

N2UR

LOW  
PRIORITY

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

21/6

C.P. NO. 1529/90

1042

BETWEEN FIRST CITY FINANCE LIMITED  
(In Receivership)

Plaintiff

A N D P.J. TAIT-JAMIESON &  
P.E. BUTLER

Defendants

Hearing: May 24, 1991

Counsel: Miss Waite for Plaintiff  
Miss Lamb for Firstnamed Defendant  
Mr. Dean for Secondnamed Defendant

Judgment: 5 JUN 1991

---

JUDGMENT OF MASTER ANNE GAMBRILL

---

The Summary Judgment application herein is dismissed. The substantive proceedings remain extant. The parties seek timetable orders and on the hearing in respect of these matters I am satisfied the following orders should be made.

There is 28 days from the date hereof for all parties to file verified lists of documents; a further 21 days for the parties to carry out inspection of documents; and a further 14 days from completion of the period for inspection of

2.

documents for further interlocutories to be filed. There is leave reserved to seek further directions.

I am satisfied that discovery and inspection could be complex if the correct financial records are not available. Accordingly I made an order in these terms.

The Plaintiff, having withdrawn the Summary Judgment application, the firstnamed Defendant indicated that costs in respect of the firstnamed Defendant should be reversed on the application. The secondnamed Defendant sought costs herein. In view of the decision I reached, it is necessary to detail some of the reasons that caused me to grant costs on this occasion taking into account the view of the Court of Appeal decision in NZI Bank Ltd. v. Philpott CA.202/89 dated 1st May 1990.

The file is a large box file. The initial affidavit of the Plaintiff consisted of 217 pages and 62 pages in respect of its Statement of Claim. The reasons for this are clear. The Plaintiff sues the Defendants alleging they have a valid guarantee in respect of hire purchase agreements granted by Boat City to purchasers and then discounted to the Plaintiff. There are 15 separate causes of action and agreements. Proceedings have been extant since September 1990. The Plaintiff is in receivership and I understand the Defendant company of which the Defendants are alleged to be guarantors is also in receivership.

The secondnamed Defendant's Counsel says on receipt of the documentation he rang and discussed the matter with the Plaintiff's Counsel and said he did not think the matter was suitable for Summary Judgment. The Plaintiff has persisted that the matter can be determined on Summary Judgment because of the documentation. The Defendant says, however, there is a clear conflict of evidence particularly in the initial arrangements reached between the Plaintiff and Boat City and the Defendant. Apart from the lengthy first affidavit of the Plaintiff, the Plaintiff has filed 8 further affidavits in reply. The Defendant says discovery is necessary as the quantum has varied in respect of the claim. There have been deficiencies in the Plaintiff's claim and each of the Defendants' guarantees must be subject to careful analysis.

Putting that aside, I am informed from the Bar and it is not disputed, that some settlement was arranged in 1989 between the Defendants herein and the Plaintiff. On that settlement the Defendants's Counsel says certain new boats and a cheque labelled 'in full settlement' was delivered to the Plaintiff. The Defendant's Counsel says those steps completed the settlement and released them from their guarantees; the Plaintiff says it does not. However, the Defendant relied on Ben-Menachem & Ors v. Nathan & Anor CA.56/89 dated 27th April 1990 where there was a factual dispute between two Directors of companies. A similar

4.

situation the Defendant says to the present case. I accept that may be the case as the evidential conflict was known at or immediately after the issue of proceedings.

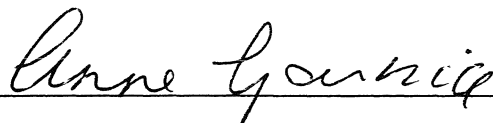
Plaintiff's Counsel is presently overseas and Miss Waite stepped in as the Counsel to conduct the case during this week. On a careful consideration of all the documents including all the affidavits in opposition and in reply, she reached a conclusion yesterday that the matter was not suitable for Summary Judgment and advised the Defendants accordingly at 1pm yesterday that she would be discontinuing the Summary Judgment application. I believe she acted very wisely in taking those steps.

I believe the secondnamed Defendant is entitled to be reimbursed as to the cost of preparing for a hearing of the Summary Judgment application recognizing that matters such as the costs of filing the Statement of Claim remain extant and remain costs in the cause to be determined by the trial Judge. What remains is the extra cost of a Summary Judgment application, perusing the affidavits in support, preparation of notices of opposition and the affidavits in opposition. I recognize that all the affidavit evidence can be used as a brief of evidence and I have taken that into account in my calculation. However, on a rough count it appears the Defendant's Counsel was required to read over 340 pages of affidavit evidence. He had to draw an affidavit for his client of 46 pages plus a further 16 page

5.

affidavit and, prior to hearing that the case was withdrawn, he prepared a complex analysis of the pleadings and the affidavits comprising 86 pages. I understand full well why he seeks costs in this context. I am satisfied too there are a number of matters herein that make the whole claim unsuitable to be determined in a Summary Judgment context, not only relating to the settlement but relating to the discounting and figures in respect of the agreement, the question of the manner of repossession of the assets and the question of the manner of sale of the boats and the receipt of the funds therefrom.

Accordingly, having been satisfied it was a proper case for an award of costs that related to the Summary Judgment application and taking into account the size of the claim was only \$58,000, I allowed \$1500 on the perusal of the affidavit evidence and preparation of affidavits in opposition and \$1000 to the Defendant for preparing for the Summary Judgment hearing. These costs are to be paid within 28 days. As I have reserved leave herein, if the costs are not paid to the Defendant, the Defendant will be entitled to apply for a stay of the proceedings.

A handwritten signature in cursive script, reading "Anne Gambrell", is written over a horizontal line.

MASTER ANNE GAMBRILL

Solicitors:

McElroy Milne, Auckland, for Plaintiff  
Sellar Bone & Partners, Auckland, for Firstnamed Defendant  
John Dean Law Office, Wellington, for Secondnamed  
Defendant