

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No 2923/88

1499

BETWEEN EQUITICORP FINANCIAL
SERVICES LTD and
EQUITICORP FINANCE GROUP
LTD

Plaintiffs

UNIVERSITY OF OTAGO
DEC 1989
LAW LIBRARY

A N D MIRAGE ENTERTAINMENT
CORPORATION LTD (IN
RECEIVERSHIP)

First Defendant

A N D L G PARR

Second Defendant

A N D D K REYNOLDS

Third Defendant

Hearing: 4 August 1989

Counsel: M C Black for Plaintiff
No appearance for First Defendant
M E Parker for Second and Third Defendants

Judgment: 12 OCT 1989

JUDGMENT OF MASTER J H WILLIAMS, QC

This application for summary judgment against the second and third defendants arises out of their execution of a guarantee on 18 November 1987 of a debenture given by the first defendant (Mirage Entertainment) to the plaintiffs (collectively called Equiticorp). That debenture was given to raise

\$315,000.00 to finish a film called "A Soldier's Tale".

FACTS

Both Messrs Parr and Reynolds have had a lengthy experience in the film industry in New Zealand for a number of years. Mr Parr in particular has had a number of successes in that industry. But up until early 1986 each of them, although known to the other, had operated independently.

At a date variously given as being towards the end of 1986 or up until April 1987, Messrs Parr and Reynolds had discussions about their entering into a joint venture. This possibility apparently arose because of a suggestion from a financier of a possible public flotation of Mirage Entertainment which Mr Parr then owned. There were delays in that flotation and it did not in fact occur until late August 1987.

Mr Parr says that he acquired the film rights for "A Soldier's Tale" in early April 1986 from Challenge Corporate Services. There is, however, some evidence that after Mirage Entertainment went into receivership on 3 June 1988, it was discovered by the receivers that Mirage Enterprises did not hold the copyright of the screenplay of the film or copyright of the film and music and that the change of title from the owner of the publishing rights of the book to Mirage Entertainment had not been obtained.

Mr Parr's work on "A Soldier's Tale" began in October 1986 with work on the screenplay. He made several trips to

France to decide on locations for filming and discussed matters with a French co-producer. Mr Parr was engaged to direct the film. It was the first film which he had directed but he claims that he was in a better position to direct than most first-time directors because of his extensive experience in production. He also claims that Mirage was to be benefitted by this arrangement as he would receive no fee over and above his salary. Filming actually commenced on 31 August 1987 but before that date not only did Mr Parr need to continue with the technical aspects of the production of the film but funding arrangements also needed to be undertaken. These arrangements ran in parallel with plans for floating Mirage as a public company, a flotation in which Equiticorp purchased 25% of the shares for \$2.25M.

In addition to flotation, funding was sought via the New Zealand Film Commission. That body had a co-production treaty with its French counterpart which might have given Mirage access to French money upon compliance with a number of requirements such as the employment of French personnel but this proposal came to nothing in the long run.

One funding avenue which was explored at that stage and which assumes some importance in this matter is an arrangement which Mirage had with a company called Atlantic Entertainment Group (Atlantic) in Los Angeles. Mr Parr says that the nature of the arrangement was a contract for the presale of the North American rights to "A Soldier's Tale" for an initial sum of \$1M which was confirmed prior to Christmas 1986 and was conditional on his being director and upon an approved cast and script. He

says that that arrangement matured into a written contract in July 1987 but with one substantial difference from the original proposal mainly that the \$1M, which had previously been intended to be paid before or during the production of the film, was then agreed only to be paid on delivery. A copy of a letter from Atlantic to Mr Parr dated 26 June 1987 has been put in evidence by one of the receivers of Mirage. The letter seems somewhat less definite than Mr Parr recalls it. It confirms that Atlantic is "willing to distribute (the film) in all media throughout North America" on certain conditions, the principal of which is that Mirage is to produce and finance the picture and that the picture will be delivered to Atlantic not later than 1 May 1988. There are comments in the letter concerning the location, budget and the calibre of the proposed cast. In return Atlantic is to be "granted the exclusive right to distribute the picture in all media in the territory of North America for a period of 25 years (and) in consideration for this grant of rights Atlantic shall pay to Mirage a sum of \$1M upon delivery of the picture as an advance against Mirage's eventual share in the gross receipts...". The letter then goes on to detail the way in which receipts from the film are to be applied including application of those receipts "towards the recoument of Atlantic's advance to Mirage" and details the distribution of the ultimate profits, 80% of which were to be payable to Mirage. The letter requires Mirage to make "production stills and dailies available to Atlantic as soon as possible and trailer material accessible after principal photography", goes on to require Mirage to supply

Atlantic with a press kit and publicity information and, after dealing with other technical matters, concludes by asking Mr Parr to indicate his acceptance of those terms by signing the foot of the letter. The letter does not appear to be signed by anybody.

It seems that it was probably after the receipt of that letter that Mirage concluded that it could not fund "A Soldier's Tale" from its own resources and approached Equiticorp and the BNZ.

By the end of August 1987 Mr Parr was in France ready to commence filming. Approximately \$1-1.5M had been spent on "A Soldier's Tale" by that stage including a large sum of money to the principal actor. French and New Zealand crew and French equipment had all been hired. The public flotation of Mirage was just occurring. Equiticorp had put a considerable sum of money into the project but had only decided to participate in the flotation at the last minute. The Bank of New Zealand had originally indicated that it may lend Mirage \$5M - Mr Parr said that sum was provisional - but had finally only offered it \$250,000.00 by way of overdraft. When that last decision was received, a decision had had to be taken as to whether or not to continue with the project or write off the \$1-1.5M already spent on it. The decision was taken to continue. It seems that that decision was probably taken by Messrs Parr, Reynolds and a Mr Small who was Equiticorp's appointment to the Mirage board.

The filming was in two sections. The first was to begin in Normandy on 31 August 1987 and the second section was to

take place some six weeks later in Bordeaux. Because of the Atlantic contract, all filming was to be completed by Christmas 1987 so that, after processing, the necessary master prints of the film could be supplied by Mirage to Atlantic by 1 May 1988.

Money troubles continued to beset "A Soldier's Tale". According to Mr Parr they began to surface after about a fortnight of filming. Mr Reynolds says that it took about six weeks for them to surface. Whichever is correct, it is clear that by mid to late September or early October 1987, the production was running out of money and funds from New Zealand were arriving late in France.

Mr Reynolds went to France in early October 1987 to discuss the matter with Mr Parr. Up to that stage the filming itself had apparently been going according to schedule but, according to Mr Parr, "the financial pressure was horrendous". Mr Reynolds told Mr Parr that they would have to finish filming at the end of the Normandy section and postpone the Bordeaux section. Mr Parr saw this as a "bombshell" at the time but now recognizes that it was the only sensible course of action to follow. He says that "at that stage we were barely surviving with just enough funds coming from New Zealand to pay the crew" and that at one stage when the French crew found that the Bordeaux section was to be postponed, they refused to work any further until they were paid. At that stage Mirage was under acute financial pressure. Money was slow in arriving and even then was in inadequate amounts. The crew, technicians and actors would not work until they were paid. Mirage owed approximately

F600,000 for laboratory and technical assistance and hire of equipment. It could not afford not to pay these creditors as it needed to preserve access to these facilities. Back in New Zealand, Mirage had a number of creditors -including \$300,000 owing on another film then in production - and a number of notices under the Companies Act 1955 s 218 had been served on it. The BNZ was threatening to freeze its bank account unless money was obtained to reduce its overdraft. The New Zealand Film Commission was unwilling to assist because Mr Parr owed them money. So he says that, in order to help, he took mortgages for \$250,000 over a recently-acquired farm and his matrimonial home. On top of that, there was the pressure to try and complete the filming of "A Soldier's Tale" by Christmas 1987 to fulfil the contract with Atlantic. Mr Reynolds that notwithstanding the recent float:

"'A Soldier's Tale' was now the major asset of the company and the future of the company to a significant extent rested on the success of that film".

That statement of facts is mainly drawn from the affidavits sworn by Messrs Parr and Reynolds but it is largely corroborated by an affidavit sworn by a Mr McGregor. He was the general manager and company secretary of Mirage between 26 September 1987 and 15 February 1988. He says that when he was being interviewed for the job he had asked Mr Small and others questions about the financial position of the company and had been assured that it "was in great shape and had no problems". But immediately on his arrival Mr McGregor says that he found that those statements were incorrect. On his first day on the

job the BNZ rang him three times concerning Mirage's overdraft which was then at thrice its \$250,000 limit. He said he found that the company's financial forecasts were poor and valued the films unrealistically. He found that none of the projected cash flows came to fruition and the accounting system was not capable of running the affairs of a public company. As a result it was not possible to establish the extent of the company's indebtedness. The accounts to March 1987 had not been finished or audited and, more than anything else, "the major problem when I took on my position at Mirage was that the company appeared to have no cash funding available".

Mr McGregor set about trying to establish the company's level of debt and keep its creditors at bay. They included the company's auditors who were owed \$90,000 and who refused to carry out the audit to March 1987 until they were paid. Mr McGregor says that he had been told that the company owed in excess of \$1M but his enquiries led him to believe that the debt was greater than that. He says that at that stage Mirage's sole film project in production was "A Soldier's Tale" although some other activities were continuing.

Mirage's board of directors held a meeting during the week prior to 20 October 1987. It was decided to see if Atlantic would agree to provide financial accomodation. However, at a meeting which Messrs Parr and Reynolds had with Atlantic in Los Angeles on or about 20 October, Atlantic declined to assist.

On 27 October 1987 a meeting was held at the BNZ in

Auckland. It was attended by Mirage directors and officers of the BNZ and Equiticorp. Mr McGregor produced a forecast showing that Mirage had little income or activity and even that, he says, was an optimistic forecast. Those present at the meeting were told that there was no money available to complete "A Soldier's Tale" and that if the film was not completed then all that had been spent to date would be lost. That included the loss of the Atlantic contract and provisional contracts which Mr Reynolds says Mirage had arranged in Holland, Spain, Israel and Italy for distribution of the film. The Mirage representatives indicated to the financiers that the company needed \$2M to pay off its pressing debts in France and New Zealand and to complete the film. If funds were made available to complete the film then the Mirage representatives indicated that perhaps as much as \$6M could be realized over time.

Mr Reynolds says that Equiticorp and the BNZ agreed to advance a further \$1M, \$685,000 from the BNZ and \$315,000 from Equiticorp, but declined to finance the remaining \$1M saying that Mirage would have to obtain it by discounting the Atlantic contract. That discounting did not occur and as a result Equiticorp, in order to ensure completion of "A Soldier's Tale", advanced a further \$1M to Mirage on 1 December 1987 - but that advance needs no more than to be noted in this judgment since it is the subject of separate proceedings.

Mr Reynolds also says that the financiers told Messrs Parr and Reynolds that they would be required to provide personal

guarantees for Mirage's additional liabilities. They say that they both pointed out to the financiers that the guarantees would be worth very little because neither had the means to make payment if called upon. Virtually all the assets that each had from their previous businesses had been invested in Mirage. Their shares in Mirage were their greatest asset and if "A Soldier's Tale" was not finished then, as Mr Parr puts it, "the company was doomed and so were we financially".

These assertions are not substantially denied by the evidence adduced on behalf of the plaintiffs. They say that the requirement for personal guarantees was a necessary condition of the provision of further funds and was intended to:

"ensure their further commitment to (Mirage) and to ensure that the film project would be actively concluded with their participation. Their participation was essential in completing the project which was the main asset of (Mirage)".

As Mr Reynolds puts it, the financiers required the guarantee:

"as a means of ensuring that neither Larry Parr nor myself who they felt were the key men in Mirage would not leave. They also wanted to put pressure on us to make sure that 'A Soldier's Tale' was completed on time and on budget in order that the (Atlantic) contract could be complied with and the \$US1M could be collected".

Although Messrs Parr and Reynolds could possibly not have met the whole of Mirage's debt for which guarantees were being required if Mirage collapsed, statements of personal worth which they had earlier provided to the BNZ still indicated that they were persons of some financial substance. The plaintiffs deponents also point out that Mr Parr is a company director, at that stage the director of a publicly listed company, with considerable commercial experience; that Mr Reynolds is a qualified Barrister

and Solicitor who ought to have been aware by his training of the consequences of the requirement for a guarantee; and that both defendants have been involved in commercial ventures in film over a number of years.

In addition, Mr Reynolds says that Mr Pearson of Equiticorp, in response to Messrs Parr and Reynolds demurring about the personal guarantee, told them that their

"liability under the guarantees would be extinguished when the (Atlantic) contract was fulfilled and we would only be liable until the film was delivered and the money collected from (Atlantic)".

Mr Pearson denies that that statement was ever made although he acknowledges:

"If the (Atlantic) contract had been fulfilled and the funds from it had come to the plaintiffs, in repayment of the plaintiffs' advance to (Mirage) then the plaintiffs' loan exposure (and consequently (Messrs Parr and Reynolds') liability under the guarantees) would have been reduced accordingly".

Messrs Parr and Reynolds were then left on their own by the financiers in order that they might consider their position. They decided that they had really no choice available but to accept the condition as to guarantee and they so advised the financiers.

The defendants' evidence then conflicts as to whether they signed any documentation with the bank at that meeting or at a later meeting but it seems as though it was probably at a second meeting, held on 13 November 1987, because there is before the Court a letter from the Bank of New Zealand of that date purporting to record an arrangement by BNZ and Equiticorp to

extend their loan facilities on certain conditions one of which is repayment of the increased lending only a few days later, namely by 30 November 1987. The other conditions required to be satisfied by 23 November. One of those conditions was the signing of the guarantee on which this proceeding is based.

That document is dated 18 November 1987. It is an extended but conventional deed of guarantee covering the \$315,000 provided for additional working capital for Mirage. It is repayable upon demand and expressly remains in force until the whole of the moneys payable under it have been satisfied.

Messrs Parr and Reynolds say that it took longer than they expected to have the BNZ and Equiticorp documents prepared and that, throughout the whole of this period, they continued to be under considerable financial pressure from creditors both in France and in New Zealand. In addition, their French producer was anxious for funds so that, apart from settling the very considerable existing debts in France, she could book a studio, crew and other equipment for the recommencement of filming "A Soldier's Tale". This was due to start on 1 December after Mr Parr and ten technicians had travelled to France from New Zealand on 25 November.

Both Equiticorp's money and the BNZ money were advanced mutually simultaneously. The whole of the Equiticorp advance was immediately absorbed in meeting urgent creditors as was the additional \$1M advanced in early December.

The guarantees were signed at Equiticorp's solicitor's

office about 3.00 pm on 18 November. Mr Reynolds says that this was so close to the end of the banking hours that if they had delayed, as for example by getting legal advice, this would have postponed the receipt of funds in France by another 24-48 hours so that, when he raised the possibility of getting legal advice in relation to the lengthy guarantees, he says that Equiticorp told him that if he wanted his cheque, they needed to sign then and there. Mr Wright again notes that Mr Reynolds is a qualified Barrister and Solicitor and says that, even had Messrs Parr and Reynolds obtained legal advice concerning the deed of guarantee, the provision of a guarantee was a necessary condition of any advance and that, without it, no further funds would have been lent. The document was accordingly signed.

Mr Parr and his technicians returned to France at the end of November. Filming recommenced in early December and was concluded by Christmas of that year. In the meantime, Mr McGregor tried to get Mirage's tax returns and accounts completed for the 1987 financial year but came to realize that there was no long term prospect for him as a professional accountant with the company, particularly in circumstances where constant nagging from creditors affected his health.

According to Mr Reynolds, all post-production stages of "A Soldier's Tale" were completed in early 1988 at which point the film was in a deliverable state as required by the Atlantic contract. However, prior to what he says was an agreed extended completion date of 1 July 1988, Equiticorp and BNZ, on 3 June,

put Mirage into receivership. Although it may have been unknown to Messrs Parr and Reynolds at the time, the BNZ and Equiticorp had in fact discussed taking that move as far back as 24 November 1987. In a file note dictated that day, Mr Pearson recorded a discussion between BNZ and Equiticorp representatives as follows:

"...The company needs further funds to continue with 'A Soldier's Tale' which I consider must proceed in line with the schedule in order that we can ultimately obtain the proceeds of the Atlantic contract (either in May from Atlantic or via the Horwitz discounting). I would only be prepared however to advance further funds if a receiver/manager was appointed to the company with a view to negotiating with unsecured creditors and trading through to May/June at which stage we should be able to get most of our money back".

As regards the Atlantic contract, Mr Reynolds, who says that his understanding was that his guarantee was to be terminated on receipt of the SUS1M from Atlantic, claims that the fact that that money was not received was due to the plaintiffs' interference in appointing a receiver. However, as to that, one of the joint receivers says that he discovered when he was appointed that not only had the various items of copyright already noted not been attended to but that a number of other technical matters had not been completed including the fact that the master negative, the negative from which the other copies for distribution to cinemas is taken, had not been cleared for delivery by Mirage. The receivers therefore took the view that at the time of their appointment, Mirage was already substantially in default under the Atlantic contract and that the lack of completion of these matters also affected the provisional contracts for the other countries as well. Mr Walker, the receiver, goes on to say that both Messrs Parr and Reynolds

failed to cooperate with the receivers in giving them the necessary information to enable them to complete the film. They say there were a number of requests for information made both before and after the 1 July date from which Messrs Parr and Reynolds must have known that the Atlantic contract could not have been complied with by the extended completion date. However, the receivers were able to obtain a further extension of time from Atlantic and, at least by the date on which Mr Walker swore his affidavit, 6 June 1989, "A Soldier's Tale" was in a deliverable state and within the terms of the Atlantic contract. At that date, however, the contract had yet to be signed and so the film remained undelivered. Bringing the film to that state had cost a further \$186,019, the funds for which came from the debenture holders. As a result, Mr Walker gives it as his view that the receivers actually enabled Mirage to comply with the Atlantic contract by overcoming Messrs Parr and Reynolds' defaults and that their allegations to the contrary cannot be substantiated.

The plaintiffs obtained summary judgment against Mirage on 6 April 1989 and now seek summary judgment against Messrs Parr and Reynolds for the sum of \$356,728.87, being the amount owed pursuant to a demand made for that sum on 30 November 1988 for the \$315,000 advance plus interest from 22 May 1988 to 18 November 1988. The plaintiffs also seek continuing interest from 18 November 1988 at \$263.88 per day. Both Messrs Parr and Reynolds have filed statements of defence. They claim that they have defences to these proceedings based on misrepresentation.

mistake, unconscionable bargain or economic duress, breach of the Fair Trading Act 1986 and that the agreement is oppressive within the meaning of the Credit Contracts Act 1981. They also allege that because the plaintiffs have sued them in the commercial list for the S1M advance made early in December 1987 and which was also guaranteed by Messrs Parr and Reynolds that that mode of proceeding is in itself an acknowledgement that Messrs Parr and Reynolds have arguable defences to this proceeding.

ALLEGED MISREPRESENTATION

Dealing first with the claimed defence based on misrepresentation, the misrepresentations alleged are:

- (a) A recognition by Equiticorp that Messrs Parr and Reynolds could not meet the guarantees if called upon;
- (b) A representation that Equiticorp's purpose in seeking the guarantees was to ensure that Messrs Parr and Reynolds remained actively involved in "A Soldier's Tale" until its completion;
- (c) A representation by Equiticorp that Messrs Parr and Reynolds' liability under the guarantee would be extinguished on receipt of the SUS1M from Atlantic.

As to the first, even if Equiticorp's acknowledgement of the position is accepted as a representation, it does not seem to be a misrepresentation since it seems to be common ground that it was acknowledged at the meeting that Messrs Parr and Reynolds' financial positions were weak if Mirage collapsed. Even if that were not the case, each of them produced statements of assets and

liabilities for the BNZ in January 1987 - although just when Equiticorp obtained copies of these is unclear - each of which indicates that they were not without substance and may at that stage have been possibly able to meet a liability for \$315,000 plus interest between them. It is, however, unclear as to the extent that those statements of assets and liabilities would have been affected by Mirage's flotation in August 1987 and by Mr Parr's mortgaging his properties late in 1987 to provide additional funds for "A Soldier's Tale". There is no later information than the January 1987 schedule on this topic.

As to (b), it seems to be common ground that Messrs Parr and Reynolds knew that one of the purposes for which the guarantees were required was so that they would remain actively involved in Mirage and in the completion of "A Soldier's Tale". In those circumstances the statement complained about cannot amount to a misrepresentation.

The assessment of (c) is a little more difficult. It requires the exercise of the robust and realistic approach to affidavit evidence tempered by judicial caution as outlined by the Court of Appeal in Bilbie Dymock Corp Ltd v Patel & Bajaj (187) 1 PRNZ 84. The Court also needs to bear in mind the well-known dicta relating to affidavit evidence appearing in Eng Mee Yong v Letchumanan [1980] AC 331, 341 and Attorney General v Rakiura Holdings Ltd (1986) 1 PRNZ 12, 14. Bearing those authorities in mind, the conclusion reached is that all parties no doubt hoped in late October and mid November 1987 that,

provided further funds were made available, the film would be able to be completed on schedule and the Atlantic moneys obtained. Had that occurred, those funds would have been more than adequate to repay this particular advance although they may not necessarily have been used to that end.

However, that common hope, in the Court's view, was not translated into a finite term for the guarantees simply because there could be no certainty at that stage that the film would be able to be completed as required and the Atlantic money paid over. In addition, the evidence does not disclose that any part of the Atlantic money was "earmarked" for repayment of this advance nor, having regard to Mirage's secured and unsecured debts in November 1987, could it be certain that any part of the Atlantic money would definitely be able to be earmarked for that use at that time.

It is clear that the terms of the guarantee itself are not limited to the receipt of the Atlantic money and it seems probable that although there may have been some suggestion about extinguishing the guarantees in relation to this loan on receipt of the Atlantic money as acknowledged by Mr Pearson in the passage referred to previously, the probability is that the extinction of the guarantee from the source was merely one of the prospects of payment which were canvassed by the parties at the time. Such at least was Mr McGregor's view because he says that there was a comment to the effect that the guarantees would be extinguished when a tax credit or GST refund was received.

Having weighed all those factors, I conclude that there is no arguable defence on the papers based on misrepresentation. It also follows from that finding that the evidence does not make it plain that the parties agreed or could agree that the termination of the guarantees on receipt of the Atlantic money was essential to them so that the defendants' right to cancel the guarantees does not arise (Contractual Remedies Act 1979 s 7(4)(a); Dawson & McLauchlan Contractual Remedies Act 1979 p 51).

ALLEGED MISTAKE

The alleged mistakes encompass the matters just referred to plus allegations that Equiticorp would support Mirage so that it could comply with its obligations to Atlantic; that Equiticorp would use its best endeavours to see that the film was completed; that Equiticorp would take no steps to hinder completion of the film; and that, if Messrs Parr and Reynolds remained actively involved in Mirage's affairs, no call would be made under the guarantee. Messrs Parr and Reynolds therefore claim that those mistakes resulted in a substantially unequal exchange of values or the confirmation of a benefit on Equiticorp which was disproportionate to the consideration.

This alleged defence attracts the same comments as misrepresentation. Most of the matters alleged could not have been mistakes because all parties were aware of the true position. In addition, there is no evidence that Equiticorp did not support Mirage as best it could to ensure compliance with the Atlantic contract and no evidence that Equiticorp hindered

completion of the film. Indeed, there is evidence that Equiticorp and the ENZ deliberately delayed their hand in appointing the receiver until after the Cannes Film Festival lest a receivership would imperil Mr Parr's efforts at that festival to sell "A Soldier's Tale" as widely and for the best consideration he could. Similarly, there is no evidence that the guarantee would not be called upon if Messrs Parr and Reynolds remained actively involved in Mirage's affairs. The evidence is that they did remain actively involved in Mirage's affairs at least up until the time of the receivership.

In those circumstances this alleged defence is not made out.

ALLEGED UNCONSCIONABLE CONDUCT OR ECONOMIC DURESS

The third alleged defence is unconscionable bargain in the sense of economic duress. Messrs Parr and Reynolds allege that Equiticorp was aware of Mirage's acute financial problems and also aware that Messrs Parr and Reynolds had so much of their personal finances dependent on Mirage's success that the circumstances in which the guarantee was signed amounted to an unconscionable bargain by their being placed under economic duress.

The locus classicus of this doctrine is in the judgment of Lord Scarman in Pao On v Lau Yiu Long [1980] AC 614 where that learned Judge held that the basis of economic duress is that it amounts to a "coercion of the will which vitiates consent". Or, as described by the same learned Judge in Universe Tankships Inc

of Monrovia v International Transport Workers Federation [1983]
AC 366, 400, an "...intentional submission arising from the
realization that there is no other practical choice open to him".

It has been held in New Zealand that economic duress is
"not to be lightly found" (Moyes & Groves Ltd v Radiation NZ Ltd
[1982] 1 NZLR 368, 372; Aotearoa International Ltd v Scancarriers
A/S 1 NZLR 513, 550) but, notwithstanding those dicta, the Court
is of the view that in this area the plaintiffs have not
satisfied the Court under R 136 that the defendants have no
defence to the application for summary judgment.

Messrs Parr and Reynolds had, in large measure,
invested the fruits of their past business activities in Mirage.
Mirage was deeply in debt from late September or early October.
Creditors were pressing both in France and in New Zealand. A
number of s 218 notices had been issued. The crews and actors
were threatening to strike or refusing to work any further unless
they were paid. The position worsened through October. By the
end of that month unless Mirage obtained further money to
complete "A Soldier's Tale" it had no hope of recovery and, if it
failed, Messrs Parr and Reynolds were financially doomed with it.
The only hope it had of obtaining funds was from Equiticorp and
the ENZ. By that stage those companies were owed at least \$2.5M.
Those financiers were only prepared to make the necessary funds
available if guarantees were provided by Messrs Parr and
Reynolds. However commonplace it may have been for the
financiers to insist on guarantees in relation to such lending

transactions, there is no evidence that either Messrs Parr or Reynolds had been required to give guarantees previously. They initially demurred from giving those guarantees. It was made plain to them that without the guarantees there would be no loans. They had no time or realistic opportunity to look elsewhere for money for which guarantees might not have been required. Given the amount which the BNZ and Equiticorp already had invested in "A Soldier's Tale" they may not have been able or permitted so to do in any case. Without the loans "A Soldier's Tale" would have remained untold.

Even though it might be said that Messrs Parr and Reynolds had themselves been largely instrumental in getting themselves into the position in which they found themselves immediately before signing the guarantees, the plaintiffs' representatives must have known of the defendants' position and must have realized that they had no option but to sign the guarantees to obtain access to the funds and bind themselves to working on and completing the film. In those circumstances whatever may have been Messrs Parr and Reynolds' background, the plaintiffs have failed to prove that the defendants' will - in the sense of their deep reluctance to sign the guarantees - was not coerced by their circumstances so as to vitiate their consent in signing. The plaintiffs have similarly failed to prove that the defendants knowing and therefore intentional submission to the necessity for them to sign guarantees arose from the fact of there being any other practical choice open to them.

In the light of that finding, it is not strictly necessary to proceed and deal with the other alleged defences but they are considered lest the conclusions on the unconscionable bargain/economic duress matter are not accepted.

Alleged Breach of Fair Trading Act 1986

Messrs Parr and Reynolds also raised an alleged defence based on what is claimed to be breaches of the Fair Trading Act 1986 ss 9 and 13. They say that Equiticorp engaged in conduct which was misleading or deceptive or was likely to mislead or deceive and that Equiticorp falsely represented that services were of a particular kind. The misleading conduct is alleged to be requiring guarantees to be executed when Equiticorp knew they could not be met, representing the purpose of the guarantees to be a performance bond for them to remain involved with Mirage and to finish "A Soldier's Tale" and representing that the guarantees would be extinguished on receipt of the Atlantic money. Similar allegations reply in respect of s 13.

There is, as yet, little in the way of authority in New Zealand in relation to the Fair Trading Act although there is now a considerable body of jurisprudence in Australia relating, in particular, to their Trade Practices Act 1974, s 52 which is the equivalent of the New Zealand s 9. That dearth of indigenous authority renders it difficult to assess allegations such as these in summary judgment applications but, on the facts of this matter, the only area where Equiticorp's actions or statements

might conceivably offend against the Fair Trading Act relate to the suggestion that the guarantees would be extinguished on receipt of the Atlantic money. In all other areas there is no evidence to suggest that Equiticorp's true motives were not made clear to Messrs Parr and Reynolds. It is clear, however, that the matter is to be judged objectively as to how the conduct or representations would have been received by the person to whom they were made (Hill & Jones Fair Trading in New Zealand: The Fair Trading Act 1986 p 28 ff). And in that regard even if Equiticorp's conduct or its representations could be regarded as offending against the act prior to the execution of the guarantee, whatever effect that conduct or those representations may have had must have been spent by even a cursory examination of the guarantee prior to its being signed. The evidence shows that Messrs Parr and Reynolds read the guarantee before signing it because they were concerned that the BNZ guarantee which they had previously signed had not reflected the arrangements between the BNZ and themselves and undertakings had had to be made and given in that respect. They were concerned to ensure that that did not re-occur with the Equiticorp guarantee. Even to persons without any commercial or legal experience, it ought to have been obvious that the guarantee was payable on demand and contained no covenant terminating it on receipt of the Atlantic money. There is no evidence that either Messrs Parr or Reynolds raised with Equiticorp or its solicitors any complaint that the guarantee was not to be extinguished on receipt of the Atlantic money, from which it can only be inferred that they were not misled or

deceived in that respect nor that any earlier representation to them was false or still operative.

This alleged defence is not made out.

Alleged Oppressive Conduct Defence

The final alleged defence is that the guarantee contract was oppressive thus entitling the Court to reopen it pursuant to the Credit Contracts Act 1981 ss 9 and 10.

There is a difference of opinion as to whether a contract of guarantee such as this is a "credit contract" within the meaning ascribed to that term by s 3 of the Act but in Elia v Commercial Mortgage Nominees Ltd (unreported Auckland CP 327/88 Judgment 24 August 1988 Gault J) it was held that where a contract of guarantee makes the guarantor liable as principal debtor - as is the case here - then the guarantee is a "credit contract". The memorandum of credit contract signed on 18 November and covering the \$315,000 advanced by Equiticorp for 12 days includes the deed of guarantee which is the subject of this proceeding as part of the security. Messrs Parr and Reynolds were covenantors to that memorandum and to the terms of the credit contract which were attached. Pursuant to those terms they covenanted to repay the principal sum together with the interest. The security also included the first debenture given by Mirage to Equiticorp on 21 September 1987 and that document itself makes it collateral with all other security documents. In those circumstances the debenture and the credit contract would

appear to fall within the definition of "credit contract" in s 3(1)(a) and the whole series of documents would appear to be linked as envisaged by s 4.

"Oppressive" is defined by s 9 of the Act as meaning "oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice".

That definition, as construed by Vautier J in Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd [1984] 2 NZLR 1, 16 means:

"The word 'oppressive' clearly connotes that some real detriment or hardship is involved. The word 'harsh' is indicative of something of the same nature. The phrase 'unjustly burdensome' clearly shows, for example, that the fact that the performance of the contract is difficult for the party applying is insufficient. Injustice must be shown to exist as well. The word 'unconscionable' is of course the same word as was used in the Moneylenders Act and there are numerous decisions showing that that word was interpreted as requiring something more than an inquiry into whether a contract was fair or unfair to one party or the other. The final phrase, 'in contravention of reasonable standards of commercial practice' is admittedly a wide ranging concept and embraces something that was not included in the previous legislation. It surely in my view, however, requires something more than a simply uninformed conclusion as to what is fair or unfair from the standpoint of commercial dealings. Except in the plainest of cases I would consider that some evidence as to what the standards of commercial practice are relative to the particular type of contract under consideration would be necessary before the Court could conclude that those standards were contravened in the particular case."

And in Shotter v Westpac Banking Corp [1988] 2 NZLR 316, 326 Wylie J held:

"It is clear that 'oppressive' and the exegetical words set out in s 9 viz 'harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial

too that the reference to 'reasonable standards of commercial practice' indicates boundaries within which conduct will not be oppressive."

In relation to this alleged defence, Messrs Parr and Reynolds point to all the matters previously set out and in particular to the circumstances surrounding the signing of the guarantees and Equiticorp's refusal to provide the money without guarantees when Mirage was under severe financial pressure both in New Zealand and in France. They say, further, that the appointment of the receivers and the receivers' conduct bears on whether enforcing the guarantee amounts to oppressive conduct.

As to the former, there is, as has been noted, nothing out of the ordinary in the terms of the guarantee itself. There is nothing out of the ordinary in a financier requiring a personal guarantee as security or part security for an advance as the Courts are well aware. Messrs Parr and Reynolds had been aware of the necessity for a guarantee since their earlier meeting with Equiticorp and BNZ. Apart from their objection to providing a personal guarantee and thus taking on personal liability by contrast with limited liability, there is nothing to suggest that they objected to the requirement for a guarantee as coming within any of the categories set out in s 9 at the time. There is nothing to suggest that they endeavoured at any time to obtain finance from any other source where a personal guarantee may not have been required. There is nothing to suggest that they endeavoured to insist on any limitation on the general terms of the guarantee whether as to time, amount, reference to the

Atlantic contract or in any other way.

From an objective point of view, this was an ordinary commercial guarantee without any element of real detriment or hardship. Its terms are not unjust or unjustly burdensome nor do they come within the definition of unconscionable in Italia Holdings (supra) and the case there referred to. Although Equiticorp's requirements were no doubt unyielding even when the defendants demurred from signing the guarantee, there is no evidence as to what would be reasonable standards of commercial practice in these circumstances and thus no objective basis on which to stigmatize Equiticorp's actions as being "contravention of reasonable standards of commercial practice".

There are two further aspects to the plea that Equiticorp has exercised its rights under the guarantee in an oppressive manner. In the first place, although there is no evidence as to the date on which demands were made under the guarantees, it is clear from the terms of the demands that that step cannot have been taken prior to 30 November 1988, that is to say at least a year after the advance fell due for repayment and virtually six months after the receivers were appointed. Since the demand, there is no evidence that Equiticorp has acted in an oppressive manner other than such as might arise by suing Messrs Parr and Reynolds by way of summary judgment in this proceeding and issuing the other proceedings in the commercial list for the December 1987 advance and the guarantees given by Messrs Parr and Reynolds in that respect. It would be strange if a creditor in exercising its rights under a security could be held to be acting

oppressively within s 9 such as to entitle the Court to reopen the contract for that reason alone. Such would not appear to fall within the guidelines set out in s 11(2)(a)(c).

As to the earlier stage of the matter, it is clear that Equiticorp and the BNZ were considering appointing a receiver as early as 23 November 1987 (which, only five days after the advance and only a week before it fell due for repayment) but that they stayed their hand and again stayed their hand despite Mirage's worsening financial situation at the end of May 1988 until after the Cannes Film Festival. There is no evidence that Messrs Parr and Reynolds were aware of the financiers' thinking in that respect nor of the reasons for them staying their hand but they seek to draw an inference adverse to Equiticorp from the fact that the receivers were appointed shortly before the Atlantic money was due for payment with, on their view, the promised termination of their guarantee following its receipt. The receivers appointed in this matter were chosen by the financiers because of their expertise in the film industry and it is clear from their affidavit that a considerable number of what would appear to be important matters required to be attended to and a considerable sum of further money had to be expended before "A Soldier's Tale" was in a state in which it could be delivered to Atlantic. Although the receivers do not say when the deliverable state was achieved, it is to be noted that on 6 June 1989 the contract had still not been signed and the film remained with the receivers. Messrs Parr and Reynolds are experienced in the film industry. They must have known that the letter from

Atlantic of 26 June 1987 was not a contract, particularly as it was unsigned by any party. They ought to have known that the various matters referred to by the receiver required to be attended to before Atlantic could be required to pay out the \$1M - even if there were a contract in existence in relation to that payment. In all the circumstances, therefore, it can have been no more than coincidence that the date of appointment of the receivers was approximately a month before the extended date for delivery of "A Soldier's Tale" to Atlantic if the film was then in a deliverable state. Having regard to that and the fact that there was no express limitation in the guarantee that it would be terminated on receipt of the Atlantic money, the only conclusion open is that Equiticorp have satisfied the Court that Messrs Parr and Reynolds have no defence based on an allegation that the plaintiff has sought to exercise the rights granted to them by the guarantee in an oppressive manner.

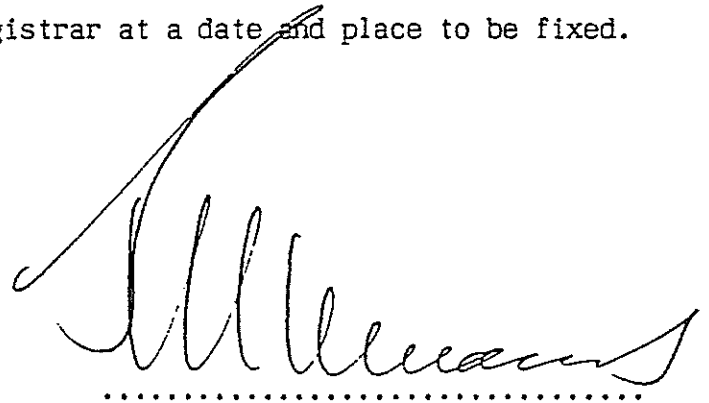
Conclusion

In conclusion, therefore, Equiticorp has demonstrated that the defendants have no alleged defence to the standard required by R 136 in all respects bar the alleged defence of economic duress. There is nothing contradictory in holding against the defendants on all grounds bar that one since that one is the sole ground which requires an examination of the defendants' position and the effect on them of their circumstances: all other grounds require an examination of Equiticorp's actions or the actions of all parties in this

dispute.

The application for summary judgment is therefore dismissed. As has been remarked previously, it is unfortunate that the Rules do not permit applications for summary judgment to be dismissed on terms such as would enable the Court to confine the subsequent trial of this matter to the issue of economic duress.

If counsel wish costs to be fixed rather than reserved at this stage, they are to submit memoranda on that topic within 14 days of the date of delivery of this judgment signifying in that memoranda that they are agreeable to the Master fixing costs without the necessity for a further hearing. If counsel are not agreed on that last point, a further hearing will need to be arranged through the Registrar at a date and place to be fixed.



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Master J H Williams, QC

Solicitors: Rudd Watts & Stone, Auckland, for Plaintiffs

 Russell McVeagh McKenzie Bartleet & Co, Auckland,
 for Second and Third Defendants

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No 2923/88

BETWEEN EQUITICORP FINANCIAL
SERVICES LTD and
EQUITICORP FINANCE GROUP
LTD

Plaintiffs

A N D MIRAGE ENTERTAINMENT
CORPORATION LTD (IN
RECEIVERSHIP)

First Defendant

A N D L G PARR

Second Defendant

A N D D K REYNOLDS

Third Defendant

JUDGMENT OF MASTER J H WILLIAMS, QC
