

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

12/3

CP NO.478/91

BETWEEN BANK OF NEW ZEALAND

Plaintiff

142

A N D J M BISLEY

Defendant

Hearing: 3 February 1993

Counsel: C A J Clark for the Plaintiff
 K G Davenport for the Defendant
 G A Cole for the Official Assignee

Judgment: 3 February 1993

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

On 29 May 1991 summary judgment was granted by consent of the defendant for liability in respect of a claim against the defendant by the plaintiff under a guarantee provided by the defendant of the indebtedness of a certain company. At the time the judgment was granted counsel for the plaintiff undertook not to enforce or proceed with any question relating to quantum pending the Court of Appeal hearing of a related proceeding. Counsel for the plaintiff also undertook to provide the defendant with "documents which supply any ground for set-off". This last was a reference to para.6 of the defendant's affidavit in opposition to the application for summary judgment which reads as follows:

"EXHIBITS "B" to "D" and "H" appear to indicate that the amounts owed by Shoreville Mandalay Limited are in fact in excess of \$1,000,000.00. However, during the time leading up to the receivership of the companies the Bank acted unilaterally to credit certain amounts deposited in various accounts to other accounts. This significantly affected the overdraft of certain of the companies and in particular, the Shoreville Mandalay account. I do not have a full understanding of how the Bank operated during that time to credit various amounts, nor do I have access to those records as they are in the possession of the receivers of the Company or the Plaintiff. The Bank's actions in this respect were discussed in the judgment, with Mr Justice Doogue saying that this was an issue of some difficulty (at page 47 and following of his judgment). The Bank was held to be allowed to set-off the amounts owed between the sub-accounts in the name of Shoreville Caterers Limited but not between Shoreville Mandalay Limited and Shoreville Holdings Limited. This distinction whilst appearing in the judgment annexed to Mr Stitt's affidavit does not appear anywhere in his calculation of the amount owed by me personally. If this aspect of the judgment is altered in any way by the Court of Appeal then the amount which I may owe to the Bank will again be significantly reduced."

The matter came before the Court again on 2 November 1992. On that date Master Towle held that the first undertaking given by counsel for the plaintiff on 29 May 1991 was spent because the Court of Appeal had heard and determined the other proceeding. The plaintiff had prior to this second hearing filed a short affidavit by Mr D A Stitt sworn on 2 November 1992 quantifying the amount of the debt. The Master held that this affidavit did not comply with the undertaking given by counsel for the plaintiff on 29 May 1991 to provide the defendant with any documents which would supply ground for set-off. He therefore ordered the filing and service of a fuller affidavit showing what set-offs the bank had operated between the various accounts to arrive at its claim against the defendant. The Master went on to direct as follows:

"... that the defendant, if she still wishes to defend the matter and claim that her liability does not extend up to the \$900,000 plus interest as claimed, should file a proper statement of defence and

claim for a set-off indicating which, if any, of the particular transactions are under challenge."

The plaintiff has filed a further affidavit by Mr Stitt setting out the details of its treatment of the various accounts. The defendant has filed a statement of defence and counterclaim. This last step was taken on 11 December 1992. Six days later the defendant was bankrupted. The conduct of her affairs is therefore now in the hands of the Official Assignee, hence Ms Cole's presence today.

I have the following applications before me:

- (1) An oral application by the plaintiff for leave to continue the proceeding against the defendant.
- (2) A written application by the plaintiff to strike out the defendant's statement of defence and counterclaim.
- (3) The original application for summary judgment for the quantum of the plaintiff's claim.

I make the following rulings on these applications:

- (1) The application for leave to continue

The application is granted in exercise of the discretion conferred on the Court by s.32 of the Insolvency Act 1967.

- (2) The application to strike out the defendant's statement of defence and counterclaim

The defendant's statement of defence and counterclaim is not in accordance with the direction given by Master Towle on 2 November 1992. It is not directed - except to the extent that it contains a paragraph complaining that certain sums were debited to these accounts which should not have been - to the transactions as

was the intent of Master Towle's direction. It raises counterclaims which may or may not give rise to a set-off. It is out with Master Towle's order and I strike it out.

(3) For judgment as to quantum

The plaintiff has filed a fourth affidavit by Mr Stitt sworn on 29 January 1993 which establishes that there is as at 29 January 1993 an amount of \$1,556,480.33 owing. Mrs Davenport for the defendant admits that no payment has been made since that date. There will accordingly be judgment for the plaintiff in the sum of \$1,556,480.33 together with continuing interest to the date of payment on the sum of \$1,084,500 at 22.5% p.a. I order the defendant to pay the plaintiff's costs in the sum of \$2,000 plus disbursements to be fixed by the Registrar.



MASTER T KENNEDY-GRANT

Solicitors

Bell Gully Buddle Weir, Auckland, for the Plaintiff
Louis P McElwee, Solicitor, Auckland, for the Defendant