28/3

ACB SET

9.3.89

Esam Cushing & Co V Benson

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CP 141/88

NOT RECOMMENDED

BETWEEN ESAM CUSHING AND COMPANY

Plaintiff

AND CHRISTOPHER PHILLIP MICHAEL BENSON

Defendant

Date of Hearing: 9 March 1989
Date of Judgment: 9 March 1989

Counsel:
Mr Rooney for Plaintiff
Mr Hill for Defendant

ORAL JUDGMENT OF MASTER HANSEN

The plaintiff's application for Summary Judgment in the sum of $25,464.46 relates to monies that the plaintiff alleges is due for purchases on the stock market in August and October 1987 and the balance left after sales between 1 October and 10 November. It is yet again another Summary Judgment Application arising out of the stock market collapse of October 1987.

The Court is concerned yet again with the number of affidavits that have been filed in this matter without leave and in contradiction of the rules. Frankly, when I first read the papers, I was minded to dismiss the Application for Summary Judgment on the failure of the plaintiff to make full disclosure because in each affidavit a little more has been forthcoming and the decision of Barker J in Foodstuffs Auckland Limited v Schweiger is authority for the Best Evidence Rule. And there are countless cases that say that the plaintiff must get it right first time around. However, I am satisfied that if I adopted that course I would end up in a situation with a full trial on part of this matter which I do not believe can be opposed and would therefore be wasteful of the Court's time. However, I hope counsel will note that since the amendment to the rules all that is allowed is an Affidavit in Support, an Affidavit in Opposition (with a Notice of the Opposition and a Statement of Defence) and an Affidavit in Reply. And the rules themselves limit that specifically to being an Affidavit in Reply, not an opportunity to patch up holes. I think counsel should note that I that both the Masters and the Judges, because of what is happening in Summary Judgment Proceedings with large numbers of affidavits being filed, those rules will be strictly adhered to.

In this particular case, the defendant does not dispute the sum owing but alleges he has a counterclaim. Mr Hill, in his submissions, talked about it as a defence and as a setoff but in reality it is quite clearly a counterclaim. In those circumstances the authority is clear in the decision of McGechan J in the Roberts' Family Fitness case that the appropriate course is to enter judgment and if the counterclaim is one that can be genuinely triable to stay execution in relation to that.

Turning to that counterclaim, it arises out of the purchase of some T.K.M. shares and some Barwon options in January 1987. The defendant alleges that he was told by an employee of the plaintiff identified only as "Tim", that he could not sell the shares until the script had actually been delivered. The plaintiff says that is nonsense, that his conduct was such that he clearly knew he could sell shares without the script and indeed, did so in relation to the shares, the subject of the Statement of Claim. The plaintiff also points to a meeting held with the defendant and his accountant and indeed there is exhibited, a letter from the firm of accountants Carr and Stanton which the plaintiff points to as an acknowledgment of the indebtedness due. I have already referred to the

Best Evidence Rule and plaintiffs getting it right and no satisfactory explanation has been proffered for this letter surfacing in an affidavit sworn as late as 7 March, despite the fact the original papers were filed on 13 December.

The defendant acknowledges that meeting but says that although there was a discussion about his general financial situation and his ability to repay the sum due, he did not raise the question in relation to the Barwon and T.K.M. shares because of the information he had been earlier given. The plaintiff says that cannot be right, that the defendant has carefully refrained from specifically stating he gave orders to sell these particular shares. Again it is somewhat surprising that the plaintiff has not taken advantage of the stockbroker's lie it enjoyed in relation to those shares and sold them which clearly would not have wiped the indebtedness due but could have reduced it. Whether or not those shares are higher now than they have been since the debt was incurred is not a matter that is before the Court in any satisfactory form. There is some Barwon option prices but that only relates to October 1987. It does not take the matter any further.

In essence, it seems to me that what the plaintiff is urging the Court here, is to take the robust commercial view as propounded by the learned President of the Court of Appeal in Bilbie Dymock Properties v Patel and Bajaj. Of course it is necessary in reading that particular decision to recall the caveat in the often under cited decision of the Court of Appeal in Doyle's Trading Company Limited v Westend Services Limited and in that case His Honour Casey J stated that:

> "While the desirability of eliminating the frustration and delays which can be caused by unmeritorious or tendentious defence needs no emphasis, it is important to play proper regard to the defendant's interest and to be wary of allowing the rule to become an instrument of repression or injustice in the laudable interest of expediting litigation. It is true that "justice delayed is justice denied", but not at the expense of a fair hearing for both parties, unless the Court is sure there is no real defence"

Now by extrapolation whether or not there should be a stay depends on whether there is, in the Court's view, a real counterclaim.

In all the circumstances of this case, I am satisfied that the matters raised by the defendant by way of counterclaim warrant further investigation. I am conscious of the fact that shares were sold without script later in the year. I am conscious also that the defendant has not specifically sworn to giving sell instructions but his explanation that because he had been told there was no script and he could not sell and therefore could not give sell instructions, is one that is credible enough to warrant trial. Furthermore, there seems to be another matter that requires investigation in this particular matter which forms part of the counterclaim, although it really is a question of failure to mitigate. That is the failure of the plaintiff to exercise his stockbroker's lien. It could be that a better price could have been obtained at some time between the debt being incurred and now, I do not know. There is no evidence before the Court.

Accordingly, there will be judgment for the plaintiff in the sum of $25,464.46. I have taken into account what Mr Hill has said about general damages in the counterclaim but I am satisfied that the defendant in this matter is only entitled to a stay for the precise sum alleged. Accordingly, there will be a stay of execution in the sum

of NZ$15,704.00 and 194.

The counterclaim has already been filed. It seems to me to be a straight forward matter that justifiably requires a timetable somewhat tighter than that laid down by the rules. There will be leave to the plaintiff to file a defence to the counterclaim within seven days. Lists of documents to be verified by affidavit to be filed and served 14 days thereafter. Inspection seven days thereafter. Any further interlocutory applications, seven days thereafter. Praecipe to be signed and filed seven days thereafter.

The plaintiff has applied for costs. This is resisted by the defendant who suggests they should be reserved. As I have just commented to counsel for the defendant, that ignores the fact that quite clearly something has been owing yet nothing has been paid. It seems the only way that the plaintiff could even get this partial satisfaction was by taking Court action. Accordingly, there will be costs of the opposed hearing to the plaintiff in the sum of $1,200.00 plus disbursements as fixed by the Registrar to be paid forthwith.

J.W. Hansen

Master Hansen

Solicitor for the Plaintiff: Gifford, Devine and Partners, Hastings by their agents Willis, Toomey Robinson and Co

Solicitors for the Defendant: McKay, Hill and Co