

N2UR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

30/8

C.P. NO. 2132/90

BETWEEN DFC NEW ZEALAND LIMITED
(Under Statutory Management)

Plaintiff

A N D

K.S. WRIGHT, P.R. MELLOR,
R.J. LEWIS, B.F. MELLOR, B.T.
HALL, G.C. ASHBY, J.S. JONES,
G. ASHBY, G.R. PAINTER, D.R.
CRUMP, G.P. LOCK, D.K.
MacLEOD, C.R. ST. CLAIR BROWN
trading as REDOUBT BREEDING
PARTNERSHIP

Defendants

1542

Hearing: July 9, 1991

Counsel: Miss Coakley for Plaintiff
Mr. Asher for Defendant C.R. St. Clair Brown

REASONS OF MASTER ANNE GAMBRILL

I have an application before me for Summary Judgment in respect of the balance of the sum due under a loan advance made to members of a bloodstock partnership (now collapsed). The Plaintiff calculates the balance owing at \$19,514.39 on a joint liability basis plus interest from 22nd March 1991. The Defendant disputes these sums and produces his accountant's figures debating the calculation of interest in the loan contract and says there is a

defence I would adopt the judgment of Fisher, J. in DFC Financial Services Ltd. (In Statutory Management) v. Abel [1991] 5 NZCLC 67.016 and find there is no breach.

Counsel made it clear that the Defendant was prepared to pay the sums that were found to be due and owing and the evidence is clear that he has, through the period, made substantial payments. What has happened in this instance is that the Plaintiff has entered into a settlement with a group of parties who have contributed funds. Mr. St. Clair Brown has declined to make a contribution in terms of that group as he maintains that he has met the indebtedness for which he is liable, or he has been released by the settlement.

The Defendant says the memorandum of terms and conditions of offer make no reference to a joint liability. On the basis of the contra proferentem rule several liability must be assumed. Both Counsel referred me to the statements in Halsbury's Laws of England 4th ed., Vol. 9 paragraph 620 et seq and the need to construe the ambiguity according to the interests of the parties. The subsequent instrument refers to a joint liability and the instrument provides that the terms of the instrument shall prevail over the memorandum of terms and conditions of offer. Counsel for the Defendant says that the documents relating to the memorandum of terms and conditions of offer must be construed as the prime document because it is the document

5.

says it can because the term or collateral contract does not directly conflict with the main object of the contract and it is entirely consistent with the main object which is that the funds were to be provided to ten different partners by the Plaintiff and then an instrument by way of security was to be given over the horses by them jointly.

Counsel submitted that in the event of a collateral undertaking varying an aspect of a written contract without being directly contradictory to its primary purposes, that undertaking may be enforceable. As the prime contract document does not identify whether the liability is joint or several, at least this matter may give rise to a tenable defence. Counsel for the Defendant said there was a promissory estoppel but I do not propose to traverse the submissions in regard thereto. Counsel for the Defendant also said there was a mistake and the mistake was known to DFC by terms of the letter. This is still arguable and really relates to the matters referred to hereinbefore. Counsel finally said that if the arrangement had been reached whereby Mr. St. Clair Brown's liability was to be treated as several, it would obviously be oppressive for DFC to take steps to recover from the Defendant the balance of the whole debt in view of the payments made.

Counsel raised the matter of settlement of which evidence was not before the Court, the payments having been made fairly recently and in the initial proceedings no credit

there should be full discovery and if, as the Defendant alleges, certain interest sums should not have been charged or are not payable, then he has no liability for which judgment should be entered. The complexity of the accounting in the records herein makes discovery desirable and it appears there is dispute between Mr. St. Clair Brown and the officers of DFC as to whether agreements were reached, letters were sent or payments made and on what dates payments were received. If this is the case, I believe the matter is not suitable to be dealt with summarily and should be dealt with at a hearing. If, as the Defendant's accountants suggest there is up to \$14,000 discrepancy, I believe that it would be wrong to find for the Plaintiff for liability only as it may be proven the Defendant owes no debt to the Plaintiff. For these reasons I refused Summary Judgment.



MASTER ANNE GAMBRILL

Solicitors:

Rudd Watts & Stone, Auckland, for Plaintiff
The Fortune Manning Law Partnership, Auckland, for
Defendant C.R. St. Clair Brown