IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP.266/87

NOT RECOMMENDED

BETWEEN ELDERS PASTORAL LIMITED a duly incorporated company having its registered office at Auckland and carrying on business throughout New Zealand as Pastoral Agents

Plaintiff

AND RAYMOND KEITH FLEMING and DONNA FRANCES FLEMING both of Laxon Stud Farm, Racecourse Road, Cambridge, Farmers

Defendants

Hearing: 9 February 1988

Counsel: P.R. Heath for the Plaintiff
A.S. Menzies for the Defendants

Judgment: 9 February 1988

ORAL JUDGMENT OF DOOGUE J

This is an application for summary judgment against both Defendants.

The Plaintiff seeks judgment in the sum of $375,318.77 together with interest from 18 November 1987 until the date of judgment at the rate of $254.61 per day.

Mr Heath for the Plaintiff in his submissions made plain that the quantum for which judgment was sought was without prejudice to the Plaintiff's right to make a claim against the Defendants in respect of other sums which were in dispute with the Defendants.

The application is opposed by the Defendants who also seek an adjournment.

I reserved the application for adjournment until the end of hearing argument.

The basis put to me for an adjournment was that the Defendants sought to put additional information before the Court as to the circumstances relating to their signing an application for credit on 24 April 1985 in which inter alia they acknowledged that the amount of money owing to the Plaintiff by them as at that date was $380,000.

Mr Menzies for the Defendants informed me that the substance of the additional information which would be traversed in any affidavit was that the Defendants had been given no information by the Plaintiff as to how the sum of $380,000 was made up and that that sum was challenged. He further informed me that the Defendants had had no legal advice in respect of the particular application for credit and acknowledgement of debt. He submitted that the round figure of

$380,000 could not be reconciled with any documentation made available by the Plaintiff to the Defendant. However, the main basis of the Defendant's opposition to the application, and perhaps the reason for the adjournment sought, was that the Defendants submit that much of the indebtedness alleged by the Plaintiff against the Defendant constitutes sums in respect of which the Defendants were in fact acting as agents for the Plaintiff. The Defendants submit that they are unable to obtain the source documentation relating to the alleged indebtedness by them so that they were quite unable to ascertain whether or not they were liable for any sum and if they were liable they did not know what sum was involved.

At the end of the hearing before me I indicated that I would refuse the application for an adjournment and would uphold the application for summary judgment on the basis of judgment for the Plaintiff on the issue of liability only and would make a timetable order to enable the issue of quantum to be determined.

My reasons for that determination are as follows:- It is unnecessary for me to traverse the law in any particular detail. The principles applicable are by now reasonably well known, see the decisions of the Court of Appeal in Pemberton v Chappell, [1987] 1 NZLR 1, with particular reference to passages at pages 3 and 4 and page 8, together with the

unreported decision in Bilbie Dymock Corporation Ltd v Naginbhai G. Patel & Anor, (CA.200/87, 16 December 1987), in particular passages at pages 3 and 4 that were referred to me by Mr Heath.

The Plaintiff in the affidavit by the manager of its credit and legal section deposes to the alleged indebtedness of the Defendants. The indebtedness related to some three different accounts as at 1 April 1985. The affidavit deposes that at that date there was a sum totalling some $358,000 owing by the Defendants. There is no information before the Court as to how that indebtedness is made up or calculated. There is merely a bare assertion by the Plaintiff that those three accounts and a further account were operated as revolving credit arrangements between the first named Defendant and the Plaintiff from 17 September 1979 and until 24 April 1985. It is alleged by the Plaintiff that during that period the first named Defendant made purchases through the Plaintiff, sold stock, and made payments in reduction of his accounts with the Plaintiff, including interest charged by the Plaintiff and notified to the Defendant.

The Plaintiff primarily relies upon the application for credit dated 24 April 1985 to which reference has already been made. In that application the Defendants acknowledge that the amount of credit due and owing by them to the Plaintiff as

at 24 April 1985 was $380,000. It is unnecessary for me to refer to the other terms of that document or to the terms of the Instrument by Way of Security of the same date executed by the Defendants in favour of the Plaintiff.

There is no information before me which enables me to reconcile the sum of $380,000 with the sum of $358,000 approximately set out as owing as at 1 April 1985, nor is there any information before me as to the details of the indebtedness as at 24 April 1985, nor does the information before me enable me to reconcile other figures before me because the Plaintiff has adopted different starting dates for various statements supplied by it to the Defendants. However, there is clearly an acknowledgement of debt by the Defendants in the sum stated. In the affidavit of the first named Defendant in opposition to the application the first named Defendant deposes that he considers that a large proportion of the debt as at April 1985:-

> "... was not incurred by me but was incurred by the plaintiff company using me as an agent and my complex as a selling point for it, trading in the sale of deer. The largest proportion of the amount claimed by the Plaintiff is in respect of the purchase of deer."

The first named Defendant annexes to his affidavit various letters written by the Defendants' solicitors to the Plaintiff's solicitors. In none of those letters is liability for debt from the Defendants to the Plaintiff disputed. All that is disputed is the amount of the indebtedness.

The first of those letters is dated 11 July 1986 and the last of those letters produced in this Court is dated 20 August 1987.

On 5 February 1987 or thereabouts the Plaintiff had forwarded the Defendants substantial information relating to the indebtedness alleged by the Plaintiff but that information suffered from the defect that I have already referred to, namely that it took April 1985 as a starting point and gave no information whatever as to how the indebtedness, as at that time, was calculated or incurred.

On the face of the papers before me, and taking into account what Mr Menzies said about the additional information which would have been put before the Court if an adjournment had been granted by this Court of the application, I am satisfied that there is no defence to the claim by the Plaintiff against the Defendants that the Defendants are indebted to the Plaintiff in a sum of money. I am, however, left in considerable doubt as to the quantum of the indebtedness. I am not prepared to rely on the acknowledgement contained in the application for credit dated 24 April 1985 as being necessarily a true assessment of the amount owing by the Defendants at that date. On the papers before me it is clear that that application was to enable the Defendants to arrange other finance and the Defendants would not necessarily have been considering with care the precise amount which they were

acknowledging in the document, should their attention have been directed to it which is itself left in doubt from the papers before me.

If I could have reconciled that figure with the figure which the Plaintiff claims was the earlier indebtedness or if there had been information before me of the earlier indebtedness which had also been available to the Defendants, I might have been in a position to have given judgment on quantum, but in the particular circumstances I think it entirely inappropriate that I should determine the appropriate amount of such a judgment. I have for example noted that whilst the acknowledgement was executed by the second named Defendant, there is no suggestion by the Plaintiff in its affidavit in support of the claim that the second named Defendant was in any way indebted to the Plaintiff at the time that the acknowledgement was executed.

I accordingly take the view that the application for the adjournment should be refused as no information was put before me on behalf of the Defendants which would suggest to me that the Defendants have any defence of liability. All the evidence before me from the Defendants indicates that there is no defence on liability but that the quantum of the Plaintiff's claim is genuinely in dispute for the reasons already indicated.

That being the case there will be judgment for the Plaintiff on liability under Rules 136 and 137.

I direct under Rule 137 that the trial of the issue of quantum take place at Hamilton on 8 March 1988 in the ordinary course of the summary judgment list on that date.

I direct that the Plaintiff's further affidavit in support of its allegations in respect of quantum be filed and served by 18 February 1988.

I further direct that any affidavit by the Defendants in reply be filed and served by 3 March 1988.

Should the Plaintiff wish to reply to any affidavits in reply by the Defendants, then any such affidavit shall be filed and served by 7 March 1988.

The issue of costs will be reserved. I would record that the parties were in Court from approximately 2.15 pm until 4.15 pm today.

Solicitors for the Plaintiff: Stace Hammond Grace & Partners
Hamilton

Solicitors for the Defendants: Davys Burton Henderson
Rotorua