N2LR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 1202/87

BETWEEN EASTERN GAMING OPERATORS LIMITED

First Plaintiff

A N D GAIETY LEISURE CENTRES LIMITED

Second Plaintiff

A N D BINGO INTERNATIONAL LIMITED

First Defendant

A N D W.C. COLSON & ORS

Second Defendants

A N D SOUTHERN CROSS DISTRIBUTORS LTD.

Third Defendants

Hearing: November 2, 1987

Counsel: Mr. Timmins for First & Second Plaintiffs
Mr. Asher for First Second & Third Defendants

Judgment: - 7 DEC 1987

JUDGMENT OF MASTER ANNE GAMBRILL

The applicants herein seek Summary Judgment. It is a case of the various parties falling out over their agreement which existed for pursuing gaming opportunities in New Zealand. There appears to be little dispute as to the factual situation excepting the effect of the final terms of a settlement negotiated by the respective solicitors to the respect parties

on or about 29th May 1987.

The company, Eastern Gaming Operators Limited, the First Plaintiff, together with Messrs. J. and E. Greengrass, shareholders in the First and Second Plaintiffs, entered into a joint venture agreement with the Third Defendant in the present proceedings. The joint venture agreement provided for the formation of a new company to be known as Bingo International Limited, the First Defendant. The directors and officers of Bingo International were the Second Defendants, R.T. Norrie and R.G. Dickie and Messrs. J. and E. Greengrass. The Secretary of the new company was Messrs. Colson and Norrie, the Second Defendants in the present proceedings.

After the parties fell out, in an effort to disentangle their business and financial arrangements, a series of deeds were drawn up by the parties' various solicitors and entered into about 19th September 1985.

I am informed, and it is pleaded in paragraph 2 of the Statement of Claim, that arrangements, including a deed of settlement which set out the primary terms of the dissolution of the joint venture agreement and the other deeds guaranteeing performance of the primary obligations by the other participants in the joint venture agreement, were entered into about 19th September 1985.

The agreement resulted in the Second Defendants, together with other partners, purchasing the interests of Messrs. J. and E Greengrass in the First Defendant company and, in essence, the claim for moneys owing arises from the deed of settlement. The Defendants do not dispute this affidavit evidence. The sums of money owing thereunder were not paid and Summary Judgment proceedings were issued in the High Court at Auckland

under C.P. No. 432/86, which was set down for hearing on 2nd June 1987. Virtually on the eve of the hearing a settlement agreement was entered into between all parties. This was a verbal agreement negotiated by Counsel and the evidence of the agreement is a letter dated 29th May 1987, from Messrs. Chapman Tripp & Co., forwarded to the then Second Defendant's solicitors, Messrs. Shieff Angland & Co.

The evidence of the staff solicitor, Mr. Mills, at Messrs. Chapman Tripp Sheffield Young that he forwarded the letter to and dealt with a Mr. Ian Williams at Messrs. Shieff Angland Dew & Co., is basically unrefuted. Counsel for the applicants urge upon me the fact that there is no evidence before the Court from Mr. Williams and no actual dispute relating to the facts and events that followed. There is, however, correspondence forwarded by the Second Defendadnts, Messrs. Colson and Norrie to the Plaintiff's solicitors, Messrs. Chapman Tripp Sheffield Young which confirms the settlement arrangements and more details will be referred to hereinafter.

The settlement appears to be part-performed as $20,000 out of $25,000, due to be paid for interest, was paid on 2nd June 1987 by Mr. W.C. Colson but the capital payment of $175,000, due on the same date, was not paid at that time. The balance of this payment was finally made on 27th August 1987 by solicitors then acting for one of the Second Defendants' parents, by a series of bank cheques totalling $213,194.51 to stay a Summary Judgment application. Under the settlement agreement a further sum became due and owing on 1st August 1987. This amounted to $276,104.12. The sum was not paid on 1st August and the applicants herein issued Summary Judgment proceedings on 5th August 1987. These are the present proceedings.

Whilst the primary obligation of the Plaintiff is to satisfy

the Court that there is no defence to the claim, to do this the Plaintiff must satisfy the Court that the defences raised by the Defendant are not tenable or acceptable. For this reason I propose to set out the defences raised and then return to the major issues which are the bases of the claim.

The defences were:

1. That the settlement agreement was not a binding contract because it was not binding until it was signed. The contract was in fact the letter setting forth the terms of a settlement, consideration for which was the adjournment sine die of the High Court proceedings. Parties are entitled to settle in this manner. The terms of settlement were recorded by the Plaintiff's solicitors in a letter dated 29th May 1987 but it was the Defendant's solicitors who withdrew the application from the Summary Judgment list. Payment due on 2nd June, although late, was made by the Second Defendants and I find no evidence that there was not a contractual obligation arising in terms of the settlement.

The terms of the letters written by Messrs. Colson and Norrie and the implementation of payments, make it clear to me the parties regarded a settlement as effective - see letter of Mr. W.C. Norrie dated 25th June 1987: ...."We understand there has been a further payment in respect of a settlement agreed to in early June". The parties were aware of the obligations from the 2nd June 1987 and cannot, having part-performed, claim that they have not the knowledge of matters to brief their "new advisers".

2. The Defendants claim that any such settlement agreement was conditional upon them raising finance, that the finance was sought through another client of Messrs. Chapman Tripp Sheffield Young, the solicitors for the Plaintiffs, and

therefore the Plaintiffs were cognizant of this fact. During all the negotiations, telephone calls, all of which are referred to in the affidavit evidence in support of the claim, there was no suggestion made, and the solicitor acting for the Plaintiffs deposes to this, that a settlement agreement was conditional upon the Defendants being able to raise finance. Furthermore, I cannot accept that the knowledge of one partner in a firm that his client financier company is considering a loan to the Defendants, should be sufficient to enable the Defendants to raise a defence of this nature against the Plaintiffs' claim. The Defendants or their advisers had an obligation to make the settlement conditional upon this if they so required it. If they had done this, they probably could not have ensured the Summary Judgment proceedings were taken off the list for hearing on 27th August 1987 after payment of the first instalment due, and they must accept consequences of their choice and action.

3. The Defendants claim the Plaintiffs have not complied strictly with Rule 138. Rule 138(2) requires an affidavit to be filed and served on the applicant by or on behalf of the Plaintiff. The affidavit must verify the allegations in the Statement of Claim and depose to the Plaintiff's belief that there is no defence to the allegations. The Defendants say Mr. Greengrass claims to verify the allegations in the Statement of Claim but this must be done by the Plaintiff. The deponent, Mr. Greengrass, identifies that he is a director and authorised to make the affidavit on behalf of the Plaintiff companies. Paragraphs 2 and 3 of his affidavit state as follows:

> "2. I have read and verified the allegations in paragraphs 1 to 8 inclusive of the statement of claim filed herein.
>
> 3. By reason of the matters appearing in the statement

> of claim and the matters deposed to by me in this affidavit I believe that the defendants have no defence to the allegations in the statement of claim."

The affidavit shows full details of the Plaintiffs' claim and the notice of motion and Statement of Claim are clear as to the alleged breaches of the Defendants. The Defendants say the best evidence rule should be complied with reasonably strictly. See Foodstuffs (Auckland) Limited v. Schweiger, (unreported) Barker, J., 1st July 1986, C.P. No. 30/86 (Auckland Registry).

Counsel referred me to the decision of Doogue, J. in Registered Securities Limited v. Lemrac Farm Limited & Ors, M. No. 184/86, Hamilton Registry. I note from the oral judgment of Doogue, J. at page 6:

> "The first of these is that the Plaintiff, in terms of Rule 138(2)(b), must depose to its belief that the Defendants have no defence and the grounds for the Plaintiff's belief must also be the subject matter of a deposition by or on behalf of the Plaintiff. The notes to McGechan on Procedure under paragraph 138.04(4) indicate clearly that the belief must be that of the Plaintiff and not of the Deponent. It is true that the affidadvits lodged on behalf of the Plaintiff in this matter by Messrs. Smauel and Frawley indicate clearly that they were authorised to make the affidavits on behalf of the Plaintiff but they do not spell out that it is the Plaintiff's belief that there is no defence on the part of the Defendants and nor do they spell out the grounds for the Plaintiff's belief. One is left to guess from Mr. Frawley's affidavit, the grounds of his belief and Mr. Samuel gives no basis whatever for the grounds of this belief.
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> As I have indicated, however, it is not solely because of the procedural matters that I would exercise my discretion against entering judgment for the Plaintiff in these proceedings.

The defects in those proceedings were fundamental primarily because they were based on a mortgage. There was no evidence of the precise amount owing nor was there evidence of the receipt of the proceeds of sale of the property.

The affidavit by Mr. Greengrass makes it clear that he is a shareholder and director of the Plaintiff companies and authorised to make the affidavit on the companies' behalf and he has read and verified the allegations.

The notes in McGechan on Procedure page 164(a) under Rule 138 paras. 3 and 4, confirm the view I have reached:

> 3. (a) "....an affidavit by a suitable employee will suffice".
>
> (b) "Unless it is self evident, it will be necessary for the deponent to state the course of his knowledge...."
>
> 4. "....the affidavit should state such facts as are necessary to establish the cause of action pleaded in the statement of claim. We consider earlier authorities....not so rigid as to require proof of every particular, provided the essential elements of the cause of action are established...."
>
> 5. "....the belief of the plaintiff....The rule requires a form of words which unequivocally implies an actual belief by the deponent in the truth of every fact required to establish the plaintiff's claim and in the absence of any fact which could ground a defence in fact or law."

The deponent clearly states the bases of the belief that there is no defence and both Plaintiffs and Defendants could comprehend the meaning of the affidavit. I am not satisfied that this complaint over compliance with Rule 138(2) should bar the Plaintiffs from judgment. I believe that reading the

documents and applying the tests set forthe in McGechan, I feel that the evidentiary rules of compliance have been met. It is clear that if any defect was present in the affidavit it could be readily cleared by a supplementary affidavit.

Whilst I agree that it is unsatisfactory for Mr. Greengrass to have deposed that the payments have not been made to him (see paras. 10 and 12), this fact is not so vital to the evidence before me as it is clear that the Defendants have failed to make certain payments owing and there appears to be no dispute as to the sums owing. It follows therefore that the Plaintiff companies are entitled to seek recovery and that Mr. Greengrass is the person who would have knowledge of these facts

4. The Defendants claim there is non-compliance with the Contracts Enforcement Act 1956. The Defendants state that the contract relates to a guarantee and that the Second and Third Defendants were in fact guarantors. The Plaintiffs say this is not a claim on a guarantee. There is no evidence before me of guarantee. The letter confirming the settlement terms is in writing, has been acknowledged without dispute as to the terms by the letter in reply of the Second Defendant, Mr. W.C. Colson, which is exhibited as "B" to the affidavit of Mr. S.J. Mills.

5. The Defendants claim the settlement agreement is a credit contract and proper disclosure has not been given under the Credit Contracts Act. The Plaintiffs have acknowledged the present claim is based on a credit contract. They claim, however, it is not a controlled credit contract. This is because the sum payable exceeds $250,000. The Plaintiffs say that the Defendants cannot isolate the separate payments made, being part of the total settlement under the contract to obtain the benefit of the Credit Contracts Act 1981. In the

alternative, the Defendants argue that a greater amount of the payment has arisen from non-payment of interest sums owing under the original deed which the Plaintiffs reject. There is still no evidence of non-compliance with the Act because full disclosure was made at the time of entering into the original deeds, which evidence is not challenged.

6. The Defendants claim the settlement agreement is a credit contract and the Plaintiffs are acting oppressively. The Plaintiffs acknowledge that it is a credit contract and have always done so, but say it is not controlled. It is for the total moneys owing - not each individual payment progressively. They say they have not acted oppressively. The various interest rates rose at 20%, 26% and 28% for non-payment. It was a commercially negotiated agreement with the parties all being fully advised and two of the Defendants being chartered accountants. The Plaintiffs state that it has been the approach of the Courts to commit parties to make their own bargains protecting them only against inequality. There is no lack of bargaining power in the present situation and the parties have all had the benefits of full professional advice. I can see nothing oppressive in the settlement terms negotiated as a compromise following the issue of the first Summary Judgment proceedings.

The Plaintiffs referred me to the statement in Italia Holdings (Properties) Limited v. Londsdale Holdings (Auckland) Limited [1984] 2 N.Z.L.R. 1. In fact, the Defendant did not continue to sustain this ground of oppositin and further comment herein is unnecessary. If required, I would have found the contract was not oppressive.

7. Counterclaim: The Defendants allege that there is a counterclaim. The details of this are sketchy and the counterclaim does not automatically entitle a Defendant to a

trial or order staying execution of a judgment. The counterclaim must be bona fide and generally should arise out of the same subject matter as the action, and connected with it. Whilst there are connections between the parties, I find the evidence as to the counterclaim too remote from the present proceedings to form a basis of recognising the full counterclaim.

It surprises me, in view of the litigious history of the parties, that a claim has not already been formulated for the sums claimed to be outstanding. The first reference to the counterclaim for the supply of Bingo tickets is in the affidavit of Mr. Colson dated 7th October 1987. A telex appears to have been sent on 4th June 1985 and refers to sales that Mr. Greengrass had become involved in for Bingo tickets to a customer, Morris Shefras & Son, and the terms of the proposed sale are set out in that telex. After these negotiations, the original settlement deed entered into about 19th September 1985 was executed, and there is no reference therein to any dispute over the sale of the tickets. Thereafter there is no evidence of any negotiations in respect of a counterclaim or set-off as against any moneys owing to the Plaintiffs, being raised in respect of these tickets. I rely on the letters written by Mr. Colson of Messrs. Colson Norrie & Co., where there is no reference to this dispute. The first reference arises on 7th October 1987 when the Second Defendants had been unable to pay moneys due earlier.

In terms of the decision in M.L. Paynter Limited v. Ben Candy Investments Limited, 8th December 1986, M. No. 46/86,, New Plymouth Registry, Gallen, J. held that when a counterclaim involves an independent claim, it should be dealt with separately and should not be used to deny the Plaintiff the right of Summary Judgment. This view was confirmed and is referred to in the judgment of Casey, J. in Pemberton v.

Chappell [1987] 1 N.Z.L.R. 1. However, Gallen, J. did consider in the abovementioned case of M.L. Paynter Limited v. Ben Candy Investments Limited, the definitions of set-off as recorded in Spry on Equitable Remedies 3rd Edition. He held that a set-off may be regarded as a defence.

There is no evidence of set-off in this matter and the parties have approached the possible defence as a counterclaim. The Plaintiffs rely on the documentation before the Court and say that the issue of credibility does not arise herein. Although the Defendants deny the money is due and owing and claim a counterclaim may exist of which they are unable to furnish full details, it is apparent the counterclaim is not related to the subject matter of the settlements entered into.

The Court's considerations in making a Summary Judgment:
The Court has a need to scrutinize the affidavits and see they pass the threshold of credibility in terms of the tests laid down by Somers, J. in Pemberton v. Chappell (supra). The Court must consider whether the defences raised are credible. At the end of the day, in making the determination, I must be satisfied that the Defendants have no defence to the claim made by the Plaintiff.

In this case I have carefully considered the affidavits, I have considered the correspondence between the parties, the Plaintiffs' solicitors, Messrs. Chapman Tripp Sheffield Young, the unrefuted evidence of the discussions between the Defendants' solicitors and the solicitor acting for the Plaintiffs, the actions of the Defendants' solicitor, Mr. Williams including the adjournment of the then extant Summary Judgment proceedings, the individual letters of Mr. Colson dated 2nd June 1986 and the letter of Messrs. Colson & Norrie dated 25th June 1986. Throughout these, there is only reference to an agreed settlement and the implementation of

the terms. There is no reference to the agreement being subject to finance. There is no reference to any counterclaim or to any dispute about Bingo tickets unpaid for in England by a customer. There is no evidence as to who the customer, Morris Shelfras & Son, was the customer of, except the telex, and in reading that, one can assess that the customer was the customer of the vendor of the tickets, Bingo International Limited.

I am satisfied therefore that judgment should be entered for the Plaintiffs for $276,104.12. The interest will be allowed at 28% up to the date of judgment. I am not satisfied as to further claims for interest but leave is reserved to either party to make further submissions hereon. Costs are allowed to the Plaintiffs of $1200 plus disbursements as fixed by the Registrar.

MASTER A.G.S. GAMBRILL

Solicitors:

Chapman Tripp Sheffield & Young, Auckland, for First & Second Plaintiffs

Samuel Ellis & Co., Auckland, for First, Second & Third Defendants