

BETWEEN EUROPEAN PACIFIC BANKING
CORPORATION

Plaintiff

A N D RICHARD CRAIG KUEGLER

Defendant

Hearing: October 6, 1987.

Counsel: Mr. G.B. Chapman for Plaintiff
Mr. P.J. Wright for Defendant

Judgment: 14 OCT 1987

JUDGMENT OF MASTER TOWLE

This application for Summary Judgment related to a claim by the Plaintiff in respect of the non-payment by the Defendant of the balance of a loan made to him in July 1986 of an amount of \$22,018.06 plus interest. The circumstances were that in July 1986 the Defendant was appointed by the Plaintiff to a position of Finance & Administration Manager of its Cook Islands operation. On 11th July the Plaintiff advanced an amount of \$40,000 in New Zealand currency to the Defendant which was expressed as being a personal loan with interest at 12% per annum, repayable on demand. The advance was made by cheque on that day and acknowledged in writing by the Defendant as being received by him on these terms. On 24th January 1987, demand was made upon the Defendant by the Plaintiff's Managing Director for repayment of the

advance subsequent to which the Defendant made payments totalling \$17,497 and in addition, the Plaintiff agreed to allow two small items totalling \$484.94 by way of set-off in further reduction. In an affidavit filed in support of the application, Mr. G.R. Stewart the General Manager of the company in the Cook Islands deposed that he was authorised to make an affidavit on the Plaintiff's behalf and to his belief that the balance of the loan had not been repaid and that the Defendant had no reasonable defence to the allegations in the Statement of Claim that the balance was still due and owing.

In notice of opposition given by the Defendant with an affidavit by him in support, the Defendant claimed that substantial further payments were due to him by the Plaintiff arising out of his position as Cook Islands Manager and that he had a claim or counterclaim in excess of the amount claimed against him by the Plaintiff relating to the loan. It was apparent that the Defendant did not dispute the fact of the loan having been made and that there was the balance claimed still owing. He gave notice that he wished to counterclaim for a total amount of \$31,523.33 arising from certain payments he claimed were due to him for allowances and reimbursement of expenses which were part and parcel of his contract of employment with the Plaintiff. Some \$24,820.34 related to a claim by the Defendant for additional salary in lieu of holidays for weekend and holiday work undertaken by him. It was apparent from the affidavits that the loan had been made to the Defendant to enable him to repay a previous staff loan secured on his house in New Zealand.

At the hearing it became clear that there was no serious contest to the claim by the Plaintiff to be paid the balance due under the loan. The question for determination was whether the Defendant was entitled to prevent the Plaintiff from availing itself of Summary Judgment procedure on the grounds that there was a reasonably

arguable counterclaim which would be unconscionable to refuse the Defendant to argue at this stage.

Counsel for the Plaintiff argued that essentially the two matters were quite different. The Plaintiff's claim was based upon a simple contract for a loan made, the balance of which had not been repaid, whereas the counterclaim stemmed from various claims which the Defendant wished to bring arising out of the conditions of his employment as Manager between July 1986 and March 1987 when his engagement terminated. In lengthy submissions he referred me to a number of authorities both here and in Australia in support of the proposition that the existence of a possible counterclaim should not impeach the Plaintiff's right to proceed on its main claim, particularly when the Plaintiff's claim was clear and not seriously challenged and the Defendant's claims at best could only stem from a quite independent contract which the Defendant should be free to pursue by independent proceedings if he wished rather than to deprive the Plaintiff of its right. He particularly referred me to M.L. Paynter Limited v. Ben Candy Investments Limited per Gallen, J., High Court New Plymouth, M. No. 46/86, where His Honour said:

"Where there is a counterclaim which cannot be categorised as a set-off either legal or equitable, it will not provide a defence to summary judgment procedure where the other criteria can be satisfied. This approach is consistent with the categorisation of equitable set-off. If the defendant's claim is closely bound up with the rights relied upon by the plaintiff then the whole should be dealt with together. If it is a genuinely independent claim it can well be dealt with separately and any unfair consequences of non-contemporaneous decisions met with by stay of execution."

Those observations were made in a claim relating to claim and counterclaim over the performance of a building contract which is quite different from the circumstances of the present application which stems from two quite separate contractual obligations. The test has been

conveniently expressed by Spry on Principles of Equitable Remedies, 3rd Edition, 1984, page 174, where the author says:

"But a defendant can establish an equity only by bringing forward a claim that impeaches that of the plaintiff. For this purpose it is not sufficient merely to prove a countervailing claim; nor indeed, is it necessarily sufficient to prove a countervailing claim arising out of the same contract as that on which the plaintiff is bringing suit. What generally must be established is a relationship between the respective claims of the parties which is such that the claim of the defendant has been brought about by, or has been contributed to by, or is otherwise closely bound up with, the rights that are relied on by the plaintiff and which is such that it would be unconscionable that he should proceed without permitting a set-off."

Despite the earnest attempts of Counsel for the Defendant to urge a rejection of the application upon me, I am satisfied that the Plaintiff has discharged its onus of proof to satisfy me that the Defendant has no reasonable defence to the claim. I do not find that this is one of the situations where injustice would be caused by allowing the Plaintiff's claim to proceed by way of Summary Judgment as the Defendant is still free to pursue any claim he may have against the Plaintiff for such sums as he may establish are still properly due to him during the period of service. It will, of course, be open to him if he wishes to apply for a stay of proceedings in the ordinary way but I see no good ground made out to deprive the Plaintiff of its right to avail himself of the Summary Judgment procedure.

Accordingly I enter judgment for the Plaintiff in the sum of \$22,018.06 together with interest calculated at 12% in accordance with the schedule provided by the Plaintiff's solicitors amounting to a further \$4,738.96 including interest to 6th October, 1987. Costs are allowed to the

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Plaintiff in the sum of \$1,250.00 plus witnesses' expenses to be fixed by the Registrar.



MASTER R.P. TOWLE

Solicitors:

Russell McVeagh McKenzie Bartleet & Co., Auckland, for Plaintiff
Kensington Swan, Auckland, for Defendant