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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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[redacted]

CP No 849/88

BETWEEN ECONOMY SERVICES LIMITED

Plaintiff

A N D [redacted]KEVIN SMITH & [redacted]NIGEL HUGHES

Defendants

Date of Hearing: 8 February 1989

Counsel: J J Cleary for Plaintiff
J R Hodder for Defendants

Date of Decision: 21 FEBRUARY 1989

RESERVED DECISION OF McGECHAN J AS TO SUMMARY JUDGMENT

The Application

This is an application for summary judgment in respect of damages claimed for alleged professional negligence on the part of the defendant firm of solicitors.

The Facts

Rather unusually in a negligence case, let alone a professional negligence case, there is no significant dispute as to the primary facts relevant to liability.

In 1985 the plaintiff took an assignment from Broadlands of a debt due to Broadlands from a Mr R L G Thompson. The plaintiff procured a signed acknowledgement of debt and agreement to mortgage directly from Mr Thompson. The acknowledged debt was $27,756.00. The mortgage agreed to was over Mr Thompson's

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interest in a property identified as Lot 7 DP 52493, in the process of transfer to the names of Mr Thompson and his wife Mrs Anna Thompson. The mortgage was for a term of five years from 5 August 1985 with interest at 11% per annum flat, payable monthly in equal instalments of principal and interest.

As at the date of that document, the title still was in the name of a building company. A caveat nevertheless was registered by the plaintiff pursuant to the agreement to mortgage. Date of registration appears to be 6 August 1985. The caveat document is not in evidence. I presume from the fact of registration that it traced title from the building company through Mr Thompson to the plaintiff, and also presume that it truthfully claimed estate or interest only against the interest of Mr Thompson. The caveat gave as the address for service for notices the business address of the defendant firm.

On some date prior to 13 August 1987 application was made to the District Land Registrar to register a memorandum of transfer from the building company to Mr and Mrs Thompson, and also a mortgage from the buyer to a Mrs Barbara Thompson, Mr Thompson's mother. While the memorandum of transfer may not have been adverse to the plaintiff's interest, constituting title in the name of its mortgagor Mr Thompson, the latter mortgage certainly was. The District Land Registrar, presumably due to request in that behalf, gave statutory notice under s 145 Land Transfer Act 1952 to the plaintiff at the stated address for service. The notice is dated 13 August 1987 and appears to have been forwarded to the plaintiff at that address for service on the same day. The notice contains the standard wording, warning that the caveat will lapse "unless notice is within 14 days from the date of service hereof" given to the District Land Registrar that an application for an order to the contrary has been made to the High Court.

The notice was received at the defendant's office address on 17 August 1987 (a Monday). It came to the attention of the solicitor responsible "sometime after that date". The exact time is not established, but clearly it was noted by 24 August 1987, still within time for action to be taken.

The solicitor, in his own words, took the view that the application must be served on the District Land Registrar within 14 days of service of the notice, but also took the view that "the date of service of the notice was presumed to be 14 days after the date of posting by registered mail". The latter view plainly is wrong, and is now acknowledged to be wrong. The source of this error, in the solicitor's words, was a practice of his in relation to the District Court Rules. He explains that under R 124 District Court Rules, when service of a default summons is effected by registered letter, notice of intention to defend must be filed within 21 days after the posting of the letter concerned. His own practice, however, has been to rely on a period of 14 days from the date of posting, to ensure notice reaches the Court before application for judgment is made. It was this practice, which gave rise to the confusion in his mind.

On 24 August 1987 the solicitor advised a director of the plaintiff (a Mr I O Caddis) of receipt of the notice on 17 August. The solicitor received and accepted instructions to protect the plaintiff's interest. Obviously a s 145 application to the Court was required, with timely notice given to the District Land Registrar. An application dated 4 September 1987, with date of hearing 14 September was given to the District Land Registrar. It was outside the 14 day period even accepting service was as late as 17 August 1987. The caveat lapse was entered by memorial on the register on 3 September 1987. Following lapse, the transfer and other mortgage referred to were registered. I note that the date of registration entered is not 3 September 1987, but 14 November 1986. That may have been the original date of presentation of

the instruments concerned. The mortgage, of which the first page only is in evidence, secures a principal sum stated as $100,000.00 payable upon demand and interest free, apart from a penal rate. There is valuation evidence that the whole land area, comprising interests of both husband and wife, now is worth $80,000.00. As to recoverability of the debt, Mr Caddis deposes:

> "10. AT one time I was endeavouring to help Thomson put his affairs in order. Because of that and my company's business as a factor I have some knowledge of the financial relationship between Thomson and his mother Mrs Barbara Thomson. I know that she paid some of the debts. She made various contentions to me including that she was considering taking a mortgage for $100,000 over his property. She added that she was doing it to protect her son's land. While I can not gauge the accuracy of this figure I am personally aware of an advance by her of $18,000 and was told by both Thomson and his mother that she had paid his debts for some years. I therefore accept that the mortgage is a genuine one, at least for a substantial part of the principal. Bearing in mind the confused state of Thomson's finances when I tried to help him, I know no way to prove the contrary.
>
> 11. IN my view the judgment against Thomson is useless because he has little or no unencumbered assets. While I believe the value of the land was amply sufficient to pay the mortgage to the Plaintiff I doubt whether it is enough to pay even the first mortgage to Mrs Thomson senior let alone anything for the Plaintiff. When one adds that the agreement to mortgage is over only a half share in the land my company's outlook is bleak."

The date as at which Mr Caddis had such claimed familiarity is not given. Statements by or information gathered from the mother, Mrs Barbara Thomson, could well be hearsay. Mr Caddis' acceptance, view, and belief are matters of opinion, not fact.

Summary Judgment : Professional Negligence : Principles

The defendants' submission is that "allegations of negligence are normally inappropriate for the summary judgment

procedure". Supporting reference was made to Dummer v Brown [1953] 1 QB 710 (CA) [1953] 1 All ER 1158; : MacKenzie v Brooker (unreported) High Court Hamilton CP 94/88 12 July 1988 Master Gambrill; and Togen Investments (NZ) Limited v Durney Construction Limited (unreported) High Court Auckland CP 337/87 29 July 1988 Master Gambrill. I was referred also to Odgers Pleading and Practice [1981] page 72. As current attitudes to some earlier cases on summary judgment procedure tend to demonstrate, there are some dangers in sweeping guidelines to the use of summary judgment procedure. While the negligence proposition is attractive, I prefer to start from basics. Clearly, there is no absolute prohibition upon use of the summary judgment procedure in negligence cases. Negligence is not one of the categories expressly excluded by R 135. The possibility of summary judgment in a negligence situation is at least contemplated. However from that point the matter becomes less one of legalities than realities. The Court cannot grant summary judgment unless "it is satisfied there is no defence" : R 136(2). The implications of that phrase are now well established following eg Pemberton v Chappell [1987] 1 NZLR 1; Bilbie Dimock Corporation v Patel [1987] 1 PRNZ 84; and Doyles Trading Co Limited v West End Services Limited (unreported) 12 December 1986 CA 94/86. Given the usual nature of negligence cases, and a fortiori professional negligence cases, in reality the required degree of satisfaction as to absence of defence is not easily achievable. Frequently, there will be differences over matters of primary fact with decisions required upon credibility. Any motor vehicle collison case furnishes an example. Frequently, there will be disputed factual questions relevant to forseeability, standard of care, and remoteness. Often factual questions bearing on contributory negligence will arise. In the particular professional negligence are, if matters actually reach the litigation stage there may well be a sharp conflict as to both the events which occurred and the professional standards involved. In the residue of cases which pass through these barriers, there will of course remain the

question of ultimate discretion under R 136. Particularly in the professional negligence field, there may sometimes be discretionary considerations arising from the desire of one or other party for trial by jury, and questions of professional reputation. I certainly will not attempt to lay down any definitive guidelines on questions of ultimate discretion, but it must not be overlooked.

Moving to authority, I apply English practice with some caution. Not only does the onus differ under the English summary judgment system, resting on the defendant to establish some arguable defence, but policy considerations implicit in the continued existence there of rights to claim for personal injury, and availability of concurrent actions against professional persons in both contract and tort, may have some influence. With those reservations however there may be some assistance gained from Dummer v Brown (supra). The facts were extreme. A bus inexplicably crossed the road and collided with a power pole. A passenger died. His widow sued the bus driver and employer bus owner alleging negligent driving. The bus driver pleaded guilty to dangerous driving. Both defendants put in a statement of defence containing general denials, but nothing else. The plaintiff moved for summary judgment on liability, with damages being assessed upon later enquiry. Neither defendant put in an affidavit. Singleton LJ observed (1160) that a summary judgment application under Lord Campbell's Act on any motor car accident "strikes one, at first, as unusual to say the least". While accepting the procedure was open; Singleton LJ:

"would keep it to the most simple case and I would not apply the provisions of that rule to a case involving any complication or difficulty because of the general practice which has been followed that it is only in a case where there is clearly no defence that judgment ought to be given" (1161).

Jenkins LJ observed (1163) that:

> "It is obvious that the proportion of cases of this kind, that is to say, claims in negligence arising out of accidents causing a death or personal injuries, which would be suitable subjects for summary procedure, must be small indeed",

although there was no procedural reason why the course should not be adapted "in a proper case of this class". Morris LJ observed (1165):

> "It is probable there will be few cases for claims of this nature in which the facts and circumstances will be such as to enable this course to be followed..".

However (Singleton LJ dissenting) the Court upheld an order by McNair J awarding summary judgment for liability, with damages to be assessed (the Court of Appeal ruled) by a High Court Judge. I think it fair to say Jenkins LJ appears to have been much influenced by the absence of an affidavit from the defendants; and Morris LJ by the past admission of liability on the part of the driver involved in his guilty plea. Certainly, in the absence of explanation the inference of negligence appears almost irresistable.

I was not referred to and have not been able to locate any decision by a Judge of this Court to date on the point, although I have some personal recollection of seeing claims based on negligence for property damage passing through summary judgment lists on an uncontested basis. There are two helpful decisions by Master Gambrill. The first, Togen Investments (NZ) Limited v Durney Construction Limited (supra) involved a proceeding claiming damages in tort for negligence against the erectors of a crane which collapsed into the roof of an hotel. The decision eventually turned on other matters, but the learned Master, noting Dummer v Brown (supra), observed that "prima facie there are very few cases in which claims for

negligence can be entertained without a full trial of the action". The second MacKenzie v Brooker (supra), interestingly involved a summary judgment application for damages for professional negligence against a firm of solicitors. Decision was given orally, and the facts are not reported in detail. It rather appears the solicitor acted for the plaintiff on the sale of her property. He drew a first contract for sale at $182,000.00, with vendor's finance being left in. Necessary disclosure was made under the Credit Contracts Act 1981. The first contract was not signed. By subsequent negotiations the price escalated to $204,000.00, again with finance left in. The later contract was signed, but no disclosure was made under that Act. The solicitor believed disclosure should not be necessary. There appears to have been "some conflict of evidence as to what were the arrangements which were made" at the time. It appears the plaintiff received advice from other (accounting) sources. The defendant's solicitors submitted that a misinterpretation of the Credit Contracts Act 1981 did not in itself establish negligence, citing Simmons v Pennington & Co [1955] 1 All ER 240; and further that the plaintiff should have mitigated loss. The learned Master was unwilling "to try a case on the affidavit evidence"; and considered the legal question whether the plaintiff was under a duty to mitigate should be fully argued otherwise than on summary judgment because of its importance to the parties. The learned Master then referred to English authority that it was general practice to send negligence claims to trial "if the circumstances create a legal liability from the defendant to the plaintiff" citing Yorkshire Banking Company v Beatson [1879] 4 CPD 204. Master Gambrill then observed:

> "As is said in the White Book page 130 actions for damages for negligence are suitable for the procedure only under Ordinance 14 if it is clearly established that there is no defence as to liability - Dummer v Brown..."

The learned Master considered she "cannot be truly satisfied there is no defence". The defendant was entitled to be heard as to instructions given in respect of the settlement price; and as to whether he observed the degree of care required in the actual circumstances that pertained to the situation. Summary judgment was refused. While neither decision of the learned Master binds me, I would always respect the considerable experience of Masters of this Court in the summary judgment field, particularly where the approach taken is consistent not only with principle but with such authority as may exist.

Liability : This Case

The claim has some pleading problems. It does not, except in the entitulment and by implication, expressly allege the defendants were in practice as solicitors. While it pleads instructions to protect the plaintiff, it does not expressly plead acceptance of such instructions. It does not directly plead an implied contractual term to use reasonable care skill and diligence or the like. In its particulars of negligence, it pleads failure to apply to the High Court in time, but does not expressly plead the absence of notice of application to the District Land Registrar ("DLR") which latter actually gave rise to the caveat lapse. On occasion the attitude is taken in a summary judgment context that substantive amendments should not be allowed, plaintiffs using a special procedure being obliged to "get it right first time". The question in the end is one of the interests of justice, involving not only questions of general policy and expedient court administration, but also the necessity for a case by case assessment. In this case, there is no doubt as to the plaintiff's intention on these matters, however imperfectly it may have been expressed, and the defendants' affidavits in reply address the real issues in dispute. The claim has been understood and answered. Errors

are formal rather than substantial. In these circumstances, I would permit amendment to make explicit that which obviously is implicit on the above points if such amendment were sought. In this particular case, I would not refuse summary judgment on pleading grounds. That will not always be the case. Lest the matter assume any importance I reserve leave to the plaintiff to seek actual leave to amend accordingly before judgment is sealed but I do not see that formality as necessary.

Taking the real issues raised, there is no dispute as to professional capacity, acceptance of engagement, and duties involved. Nor is it disputed that the plaintiff's interpretation of s 145 of the Land Transfer Act 1952 obligations, and of the s 145 notice, was erroneous.

The central question reduces to one whether that error amounted to a breach of the implied term to use reasonable care skill and diligence.

In that connection it was submitted that the Court could not, or should not, reach a conclusion on that question of observance of professional standards without evidence, particularly as it is not "every slip" by a professional which amounts to negligence. In a general way, there is much to be said for such caution. Even within the field of legal practice, I for one would hesitate to reach a view upon the appropriate professional standards on matters of current conveyancing. However, some pragmatism may not be amiss, particularly in the light of R 4 considerations and the required robust approach to the summary judgment rules. Prevailing professional standards are not the sole determinant of the standard of care required. Common sense also has its place McLaren Maycroft v Fletcher [1973] 2 NZLR 100, 208. Moreover, Judges of this Court are equipped not only by past experience but by everyday contact to asssess the degree of difficulty, if any, involved in the proper interpretation of

statutes and statutory notices. Indeed, a layman might think there was something bizarre in a Judge solemnly saying he needed evidence as to how difficult it would be for a lawyer to understand a statute. I happily follow the approach and experience of Ongley J brought to bear in Public Trustee v Joseph (unreported) High Court Wellington 5 February 1982 A 581/78 where in relation to an obvious case of failure by a solicitor to prepare and perfect security documents and arrange independent advice His Honour ruled:

> "No formal evidence as to professional standards is necessary to persuade me that (the solicitor) was in breach of the implied covenant in his contract of retainer to exercise due care and skill ...".

I am not sure whether in the end the process is one of judicial notice, common sense, professional knowledge, or a mixture of all, but whatever it may be I willingly adopt it.

I must say, with no pleasure but equally with no doubt, that the erroneous interpretation placed by the defendant solicitors upon s 145 and upon the statutory notice issued, and the resulting failure to make application to the Court and give notice within time to the DLR, did not meet the standard of reasonable skill care and diligence required by their retainer. Section 145 in its terms is plain. Section 145(1) provides that:

> "Every caveat ... shall upon the expiration of 14 days after notice given to the caveator that application has been made for the registration of any instrument affecting the land ... be deemed to have lapsed ... unless notice is, within the said 14 days, given to the Registrar that application for an order to the contrary has been made to the High Court, and unless such an order is made and served on the Registrar within a further period of 28 days".

As to service, s 139 provides that:

> "Every notice relating to a caveat ... if served at the place appointed in the caveat ... or forwarded through the post office by registered letter, addressed as aforesaid, shall be deemed duly served".

There simply is no room for the interpretation adopted by the defendants. I am satisfied, accordingly, that the plaintiff has proved engagement, implied term, and breach of implied term. While counsel for the plaintiff advances the claim as one founded both in contract and tort, in this Court it being a professional negligence matter I can recognise only the cause of action in contract. That has an incidental result, however, that proof of damage is not an essential ingredient to the cause of action, although if need be I would find there has been some damage through deprivation of potential security.

I am satisfied there is no defence on liability. The present is one of those unusual negligence cases where such can be said. The question of general discretion remains. There is no sign that the defendants seek jury trial. That would not be a course normally sought by defendant professional men. Nor can I see rights of action on the part of the defendants against Thompson such as would warrant third party proceedings on their part. They are not in any way subrogated to the plaintiff's position at least at this stage. I see no grounds for exercise of the general discretion.

The plaintiff will have summary judgment against the defendants on liability.

Summary Judgment : Quantum

Quantum raises some difficulties. Prior to defendants' negligence, plaintiff held an agreement to grant a first

mortgage securing some $27,756.00 over Mr Thompson's half interest in the land, the combined interests in which were worth some $80,000.00. Following the defendants' negligence, the plaintiff still holds that agreement, but now stands behind a registered first mortgage ostensibly securing some $100,000.00 over both interests in the land, and without any protective caveat. The plaintiff's resolution to this situation is simple : it claims, from that moment, to have lost everything. On the evidence, or lack of it, I am not persuaded. I cannot say with any certainty that the debt owed will be irrecoverable. The evidence as to Mr Thompson's means, to the extent admissible at all, is sketchy and far from independent. There is evidence his mother has rescued him financially on previous occasions. There is no clear evidence of insolvency, let alone the prospect of bankruptcy. There has been no attempt, judgment or otherwise, on the part of the plaintiff to obtain payment by Thompson on the personal covenant. I will accept for present purposes the law in Pilkington v Wood [1953] 1 Ch 770, as recognised in McGregor on Damages 15th Ed para 316 and applied by Sinclair J in Beneficial Finance Limited v Hyams (unreported) High Court Auckland 11 February 1985 A 423/83. An aggrieved former client should not be required to embark upon "a complicated and difficult piece of litigation against a third party". That is a mere reflection of the overall test of reasonableness laid down in Treloar v Henderson [1968] NZLR 1085. Reflecting that test of reasonableness in another way, where liability is plain an aggrieved client can be expected to sue the third party to judgment and recover so far as available before looking to the solicitor concerned. An example is Public Trustee v Joseph (supra) where Ongley J was unable to infer a guarantor could not pay a small guaranteed debt, and nonsuited an aggrieved client to give an opportunity for that course to be pursued before recourse was sought against erring solicitors. On the state of the evidence at this point, I am quite unable to say the debt concerned ultimately will prove irrecoverable from the

debtor Mr Thompson. Nor can I say it would be unreasonable to require the creditor to sue the debtor to judgment and enforcement. There is, after all, a signed acknowledgement of debt and agreement to grant a first mortgage. Counsel for the plaintiff submitted that as the defendants were negligent, they should bear the burden of recovery. I do not think matters are quite so simple. While the defendants are liable, it is still for the plaintiff to prove they are liable for something more than nominal damages. Approaching the question another way, I have no reliable evidence as to the present value of the agreement to mortgage as it formerly stood, and as it now stands. Relative values upon an open market, if there is one, are problematical. I am not satisfied that there is no defence on quantum. On that aspect the matter must go on to trial.

Orders

(1) The plaintiff will have judgment against the defendants on the issue of liability.

(2) The application for summary judgment in respect of quantum is dismissed.

(3) Leave is reserved to apply for further directions as to the future conduct of the proceeding upon seven days notice.

Costs

While the plaintiff has obtained judgment on the question of liability, it is possible this proceeding yet may prove to have been unnecessary. Costs reserved.

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R A McGechan J

Solicitors: J J Cleary, Wellington for Plaintiff
Defendants in person

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