trade Outlook Ltd. v Associated Newspapers Ltd. [1933] 2 K.B. 616, then it is my view that what has occured in this case falls squarely within the ambit of the above decision. The beginning of the headnote correctly reflects what was decided and this is what is recorded in the headnote :-

> "Accord and satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged, and the satisfaction is the consideration which makes the agreement operative. It is not necessary that the consideration should be executed; the consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable at law."

Having come to the conclusion which I have there is no necessity to further consider the question of injunction because, in my view, there is now no basis for maintaining an injunction against the defendants or any of them.

In coming to the above conclusion, I am conscious of the fact that Mr Jenkins contends that certain claims are not affected by the December 1983 letter either because they occurred subsequently or were breaches continuing in nature which went beyond 21st December 1983. I do not accept that as being established on the papers before me. I see no reason why the First Defendant should not be entitled to

exercise any remedies it has vested in it by reason of the various securities in the settlement agreements unhindered by the trappings of injunction.

If Mr Baillie can establish any loss for which any of the Defendants can be liable, he must be left to deal with that in an ordinary action for damages.

Because it was raised during the hearing, there is one aspect upon which I should comment. Much of the Plaintiff's complaints related to prices which were realised when certain equipment and articles were sold. Almost all the evidence tendered in support of his contentions came from the Plaintiff himself with little or no acceptable supporting evidence at all. It is idle to say that because the Plaintiff has been engaged in the field in which the equipment is used, he is competent to express an opinion on the prices obtained for them. Whatever he says about the prices suffers from the criticism that his evidence is self-serving and not independent. Thus that evidence runs the risk that it will be entirely discounted unless it is supported by independent and expert valuation evidence. No or little such evidence is available at the moment.

In all the circumstances, the application for injunction is refused and the interim injunction already granted will be discharged. The Defendants are entitled to costs which I fix at $1,000 plus any disbursements.

A.D. Isaac J.

Solicitors:

For Plaintiff: B.M. Laird, Orewa.
For Defendants: Russell McVeagh McKenzie Bartleet & Co., Auckland.

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AUCKLAND REGISTRY

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PLAINTIFF

A N D CBA FINANCE LIMITED a duly incorporated company having its registered office at 100 Symonds Street, Auckland, 1, Financier

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SECOND DEFENDANT

A N D PETER REGINALD HOWELL and JOHN GORDON FORSYTHE both of Auckland, Chartered Accountants

THIRD DEFENDANTS

JUDGMENT OF SINCLAIR, J

Reserved decision delivered by me this 22nd day of November 1984 at 2.30pm.

G.A. MORTIMER
Deputy Registrar

Copy Received

Mr Laird S/N 23.11.84

Mr Curry-Dafter S/N 22.11.84