

NZLR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP.171/87

**NOT
RECOMMENDED**

IN THE MATTER of Memorandum of Mortgage
No. H.401110.2

BETWEEN BANK OF NEW ZEALAND
a body corporate
constituted under the Bank
of New Zealand Act 1979
and having its registered
office in the City of
Wellington, Bankers

Plaintiff

AND HUGH GRANT SAYERS of
Katikati, Orchardist and
JACQUELINE TARO SAYERS
of Katikati, Married Woman

Defendants

Hearing: 12 October 1988
Counsel: I.B. Thomas for the Plaintiff
No appearance for the Defendants
Judgment: 12 October 1988

ORAL JUDGMENT OF DOOGUE J

These are proceedings which commenced as an application against the Defendants for an order for summary judgment. The proceedings came before a Master on different dates when judgment was given against the Defendants on liability only leaving the issue of quantum for determination in accordance with the ordinary procedures relating to civil proceedings. The hearing on quantum

was set down for today with notification to the solicitors on the record for the Plaintiff and the Defendants by telephone on 6 October 1988 and by letter facsimilied to the solicitors at 10.40 am on 7 October 1988.

The solicitor for the Defendants had been given conditional leave to withdraw on 20 September 1988, the condition being that he informed the Defendants of the fixture position as he was still the solicitor on the record and there was no other address for service of the Defendants.

When the matter was called this morning there was no appearance by either counsel or the Defendants on their behalf. The matter has proceeded as an undefended claim before me in respect of the quantum issue, with formal proof being offered by the Plaintiff.

I have heard evidence from Mr Peart, the Katikati branch manager of the Plaintiff. He has produced copies of the statements of account forwarded to the Defendants between November 1983 and August 1984. He informs me that somewhere about the second quarter of 1984 the statements forwarded to the Defendants were returned and that thereafter statements were not forwarded to the Defendants but that, to the best of his knowledge, the Defendants would have received all relevant bank statements relating to their account until that part of 1984.

The primary indebtedness of the Defendants was incurred substantially prior to that time.

I am further informed that full discovery was made to the Defendants by the Plaintiff and that no request for further discovery has been made by the Defendants of the Plaintiff.

The statements of account produced by Mr Peart are in the customary form of bank statements produced by the traditional banking institutions of this country. They disclose the debit entries in a form which is clear to any reader at the relevant dates. Debits are shown in respect of interest and bank fees and charges. Mr Peart's evidence is that the interest charged to the account has at all times been in accordance with the Plaintiff's agreement with the Defendants, with an increase from the rate of 14% to 16.5% during 1985. Notice of that change of interest rate was given to the Defendants by a letter dated 4 June 1985, which is Exhibit B to Mr Peart's affidavit of 20 August 1987.

In the absence of any evidence challenging the records before me, and Mr Peart's evidence, I am satisfied that the amount owing by the Defendants to the Plaintiff at 30 September 1988, inclusive of all interest to that date, along with bank charges, is \$131,317.23

The Defendants in their affidavits had advised that they had no knowledge of the make up of the sums claimed by the

Plaintiff. The evidence before me and the statements of counsel from the Bar satisfy me that the information has either been in the hands of the Defendants or was available to them should they seek it.

The Defendants have further deposed in their affidavits that they had calculated the interest at a higher rate than the rate of 16.5% charged since approximately mid-1985. There is no evidence before me of any error in the interest calculations. Mr Peart has confirmed that the Plaintiff has not charged interest at any rate greater than 16.5%, although bank charges were additional to the interest, and if the Defendants' calculations have included them within the interest, a greater rate than 16.5% may have been achieved.

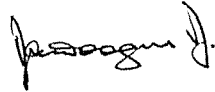
I am satisfied, on the evidence before me, that the Plaintiff is entitled to judgment against both of the Defendants in the sum of \$131,317.23.

In addition the Plaintiff is entitled to costs for trial in accordance with Items 9 and 10 of the Second Schedule to the High Court Rules, with trial being on quantum only.

In addition the Plaintiff is entitled to costs on the summary judgment proceedings in so far as liability was determined in favour of the Plaintiff, with costs having been reserved.

I would fix such costs at \$1200 and the Plaintiff is also entitled to costs on discovery. In respect of those costs I certify for the global sum of \$250.00.

In addition the Plaintiff is entitled to its disbursements which are to be fixed by the Registrar in accordance with Item 34 of the Second Schedule to the High Court Rules.

A handwritten signature in black ink, appearing to read "P. J. Maltby".

Solicitors for the Plaintiff:

Holland Beckett Maltby
Tauranga