

25/10

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 86/86

BETWEEN WYNDHAM JAMES FITZGERALD
HAMILTON and KATHLEEN
MARGARET HAMILTON of
Muritai, Private Bag,
Rangiora, Farmers

Plaintiffs

A N D ANDREW PATRICK LISSAMAN
EVERIST of Christchurch,
Solicitor and ANTHONY
NORBERT-MUNNS of Christ-
church, Sharebroker
trading as Gloford Farming
Partnership

Defendants

A N D PYNE GOULD GUINNESS
LIMITED a duly incorpora-
ted company having its
registered office at
Christchurch and carrying
on business there and
elsewhere as stock and
station agents

Third Party

**LOW
PRIORITY**

In Chambers:
Hearing:

6th October 1988

Counsel:

P.M. James for Plaintiffs
P.H.B. Hall for Defendants

ORAL JUDGMENT OF WILLIAMSON J.

As a result of a judgment delivered on the 8th July 1988 the Plaintiffs have formally entered judgment against the Defendants for a total, inclusive of interest and costs, of \$16,970.12.

In this application the Defendants seek a stay of execution of that judgment. The application was made pursuant to Rule 565. An amendment is sought for the application to be

under Rule 35 of the Court of Appeal Rules 1955. Leave to make that amendment is granted.

The tests which normally apply to an application for stay under Rule 35 are set out in paragraphs CA 35.04(1) of McGechan on Procedure. In general terms the Plaintiffs have a right to the proceeds of a successful judgment. The ground upon which the Defendants in this case claim that stay should be made concern the ability of the Plaintiffs to repay moneys if the appeal is successful. There is, in the affidavit filed in support of this application, an allegation of insolvency or of difficult financial circumstances on the part of the Plaintiffs.

In response to this suggestion the Plaintiffs have filed an affidavit claiming that their financial position is sound and that if the appeal is successful they are in a position to refund any judgment. Mr Hamilton has annexed to this affidavit a copy of the statement of assets and liabilities of him and of the partnership as at the 30th June 1988. This statement of the assets and liabilities indicates an excess of assets over liabilities of \$343,315.

As Counsel for the Defendants points out, it is based upon the land and improvements having a value of \$342,500, whereas a note to the statement indicates that as at the 1st October 1988 the Government Valuation of these land and buildings is \$260,000. It is argued on behalf of the Defendants that in view of this Government Valuation, and in view of the losses made by the Plaintiffs' farming partnership, that there is substance in the Defendants' fear that they may not be repaid if their appeal is successful.

There are many cases collected in the notes to McGechan on Procedure which illustrate the varying ways in which this Court has dealt with applications such as this. These variations follow the variations in the factual situations applicable both to the parties and to the claims.

In the case of Plowman v Dillon (unreported 11/8/86 Auckland A.496/83) Chilwell J., after doubts were voiced about the Plaintiff's solvency, made orders requiring the giving of security. In Anderson v Livemore, (unreported 27/5/87 Auckland A.1546/85) which is also mentioned in McGechan, Wylie J., in a similar situation, refused a stay without imposing any conditions.

The facts in this case are that if the Defendants meet the judgment they will be paying an amount of \$16,970.12 to the Plaintiffs who are farmers of long standing. The accounts annexed to Mr Hamilton's affidavit certainly indicate the problems which the farming industry may have been facing, but they also provide clear evidence that the Plaintiffs are capable of repaying such a sum. Indeed the equity in Mr Hamilton's land, given the mortgages set out, is still \$154,000. Counsel for the Plaintiffs has indicated that one of the mortgages in relation to the Estate H. Brown involves moneys which are themselves to be paid ultimately or credited to Mr Hamilton.

The period between any payment by the Defendants and repayment if the appeal is successful is uncertain. Counsel do not know when a fixture may be given in the Court of Appeal. They do not, however, anticipate that it would be greater than a period of one year. In those circumstances I am of the view that no real case of insolvency or of financial difficulty impeding repayment has been made out.

None of the other grounds mentioned in McGechan on Procedure have been established. Counsel for the Defendants points to the fact that this is not a case where the moneys being paid are ones which originally the Plaintiffs had to pay out but rather that they represent damages for breach of contract. He has also drawn attention to the significance of the drop in interest rates in recent times so that payment of 11% on moneys owing under a judgment is now not far removed from the interest rate which might be obtained on the open

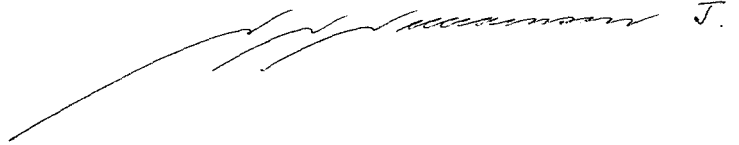
market in relation to such funds. Counsel has also pointed to the importance of questions relating to the quality and fitness of animals and to the fact that such questions may arise on the appeal.

Having endeavoured to balance all those matters, I am of the view that they are not sufficient to outweigh the general principle that Plaintiffs have a right to proceeds of a successful judgment. Consideration of their rights is a matter which has been emphasised in various judgments, in particular that of Hardie Boys J. in Farmers Meat Exports Ltd v Waitaki NZ Refrigerating Ltd, (unreported, 6th December 1985, Christchurch A.59/81).

It may well be that a simple undertaking from the Plaintiffs to the Defendants to repay the amount of the judgment, if the appeal is unsuccessful, would be sufficient. In view, however, of the rather volatile area of deer farming in which the Plaintiffs carry on their business and the stresses which have been in that area in recent time, I am prepared to make an order following the general approach of Chilwell J. in Plowman v Dillon, namely that:

- (a) The Defendants are to pay to the Plaintiffs the amount of the judgment, plus interest, within two weeks or until (b) is complied with.
- (b) That the Plaintiffs are to give security for any sum which becomes due to the Defendants as a result of the appeal in an agreed form or as fixed by the Registrar of the Court.
- (c) There will be leave to apply further if satisfactory security is not available. On the information I have at present a security of a fourth mortgage over the land or portion of it is available and would more than adequately secure repayment of such funds.

Costs on this application are reserved pending the appeal.

A handwritten signature in black ink, appearing to be "William J.", written in a cursive style.

Solicitors:
Saunders & Co., Christchurch, for Plaintiffs
Wood Marshall, Christchurch, for Defendants