IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

[redacted] CP 1899/87

BETWEEN EQUITICORP FINANCE GROUP LIMITED and EQUITICORP NOMINEES LIMITED both duly incorporated companies having their registered offices at Auckland and carrying on business as Financiers

PLAINTIFFS

A N D DONALD FREDERICK COLLETT of Auckland, Company Director

FIRST DEFENDANT

A N D CHEAH THEAM SWEE of Singapore, Company Director

SECOND DEFENDANT

A N D MATHEWS JOSEPH of Wellington, Company Director

THIRD DEFENDANT

A N D SHERRYL ANN JOSEPH of Wellington, Manager

FOURTH DEFENDANT

A N D ALISTAIR IAN SCOWN of Hamilton, Company Director

FIFTH DEFENDANT

A N D ALAN CHARTON of Singapore, Company Director

SIXTH DEFENDANT

A N D MICHAEL DOSSOR of Wellington, Company Director

SEVENTH DEFENDANT

A N D DAVID JOHN MULHOLLAND of Wanganui, Company Director

EIGHTH DEFENDANT

Hearing 18, 19 February 1988

Counsel D F Dugdale and Jane Latimer for second defendant in support

R J Craddock QC and B P Henry to oppose

Judgment 4 March 1988.

JUDGMENT OF TOMPKINS J

The second defendant, Mr Cheah, has applied, pursuant to R 143 of the High Court Rules, for an order that the summary judgment given against him for $7,556,442.47 on the 17 December 1987, be set aside.

Background

All the defendants were directors and shareholders of Clearwood Thoroughbred Stud Ltd ("Clearwood") and London Pacific Ltd ("London Pacific").

In November 1986, Euro-National Securities Ltd and Kupe Investments Ltd, each separately entered into agreements with the defendants whereby the defendants agreed to purchase shares in Clearwood. In each case the first named plaintiff guaranteed to the vendor the performance of the defendants' obligations.

It is claimed by the plaintiffs but denied by the defendants, that it was part of the transaction that the defendants would indemnify the first named plaintiff against any liability it may incur to the vendors.

On the 19 January 1987, there was executed a Deed of Covenant and Indemnity whereby the defendants indemnified the first named plaintiff against any amount that it may become liable to pay to Euro-National or to Kupe. This deed was signed on behalf of each of the defendants by the second named plaintiff, Equiticorp Nominees Limited as

the attorney of each of the defendants. This was pursuant to a document called "Heads of Agreement" made on the 14 November 1986 between the defendants which set out the basis upon which the defendants' consortium would operate. By clause 2.5 of the Heads of Agreement, each defendant appointed Equiticorp Nominees Limited his attorney, the power to be exercised only on the basis set out in the clause.

Under the terms of the agreement for sale and purchase between Euro-National and Kupe as vendors and the defendants as purchasers, the defendants were required to re-purchase from Euro-National and Kupe certain ordinary fully paid shares in the capital of London Pacific on dates specified in the agreement. They failed to do so. Euro-National and Kupe then called on the first named plaintiff under the guarantees. As a result, the plaintiffs have paid to Euro-National and Kupe a total of $10,650,000 plus accrued interest.

On the 28 August 1987, the plaintiffs demanded from the defendants $3,550,000 being the payment it had by then made plus interest and costs, a total of $3,558,000. The defendants did not meet this demand.

The Proceedings

On the 13 November 1987, the plaintiffs commenced these proceedings seeking summary judgment against each of the defendants for $7,268,163 being the total of the payments

they had by then made to Euro-National and to Kupe plus interest, and in addition, judgment for $3,550,000 being the payments they would be required to make to Euro-National and Kupe on the 31 December 1987.

On the 19 November 1987, there was served on Mr Cheah in Hong Kong the statement of claim, notice of proceeding for summary judgment, notice of interlocutory application for summary judgment, and the affidavit of Mr MacMorran in support. On the 14 December 1987, there was received at the High Court at Auckland by post, an appearance by Mr Cheah objecting to the jurisdiction of the Court. This document, some five pages long, sets out in detail the basis upon which Mr Cheah claimed that this Court did not have jurisdiction in respect of the claim against him, and also sets out various assertions as a result of which he claimed that he had a valid defence and a valid counterclaim.

Three days later, on the 17 December 1987, the application for summary judgment came before Master Towle, the other defendants either not having been served or having filed affidavits in opposition. The plaintiffs proceeded only against Mr Cheah. There was no appearance on his behalf - he would have been unaware of the hearing. The Master entered judgment against Mr Cheah for $7,556,442.47 which included interest and also entered judgment for a declaration of liability by Mr Cheah in respect of the further amount of $3,550,000 due on the 31 December 1987. In his reasons, issued on the 23 December 1987, Master Towle considered

the appearance of Mr Cheah objecting to the jurisdiction of the Court. He recorded an oral application made on behalf of the plaintiffs pursuant to R 131 (5) to set aside that appearance. He did so, relying on the absence of any address for service as required by the rules, the absence of any appearance on behalf of the second defendant and being satisfied that the Court had jurisdiction to hear the plaintiffs' claim. He considered, but decided against, imposing any terms which may have permitted Mr Cheah time to file a defence to the claim.

This application to set aside the judgment followed. On the 11 February 1988, after a further hearing at which Mr Cheah and the other defendants were represented, Master Towle made an order pursuant to s 26 (N) of the Judicature Act 1908 that the proceedings be referred to a Judge. On the same day, Thorp J adjourned the application to set aside the judgment and granted a stay on certain strict terms.

The issues

R 143 provides :

> **"Setting Aside Judgment** - Any judgment given against a party who does not appear at the hearing of an application for judgment under rule 136 or rule 137 may be set aside or varied by the Court on such terms as it thinks just."

The principles to be applied to an application under this rule were not the subject of any detailed submissions by counsel. Having considered the judgments of Thorp J in Chase Securities ltd v G S H Finance Pty Ltd (CP 106/86 Auckland Registry 26 June 1986) and of Wylie J in UDC Finance

Ltd v Lloyd (CP 297/86 Auckland Registry 16 September 1986) together with judgments in other registries referred to in McGechan on Procedure and Sim and Cain, Practice and Procedure, I consider that the Court should have regard to such factors as the nature of any defence the defendant claims to have, the nature of any delay and the reasons for it, and whether the plaintiff will suffer irreparable injury if the judgment be set aside. But these factors are really only indicators to what must be the fundamental issue for the Court to determine and that is what the justice of the case requires. And in considering the justice of the case, regard must be had to both the plaintiffs and Mr Cheah. Like Wylie J in UDC Finance I adopt as applicable to this rule the dicta of Greig J in O'Shannessy v Dasun Hair Designers Ltd [1980] 2 NZLR 652, 633.

> "...the question is what the justice of the case requires in the particular circumstances. That justice must be applied to both parties. There is a question of justice or injustice in depriving the plaintiff of his judgment obtained regularly. On the other side there is the question of injustice in refusing to give the defendant the opportunity to have his case put and the matter dealt with by way of a full hearing. It will always be relevant to consider, as Lord Russell of Killowen said, whether there can be any useful purpose in setting aside the judgment and there may be no useful purpose if there can be no possible defence and further, to consider how it happened that the applicant found himself subject to a judgment to which he might have raised some defence."

But in considering the possible defence factor, it must be borne in mind that it is a summary judgment that is being sought to be set aside. On any hearing of the summary judgment application, the onus is on the plaintiff to establish that the defendant has no defence to his claim (R 137). To require a defendant on an application to set

aside the judgment to establish that he has a defence, would not only result in a reversal of the onus of proof but would also mean that the Court at this stage is determining the principal issue that would be for the Court to decide if the judgment were set aside and the plaintiffs proceeded with their application for summary judgment. In this case there is a further factor. At least some of the submissions that Mr Cheah advances by way of defence are common to the other defendants. If, for example, the Court on this application were to determine that those defence submissions have no merit, that determination may be thought to prejudice the other defendants. While such a finding would not be binding on them, they may well consider that the Court has made a ruling adverse to their interests without their having been heard.

These considerations lead me to conclude that while the Court should have regard to the nature of the defences raised on behalf of Mr Cheah, it should not require him to establish that he has a substantial ground of defence, since that issue ought to be determined if the application to set aside the judgment be granted. But if the Court were to conclude that the matters raised by Mr Cheah by way of defence were completely baseless, without any merit at all, or frivolous, then that may well be a decisive factor in determining where, on this application, the justice of the case lies.

Mr Dugdale advanced his client's case on the application on two broad fronts. First, he submitted that the judgment

was irregularly obtained. He contended that if that ground were established then the judgment should be set aside irrespective of any other considerations. Alternatively, he contended that the defendant had established an arguable defence, or at least that the factors he raised by way of defence were not groundless, without any foundation, or frivolous. He accepted that Mr Cheah's objection to the jurisdiction could not succeed.

Mr Craddock for the plaintiffs submitted that the judgment was properly obtained and further, that Mr Cheah had failed to establish any basis upon which he could have a possible defence to the plaintiffs' claim.

The obtaining of the judgment

The essence of Mr Dugdale's submission is that the Master was wrong in setting aside Mr Cheah's appearance, and that the appearance having been lodged, the application for summary judgment should not have been dealt with without hearing Mr Cheah, at least on the appearance if not on the application itself.

The notice to defendant served on Mr Cheah was in accordance with form 13 to the High Court Rules. It included the following:

> "Appearance Objecting to Jurisdiction of Court
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> 4. If you object to the jurisdiction of the Court to hear and determine this proceeding you may, within the time allowed for filing your affidavit, -

(a) File in the office of the Court instead of an affidavit an appearance stating your objection and the grounds thereof; and

(b) Serve a copy of the appearance on the plaintiff"

This was what Mr Cheah did. As I have already indicated his appearance set out in considerable detail the reasons why he objected to the jurisdiction and also what he considered to be defences to the plaintiffs' claim. It included as his address, 22 Woollarton Drive, Singapore 1025. This was not an address for service as defined in R 3 of the Rules which requires the address to be not more than 5 kilometres from the proper office of the Court.

Rule 44 requires that at the end of the first document filed by a party there should be a memorandum stating a number of matters including an address for service. The appearance was the first document filed by Mr Cheah. It was therefore defective because it did not comply with R 44 in that although it set out an address for service that address for service did not comply with R 3.

Mr Craddock submitted that because of the absence of a valid address for service the appearance was a nullity. I do not uphold this submission. Rule 212 describes the consequences of a failure to give an address for service. It says that:

"Until a party to a contentious proceeding has given an address for service in terms of these rules he shall not be entitled to be served with notice of any step in connection with the proceeding or with copies of any further documents filed in the proceeding or to address the Court."

So at the stage where the application for summary judgment came before the Master,, Mr Cheah had filed an appearance

within the time prescribed but because of the failure to include a valid address for service he was not entitled to be served with notice of any further step.

The procedure to be followed after a defendant has filed an appearance protesting the jurisdiction is set out in R 131. Subclause (3) provides :

> "A defendant who has filed an appearance under subclause (1) may apply to the Court to dismiss the proceeding on the ground that the Court has no jurisdiction to hear and determine it."

Mr Cheah, in the events that occurred, did not have the opportunity of making such an application.

Subclause (5) provides :

> "At any time after an appearance has been filed under subclause (1) the plaintiff may apply to the Court by interlocutory application to set aside the appearance,"

It was pursuant to this subclause that Mr Craddock made his oral application. And I assume it was because of the absence of a valid address for service that the Master was prepared to deal with the application without the notice to Mr Cheah that an interlocutory application would otherwise require.

But, subclause (7) of R 131 I consider to be significant. It provides :

> "The Court in exercising its powers under this rule may do so on such terms and conditions as may be just and in particular on setting aside the appearance may enlarge the time within which the defendant may file and serve a statement of defence and may give such

> directions as may appear necessary regarding any further steps in the proceeding in all respects as though the application were an application for a direction under R 437 or R 438."

In the circumstances of this case I consider that the master should have acted under that subclause. Mr Cheah had filed an appearance within time. Under the terms of the notice served on him he was entitled to file the appearance "instead of an affidavit" so it could not be expected that the appearance alone would deal with all the matters that would be dealt with in an affidavit filed in oposition to the application for summary judgment. So even if the Master considered that because of the defect in the address for service it was appropriate for him to deal with the application to set aside the appearance without notice to Mr Cheah, it seems to me that it would have been "just" to enlarge the time within which Mr Cheah may file and serve an affidavit, to require that notice of such an enlargement be given, and to impose a reasonable time limit for compliance.

Mr Dugdale submitted that the consequence of the Master striking out the appearance and proceeding without any further notice to Mr Cheah to enter judgment against him resulted in a default judgment that was irregularly obtained as a result of which Mr Cheah is entitled ex debito justitiae to a setting aside : Greig J in O'Shannessy at 654. But I do not consider that the omission of the Master to exercise the discretion given to him by R 131 (7) renders the judgment irregular. Rather I consider that this is a factor to take into account in considering what the justice of the case requires.

The Grounds of Defence

Mr Dugdale raised a number of issues that he submitted would need to be determined before the Court could be satisfied on a summary judgment application that Mr Cheah has no defence to the claim.

First, he pointed to the second defendant's denial that there had been any agreement between the defendants and the plaintiffs for the former to indemnify the latter. More particularly he referred to the terms of the Euro-National and Kupe sale agreements of the 7 November 1986, and submitted that in view of clause 8.1 in these agreements, to which the first named plaintiff was also a party, any previous agreement that may have existed concerning such an indemnity would be of no force or effect.

Secondly, he submitted that the execution of the deed of indemnity by Equiticorp Nominees Ltd was invalid as a fraud by that company on its powers or otherwise beyond its powers as attorney of the defendants. In support, he contended that the power of attorney was used otherwise than in accordance with the express restrictions on its use contained in the heads of agreement between the defendants of the 14 November 1986, such restrictions on the exercise of the power being expressly incorporated into the powers of attorney completed by the defendants in favour of Equiticorp Nominees.

Thirdly, he contended that on a proper reading of the

provision in the heads of agreement the attorney could only exercise the power after the defendants' management committee had deemed the giving of the indemnity to be appropriate and that the giving of the indemnity was never referred to the management committee. Fourthly, he contended that the terms of the deed of indemnity were so weighted in favour of the plaintiffs that its execution by the attorney was not an honest exercise of its powers, the donee being obliged to exercise its powers bona fide. He emphasised that the attorney purporting to exercise the power was the second named plaintiff and that the indemnity was given in favour of the first named plaintiff.

Finally, he submitted that the plaintiffs had abandoned their right to be indemnified by the defendants as the result of an agreement claimed to have been reached on the 8 October 1987, when a scheme for re-arrangement prepared by the plaintiffs was submitted to and agreed to by all the defendants. In support of that contention he referred to the affidavits of other defendants deposing to their belief that as a result of the agreement said to have been made at that meeting there was no longer to be any liability to indemnify the plaintiffs.

Mr Craddock for the plaintiffs advanced detailed submissions in support of his contention that not only the evidence submitted by the plaintiffs, but more importantly, the documentary material produced by the plaintiffs, demonstrated beyond doubt that the matters raised by Mr Dugdale by way of defence were baseless and contrary to the documentary evidence. He submitted that the factual assertions contained in Mr Cheah's affidavit did not pass the threshhold of credibility,

citing in support of that approach the judgment of Somers J in Pemberton v Chappel [1987] 1 NZLR 1, 4.

Although in the submissions before me the issues to which I have referred were examined in detail by both counsel, in view of the conclusion I have reached I consider it neither desirable nor appropriate that I should set out those submissions in full and express any concluded view on the merits of each. But having regard to the matters raised and the submissions advanced in support of and in opposition to each, I have reached the conclusion that Mr Cheah has established an arguable case on whether the plaintiffs will be able to satisfy the Court that he has no defence to the plaintiffs' claim. I do not consider it appropriate to express any more definite view than that since the issue of whether the plaintiffs can so satisfy the Court is a matter that should more properly be determined on the hearing of the application for summary judgment.

Conclusion

I pass to consider other factors relevant to the exercise of the Court's discretion. Delay is not really an issue. Mr Cheah acted, if inappropriately, within the time specified in the notice and has since pursued his application under R 143 promptly.

Mr Craddock submitted that the plaintiff could suffer an injustice if the judgment was set aside. An affidavit filed by a solicitor on behalf of the plaintiffs deposed

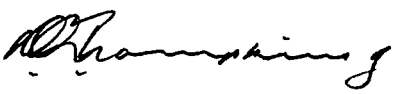
to Mr Cheah being the defendant in other very substantial claims in other jurisdictions. More particularly, there was evidence that judgment had been given against him in Malaysia for M $20,000,000. Mr Cheah has applied to have that judgment set aside. There was evidence of other claims against Mr Cheah in Singapore. It may well be that the plaintiffs will suffer some prejudice if this judgment is set aside but obtained again at a later date by which time the plaintiffs may have suffered some disadvantage resulting from the delay in enforcement proceedings. But I do not consider that that possible prejudice outweighs the possible injustice to Mr Cheah in depriving him of the opportunity of putting forward the matters he wishes to raise by way of defence at a full hearing on the summary judgment application.

Having regard to the manner in which the judgment was obtained, the issues relating to possible defences by Mr Cheah, the absence of any delay and the prejudice aspect, I conclude that the ends of justice require that the judgment obtained against Mr Cheah in his absence should be set aside.

Mr Craddock submitted that if the judgment were to be set aside then it should be on terms requiring Mr Cheah to give security for the amount of the judgment. I do not accept this submission. The giving of such security would place the plaintiffs in a considerably more favoured position than in my view the circumstances of the case warrant. But I accept Mr Craddock's further submission that terms should be imposed to ensure a speedy hearing.

There will be an order that the judgment given against Mr Cheah on the 17 December 1987 be set aside. It will be a term of this order that Mr Cheah file in the Court any further affidavits he wishes to file within 21 days of the date of the delivery of this judgment. In case the plaintiffs consider that some further terms may be justified in order to ensure a speedy hearing, leave is reserved to the plaintiffs to apply further.

Costs are reserved. If any party considers that they should be fixed at this stage counsel may file memoranda or may seek a hearing before me.



Solicitors

Messrs Kensington Swan, Auckland for second defendant in support
Messrs Hesketh Henry, Auckland to oppose