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N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CP No. 30/89

BETWEEN ELDERS RURAL FINANCE NZ LIMITED

First Plaintiff

NOT RECOMMENDED

A N D ELDERS PASTORAL LIMITED

Second Plaintiff

517

A N D IAN CHARLES EASTON of Barber Road, Shannon, Farmer and GAYLE ANN EASTON his wife

Defendants

CP No. 102/89

BETWEEN ELDERS RURAL FINANCE NZ LIMITED

First Plaintiff

A N D ELDERS PASTORAL LIMITED

Second Plaintiff

A N D IAN CHARLES EASTON of Barber Road, Shannon, Farmer and GAYLE ANN EASTON his wife

Defendants

Hearing: 17 May 1989 (at Wellington)

Counsel: J.P. Doogue for Plaintiffs
I.M. Gordon for Defendants

Judgment: 23rd June 1989

JUDGMENT OF GREIG J

This is an opposed application for summary judgment. It is a claim by a stock and station agency group for the monies alleged to be owing by its farmer client and customer. The claim is the culmination of a lengthy period of farming support and continuing current account transactions between the parties in the operation of the defendants' farming and other ventures. These ventures were more substantial than many ordinary farming operations and have involved large amounts of money. Likewise there has been a number of discussions, meetings and negotiations throughout the relevant period. Arising out of this long and close interaction between the parties that the defendants found the alleged defences both broadly as general allegations of oppressive and wrongful conduct on the part of the plaintiffs as well as particular instances of such conduct and matters which, it is said, breach contracts or sub-contracts which arose between the parties.

The principles under which these applications are to be dealt with are now well known and it is not necessary to make any lengthy citation of authority or to attempt to rehearse, in summary way or otherwise, the principles which apply. It is, I think, appropriate to mention again, however, that there is a need for judicial caution balanced with a robust and realistic judicial attitude when that is called for by the particular acts of the case: see Cooke P in Bilbie Dymock Corporation Ltd v Patel (unreported, 16 December 1987, CA 200/87). Reference was also made in that judgment to the familiar words of Lord Diplock in Eng Mee Yong v Letchumanan [1980] AC 331 at 341.

That approach, however, must not be carried to the point of denial of justice. I refer in particular here to the observations of Casey J in Doyle's Trading Company Ltd v West End Services Ltd (unreported, 12 December 1986, CP 94/86). I would refer in a general way to the judgment of McGechan J in Roberts' Family Investments Ltd v Total Fitness Centre (Wellington) Ltd (unreported, 31 March 1988,

CP 516/87, Wellington Registry). If I may say so, with respect, that summarises completely and accurately the applicable principles in such matters as this. In the end, bearing in mind the onus which is on the plaintiff, it is a matter of judgment on the particular facts and circumstances of the case whether the Court is brought to the state of satisfaction that there is no defence to the claim.

Although the plaintiffs, or their predecessors in business, had a business arrangement and dealings with the defendants for a number of years it is, I think, appropriate to commence a discussion of the circumstances of this matter in September 1985 when the parties entered into a written agreement on 9 September 1985 to provide a cash advance facility. The total facility then offered by the first plaintiff (ERF) was $1,280,000 made up of a term facility limit for a period of two years of $780,000 and a pastoral facility limit of $500,000 which later became repayable upon demand. By an amending agreement dated 17 October 1986 the term loan facility was increased to $900,000 and the pastoral current account facility to $1,300,000, making a total facility of $2.2 million. The term loan facility remained on a term of two years but from 20 September 1985 and the current account facility became repayable on demand with all goods purchased from or sold on behalf of the borrowers to be credited to that current account. As at 31 December 1988 the term loan facility amounted, together with interest, to the sum of $1,081,507 and the current account facility at the same date to $1,187,397. At the date of hearing the term facility amounted to $1,174,334 and the current account facility $1,280,746, a total outstanding of $2,455,080. The current account facility was at all times provided by and in the amount claimed by the second plaintiff (EP).

In accordance with the arrangement made between the parties, instruments by way of security were executed by the defendants on 29 October 1985, 23 October 1986, and 2

July 1987. Each of these instruments describes the grantee as "ERF" but as trustee for itself, EP, and any other lenders in the Elders Group.

On or about 20 May 1988 the plaintiffs commenced default action against the defendants and a number of the items secured under the instruments by way of security were seized. In June 1988, following the application of the defendants, it was agreed that a number of the items so seized should be bailed to the defendants to enable them to carry out some harvesting operations which were then about to commence. After the end of that harvesting (in January 1989) the plaintiffs then again attempted to retake possession of those items which had been bailed, but the defendants refused to permit that to be done. One particular item of machinery, the subject matter of the instruments by way of security, was never seized by the plaintiffs but has always remained in the possession of the defendants. That is what is described as a Grimme Potato Digger.

The plaintiffs commenced two actions, one a summary judgment for the amounts alleged to be owing under the term facility and the current account facility and the other for recovery of possession of the items retained by the defendants under the bailment and otherwise including the Grimme Potato Digger. By consent these applications were consolidated at the hearing of the two matters. There was also at that time an application for discovery by the defendants against the plaintiffs.

The defendants filed statements of defence to the pleadings in which they, in substance, admitted all the narrative but denied the liability to the plaintiffs either in respect of the money or the chattels, raising breaches of contract and oppressive conduct under the provisions of the Credit Contracts Act 1981. In accordance with an amended notice of opposition, which was filed at or just before the

hearing of these actions, the grounds on which the defendants opposed the orders were that there are defences which raise questions of fact and credibility that cannot be resolved on a summary judgment hearing and that they have, as it was said:

> " ...a number of good defences to the plaintiffs' claim including but not limiting:
>
> (a) the plaintiffs' conduct of funding arrangement and later withdrawal of funding for alleged breach of Heads of Agreement in February 1988 amount to:
>
> (i) Breach of Contract
>
> (ii) Wrongful repudiation of contract
>
> (iii) Oppressive conduct
>
> (iv) Unconscionable contract. "

There was also a claim for set-off, at law or in equity, in respect of alleged losses arising out of the plaintiffs' withdrawal of funding. As far as the items under the securities are concerned, it is claimed that there was a wrongful seizure and that in relation to the terms of bailment the payment of GST or PAYE was stipulated for and that the plaintiffs have breached that term of the contract and are thus not entitled to a recovery.

As I have already recorded, the terms of the arrangements made between the parties are recorded in written agreements dated 9 September 1985 and, as amended, 17 October 1986. Three instruments by way of security provide further terms as to the arrangements made between the parties. A fundamental term of these financing arrangements was that they were for a term of two years expiring on 31 August 1987 which was extended to 20 September 1987. The term loan facility was to be repaid by

11 monthly consecutive instalments with a final instalment of the balance, then calculated, on 20 September 1987.

By letter dated 28 July 1987, to the defendants, EP referred to the seasonal account facility term, noted that it was to end at the end of August 1987 and suggested that it was necessary that all approvals would have to be in place before new seasonal requirements were settled and provided for the period ended August 1988. In that letter Mr Carpenter, the Central Area Finance Manager for EP, sought balance sheets plus all details, plans and costings for the forthcoming cropping season. In the letter he said:

> " In effect, the "Taps" will be turned off an the night of 31 August, without further credit being available unless the new facility has been arranged. "

There were a number of discussions between the parties but no arrangement or agreement was ever made as to the renewal or continuation of the 1985 and 1986 agreements, or as to the seasonal financing of facilities for the forthcoming season. Ultimately an agreement was made in November 1987. That was finally settled and executed by the parties under date 20 November 1987. That agreement, after reciting the fact that the defendants carried on cropping operations and a transport and crop harvesting business from the lands which were described in the agreement, and after recording, in recital numbered 3, the amount of the approximate debt owing at $1,768,024 showing separately the debts to ERF and EP, recited this:

> " The parties desire to enter into an agreement for the purpose of enabling Elders to be repaid a significant part of the debt owed to it to which reference is made in paragragh 3 above from the continued trading of the businesses carried on by Mr and Mrs Easton to which reference has been made above, rather than from a realisation

of all assets of Mr and Mrs Easton as at the date of this agreement. "

Then followed some 20 clauses which dealt with the proposed sale of certain items of machinery and equipment, the giving of further securities and the operation of the farm business, and the other ventures and the control of the funds through the plaintiffs' account and bank accounts. In accordance with that arrangement the plaintiffs made further funds available to the defendants through the accounts and generally in accordance with the terms of the November 1987 agreement. However, there were complaints by the plaintiffs as to the failure on the part of the defendants and their advisers to meet with the agreement.

On 17 February 1988 Mr Carpenter wrote to the defendants and to their accountant making a number of complaints as to the alleged failures including the inadequacies of the accounting reports which had been provided, the failure to comply as he saw it with the terms of sale of some of the items of equipment and the apparent failure to meet other terms of the agreement. It was required that there should be a meeting to clarify matters and, from the point of view of the plaintiffs, put the conduct of the operations on the basis sought under the November 1987 agreement before making any further payments. In the result the plaintiffs stopped any payment as at the end of February 1988. There were then further meetings which achieved no final result but culminated in the demand and in the seizure of the chattels in May 1988. Yet further meetings followed and, as a result, further accommodation given and payments made, and the arrangement reached as to the bailment. Finally, there was a demand made in January 1989 for the recovery of the chattels at the end of the bailment. The proceedings were begun in February 1989.

At all relevant times, and at least prior to the 1985 agreement, the defendants have been advised by a

chartered accountant or chartered accountants, and by solicitors. The latter, in particular, have taken a full part in the continuing development of the arrangements between the parties and, in particular, in late 1987 in the negotiations towards and the settlement of the terms of the agreement of November 1987.

In spite of the fact that there has been this continuing advice and participation by solicitors and accountants, and in spite of the fact that there have been many and frequent negotiations and discussions between the parties, it is only now that there has been any formal challenge as to the amounts owing, as to the seizure of the chattels and as to a number of the particular claims that are now raised. This must give rise to doubt about the genuine nature of the alleged defences and opposition to the claims made by the plaintiffs, all of which are based upon the recorded agreements and securities, the provision of funds and financial accommodation and the books and monthly accounts rendered to the defendants.

Prima facie the plaintiffs are entitled to rely on the terms of the agreements and other documents made between the parties. They, I am satisfied, have delivered to the defendants monthly accounts which have set out in detail the amounts owing and due and have recorded thereon the debits and credits as between the parties. These have all been subject to consideration by the accountants, inevitably in the dealings which have been made between the parties.

Moreover, the defendants on a number of occasions have acknowledged the indebtedness at various times and always on an increasing basis. These include accounts prepared by their own accountants for their operations and for submission to the plaintiffs. In the agreement of November 1987 there is a formal recital of the approximate amount then owing and its breakdown as between the two

plaintiffs. In May 1988, as part of the proposal for the continuing arrangements to be reinstated between the parties for the time being, there was a further acknowledgment of indebtedness. In accordance with a request made by the defendant or their solicitors the plaintiffs provided full statements of the accounts between the parties and only some particular items arising on and from 1 October 1987 were queried and none of these are now pursued. There is a clear implication that the defendants, under advice from solicitors and accountants, have accepted in substance the amount of the indebtedness and have done so repeatedly but only now, when the claim is made, attempt to challenge that.

In terms the demand of May 1988 is not challenged at all.

The claim made by ERF is a term loan arrangement in which a sum or sums of money were undoubtedly advanced subject to repayment by instalments with a final substantial payment of the balance at the end of the term on 20 September 1987. This is not a current account arrangement with fluctuating amounts, debits and credits into the account. It is a fixed loan and there can be, and indeed there is, little ground for any challenge of the amount owing thereunder.

I infer from all this that there is no genuine challenge to the monetary claims that are made but rather a late and desperate attempt to stave off the inevitable judgment and the justified claim by the plaintiffs against the defendants. This in spite of what seems to have been considerable patience and the provision of further and continuing accommodation since the end of the two year term of the arrangement. That might well be sufficient to end the matter but I think it is nevertheless appropriate that I should consider the specific points raised and canvassed in the hearing on behalf of the defendants as particular items of defence, counterclaim or set-off.

STUMP CHIPPING MACHINE

This was a piece of equipment which was developed and, in part, invented by the defendants. They received from the Development Finance Corporation (DFC) a large sum of money towards the development of that, the DFC taking a security over the machine itself. In the original arrangements, and as recorded in the papers with the 1985 agreement, some $150,000 was paid to DFC in reduction of the amount owing as part of the distribution of the proceeds of the advances being made by the plaitiffs. The machine was then said to have a market value of $200,000. There remained some $30,000 owing to be paid to DFC by two payments of $15,000 each in October 1986 and January 1987. In the budget prepared by the accountants to the defendants these were shown as anticipated payments. In one of the papers annexed to the affidavits the indication is that those two payments were to be made to the EP current account. In fact no payments were made and the machine was seized by the DFC on or about 11 March 1987. The machine was stored in an open shingle quarry and at that stage it was subjected to vandalism which caused some considerable damage to it. Further damage occurred later when it was transported back to the defendants' property some months later. It is the defendants' claim that EP broke the contract to pay the instalments, thus breaking the arrangement with DFC which resulted in the seizure. It is put in Mr Easton's affidavit as follows:

> " The understanding between ourselves; Mr Dilks and, our solicitor, Mr Broadhead was that these payments were to be made directly by the Elders office at Palmerston North. Elders were aware that these payments were a requisite of the cashflow. "
> [Mr Dilks was the defendants' Chartered Accountant.]

That understanding is the only assertion that is made and the only support for it comes from the budget prepared by the accountants. There is no confirming evidence by the accountant, the solicitor or any other person in support of the defendants' assertion. That assertion is weakened by the fact that there was no earlier claim about this matter. Even though proceedings were issued by the defendants against the DFC to prevent the sale no claim was made against EP that it had any responsibility in the matter. Indeed, contemporary letters seem to indicate that there was no agreement whatsoever that there should be such payment. Certainly correspondence exhibited by Mr Carpenter between himself, on behalf of EP, and the DFC in February and March 1987 is inconsistent, in my view, with the allegations made by the defendants. Likewise a letter from Mr Broadhead to EP dated 8 April 1987, which asked for the support of EP to repay the amounts owing to DFC which in fact EP finally did, contains this:

> " May I take the liberty, bearing in mind that Elders themselves have a charge over this machine, that it is probably to Elders advantage to back the Eastons in this matter. My instructions are that this was the original intention in the negotiations between the Eastons and your company towards the end of last year. "

In the result there is no support for the assertion made but some evidence which is inconsistent with and contradictory of it. I have no hesitation in rejecting this claim on the facts.

A.M. BISLEY - 3 GRAIN HARVESTERS

The defendants had purchased between 1985 and 1986 for a total price of $600,000 three grain harvesters from A.M. Bisley and Co. Ltd. These were secured on hire

purchase arrangements. The monthly instalments were one of the items which were budgeted for in the 1987/88 season and they became one of the items which were dealt with in the 1987 agreement. It is the defendants' claim that, following the signing of the November 1987 agreement, certain monies were paid to the defendants by EP with instructions as to their allocation but omitting any direction of an allocation to A.M. Bisley & Co. Ltd. The defendants say that they assumed that the plaintiffs would make the payments to Bisleys, that EP did not make the payment and that Bisleys ultimately obtained a summary judgment in respect of the outstanding amounts against the defendants. That claim is directly contradicted by the provision of cl 15 of the November 1987 agreement which makes it clear that the defendants were to pay the amounts owing to Bisleys out of their bank account from monies which EP was to fund into that bank account. In his letter of 17 February 1988 to the defendants Mr Carpenter expressly raised this matter and inquired whether these payments had been made by the defendants because the creditor had made some complaints to EP. There was no suggestion earlier, when the defendants were sued by the creditor in summary judgment proceedings, that EP was at fault or was in any way responsible.

This too is a late assertion which has no basis in fact and which I reject.

WITHDRAWAL OF FUNDS UNDER THE 1987 AGREEMENT

I have already noted that in February 1988 EP stopped its funding of the defendants and their accounts following the correspondence and discussion, although the funding was renewed later with the arrangements that were made. It is the defendants' contention that that cessation of funding was in breach of the agreement and that the defendants had taken all steps to comply fully with the terms of the agreement.

The plaintiffs took the view that the defendants had failed to comply with the agreement and the letter of 17 February 1988 records their views about that. There was the Bisley non-payment, the failure to comply with the appropriate accounting and the failure, in the view of the plaintiffs, to comply with the requirement that two Mack trucks should be delivered up to a dealer for sale. That letter called for a discussion which apparently took place but which failed to meet the requirements and demands of the plaintiffs.

In my opinion the plaintiffs were entitled to bring the payment to an end for one or more of the matters that they complained of in their letter of 17 February 1988. This November 1987 agreement was a special arrangement not by way of variation or continuation of the earlier financing agreement but as recorded and recited in it an agreement to provide for realisation of some of the assets to reduce the debt owed to EP and ERF and to give very strict control. In consideration of that there was a continuation of financial accommodation. In those circumstances it was, I think, incumbent on the defendants to comply to the letter with the proper demands of the plaintiffs in accordance and provided for under the agreement. Plainly the defendants did not do that. The plaintiffs were perfectly justified, in my view, in the actions they then took including the stoppage of funding in February 1988. This again is a claim which cannot amount to a defence and which I reject.

G.S.T.

It is suggested by the defendants that the plaintiffs failed to comply with the arrangement which they had undertaken to pay GST on any of the transactions in which they were providing finance. That clearly was an undertaking by EP and ERF which is set out in the 1987

agreement and later in the arrangement made for bailment. However, that never has been refused and the plaintiffs were at all relevant times ready to pay. I accept the evidence given in this matter that no figures were ever produced and no demands made for payment of the GST and that the accounts and figures available to the plaintiffs were not sufficient for them to make the appropriate GST payments. It is, of course, far too late now for the plaintiffs to claim that this GST should now be paid. That too is a claim without any foundation.

QUINN

The defendants claim that in February 1987 Mr Carpenter, on behalf of EP, asked the defendants to harvest 500 acres of wheat for a Mr S.O. Quinn, of Makerua. Mr Easton, in his affidavit, says that he agreed to do the job "on the basis that Elders would pay us cash on completion." He claims, in his affidavit, that he rendered an invoice to Elders for $30,000 which Mr Carpenter declined to pay. Later Mr S.O. Quinn paid $7,500 off the account but the balance, it is said, remains outstanding. It seems an underlying assumption in this claim that EP would pay and then collect the amount from Quinn. It is to be noted that there is no suggestion that an agreement was reached as to the price. Nor is there anything to support the claim in any correspondence or other claim made earlier than after the issue of these proceedings.

It is, it seems to me, inherently improbable that such an arrangement would have been reached in February 1987 in light of the situation between the parties. There is no suggestion of any other similar arrangement or dealing being made earlier to show this was a common occurrence. This is a suggestion that the plaintiffs were to advance a further $30,000 on this account taking the risk of recovery from the actual person. That, too, seems to add to the

implausibility having regard to the situation, even in February 1987, in which this account was being operated and controlled. There is, moreover, an apparent internal contradiction to the defendants' claim. The invoice, as exhibited in the case, was not rendered to Elders but directly to Mr Quinn. It bears the date 31 March 1987. On 30 April 1987, just one month later, it appears that Quinn paid $7,500. This too is, I think, a claim which has no proper foundation in fact and which I reject.

IMPLIED TERM FINANCING AGREEMENT

In accordance with the common practice the accountants for the defendants prepared in August 1986 an estimate of expenditure and income for the year ended 31 August 1987 which was, in effect, a budget or estimate for the 1986/87 season to enable the parties, and in particular EP, to assess what assistance might be required over the following year. The actual outcome of the year's operations did not meet the budget. It is the defendants' contention that there was an implied term of the financing agreement as it was put in Mr Gordon's written synopsis:

> " that Plaintiffs estimated costs for Defendants could reasonably be within the scope of estimate provided by Plaintiffs for preparation of budget. "

There is a claim that this creates an equitable set-off in the increased costs of cropping. No doubt a matter contributing to the shortfall in the outcome of the year was any increase in cropping expenses but the defendants have not taken into account the shortfall in receipts and increases in other expenditures which were beyond the budget amount and for which the plaintiffs could have no responsibility at all. It is to be noted that the budget was the defendants not the plaintiffs.

The short answer to this point is that there is no grounds under the generally applicable principles to imply such a term in an arrangement like this. It is not something which is at once immediately obvious, or goes without saying, or is required necessarily to give business efficacy to the arrangement. It is not something that could be implied. Moreover, it is inherently implausible that the financier would, in effect, warrant the budget or estimate prepared by the borrower. That too must be rejected as a defence.

UNCONSCIONABLE CONTRACT

This is a claim that in the creation of the November 1987 agreement there was unconscionable conduct on the part of the plaintiffs and their officers which is said to be based upon the special disadvantages of the defendants and the exploitation by the plaintiffs of their stronger position. A number of matters are put forward as the particular bases of this claim which includes the pressure of the time with the crops normally being planted in October but negotiation not completed until November; the need, if not the desperate need, of the defendants to arrange finance to allow them to continue their cropping planting operations; the fact that, as it is said, the defendants were forced to accept the terms of the plaintiffs.

This claim, and the way it is presented, ignores the earlier conduct of the parties and in particular the clear notice by Mr Carpenter that the taps would be turned off if arrangements were not made. That was ample and early notice to the defendants that arrangements had to be made. There was then a continual discussion between the parties, and negotiations, in which the defendants were advised by their accountant and solicitor. The solicitor proposed some variations and clauses in the agreement which was finally executed and these were accepted by the plaintiffs. There

is just no conduct which could be described as unconscionable or inappropriate or which would in equity create any unfairness in the terms of the contract or in the arrangement of the heads of agreement overall.

It is a suggestion, in this part of the case, that there was a misrepresentation. That refers to the fact that the agreement was originally signed by the parties in a form which included a number of amendments and interlineations. The plaintiffs' officers then retyped the document and presented it again to the defendants for signature. It was, in all essential terms, exactly the same as the original signed, but with a variation to a schedule which was in a summary form without any of the particulars that had been in the original schedule. There is no substantial difference between the two agreements and it must be said that if there is any difference then it may be rectifiable because the original agreement is that which was accepted by both parties. It could not be said that there was any misrepresentation which could give rise to any allegation of fraud, nor is it conduct which could be described as unfair or unconscionable in all the circumstances.

I reject as untenable the defences raised on this head.

OPPRESSIVE CONDUCT

It is claimed that, in terms of the Credit Contracts Act, the conduct of the plaintiffs amounted to oppressive conduct which would entitle the defendants to apply to the Court to re-open the contract. Under this head the defendants rehearse all the previous matters which I have already referred to and rejected and also mention other matters such as a delayed payment for the drying and storage of grain, the GST matter, and the alleged variation in the

versions of the 1987 agreement. It is also a particular claim or complaint under this head that the plaintiffs sought to retain full control over the operations of the defendants as if the 1987 agreement and its effect was a receivership or management control rather than a proper borrower and lender arrangement. Included under this allegation of oppressive conduct is the stoppage of funds in February.

There is a special item that is raised under this head and that is a debit of $203,000 which was made to the current account in June 1986 and which was of course known in the 1986/87 budget. It is claimed, and has been claimed on a number of occasions, that this was an amount debited in error or which has never been explained to the defendants' satisfaction. The matter was canvassed in some detail in the affidavits and in the submissions made to me. I find that the amount involved in the debit was advanced as part of the term loan arrangement in 1985 and was in fact paid out. It was at that stage debited to the Term Loan Account but when it appeared that the debit in that account exceeded the limit already approved by the plaintiffs' Head Office, the amount was transferred to the Pastoral Loan Account. That was advised to the defendants and their accountants in December 1985 and in January 1986. It appears, however, that for some reason the entry of the debit was left in a ledger account in Hodder and Tolley Limited's books, the predecessor to the plaintiff EP, and it was not until the June 1986 monthly accounts that the debit was, for the first time, shown as part of the Pastoral Loan Account in the monthly accounts sent to the defendants. The matter has, however, as I have noted, been a matter of complaint earlier and it was, at least in 1988, again raised through the accountants and a full explanation was given.

There is no doubt that the amount was properly debited. It is part of the overall accounts but was apparently unrecorded for some little time. It was,

however, as I have noted, brought to attention before the 1986/87 budget was prepared and so at least since that time has been fully recorded and taken into account as an integral part of the anticipated and budgeted expenses and outgoings of the defendants. There is no mistake about it, nor can there be any ground for complaint. This is money due as part of the total amount and there can be no real challenge of that. Though the defendants claim to be dissatisfied with explanations given I am satisfied full explanation has been given.

On most of the matters of which oppressive conduct is raised, I have rejected the claims made in substance on the merits at this stage. Even if they were not to be rejected in that way they do not amount, in my opinion, either singly or collectively, to oppressive conduct under the Act. Judged on ordinary commercial terms, as between the plaintiffs and the defendants, there is no oppressive or harsh or unreasonable conduct in the operation of this account and the continuation of accommodation. On the contrary it seems to me that the plaintiffs have afforded considerable latitude and given continued support to the defendants activities. Even after the accounts had been closed and action taken to recover the amounts the plaintiffs gave further assistance, allowing a bailment and delaying any further payment.

There is one matter which, though raised in the affidavit evidence and which the defendants assert as part of the background, was not given any emphasis in the course of the hearing. This is a complaint which the defendants made that the predecessors of the plaintiffs had failed to obtain appropriate insurance over a crop which was destroyed by flood in December 1983. On this account the defendants have issued proceedings against a local authority alleged to be responsible for design faults in the catchment and drainage of the land, part of which became flooded. That, of course, is a matter which predates the 1985 arrangement.

It could have no effect, therefore, on the conduct of that or what has followed since. In any event it seems that that was a matter which, as between the parties in this proceeding, has been settled.

EQUITABLE SET-OFF

This is put on the basis that, for the year ending August 1988, the defendants had budgeted to reduce the account balance by a sum of $688,558. That was substantially dependent upon the plaintiffs' continued support and the advancing from time to time of money on the current account to enable farming operations to continue. It is said that if the plaintiffs had adhered to the agreement and budgeted cash flow requirements had been met the defendants would have achieved that reduction. Because, as it is alleged, the plaintiffs failed to adhere to the agreement then there is a right to set-off this projected failure of recovery.

I have found that there is no basis in fact for such a claim because, in my judgment, the plaintiffs did not fail to adhere to the agreement and were entitled to stop the payments in February 1988. But, in any event, the doctrines of equitable set-off, upon their widest construction, could not be extended to apply to such a case as this.

In the result then all the various claims come to nought and I am satisfied that there is no real defence to the claims made by the plaintiffs.

I have already noted that ERF, although a part of the plaintiffs' group and party to common forms of agreement with the defendants, is a separate company which has granted a separate term loan facility. There is no doubt that the

defendants have failed to pay interest and to meet other arrangements and terms of that term loan agreement. All the complaints that have been made and the matters of defence which have been raised are directed to EP and the conduct of the current account. I have taken the view, on the evidence before me, that there was a breach of the term loan facilities and a breach of the various securities granted. ERF was entitled to take possession. There is no challenge in terms of the formalities of that seizure or the right to repossess. Thereafter ERF provided a further bailment of the chattels for a term of the harvest. That term is long over. There is no basis whatsoever for any allegation that the defendants are entitled to continue their retention and possession of the chattels against ERF. Even if there was some breach of the other transactions that could not extend to give a better right and title to the defendants as bailees than they originally had which terminated at the end of the harvest. There never has been and never could be, on the material before the Court, any defence to that claim for possession.

There remains the defendants' application for discovery. That in my judgment in the circumstances of this case is neither necessary or appropriate. The application is refused.

In the result then the plaintiffs are entitled to summary judgment as requested. The first plaintiff is entitled to judgment in the sum of $1,174,334 and the second plaintiff is entitled to judgment in the sum of $1,280,746. There will be an order in favour of the plaintiffs that they do recover possession against the defendants of all the chattels referred to in para 23 of the statement of claim in the proceedings CP No. 102/89 excluding the 1984 Mack truck registered No. LM 6549 but including as well the Grimme Potato Digger. The plaintiffs are entitled to costs which I fix in the sum of $2,500 plus disbursements to be fixed by the Registrar.

Solicitors: Stace Hammond Grace & Partners, HAMILTON, for Plaintiffs

McElroy Morrison, WELLINGTON, for Defendants