NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP NO.5/93

BETWEEN D KALFF HOLDINGS LIMITED

Plaintiff

A N D LARRY CHARLES KALFF and CATHERINE IRENE KALFF

Defendants

Hearing: 20 May 1993

Counsel: M R Callander for the Plaintiff
B J Paterson for the Defendant C I Kalff

Judgment: 20 May 1993

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

The plaintiff seeks judgment against the defendant C I Kalff for the sum of $53,000. The sum is alleged to be owing under an agreement for sale and purchase entered into in October 1979. The agreement provided for a purchase price of $83,000, $30,000 of which was to be paid in cash on settlement and the balance of which was to be paid *""upon demand" within the meaning ascribed to those words by the Fifth Schedule to the Chattels Transfer Act 1924..."*

At the time of the agreement for sale and purchase the defendant, C I Kalff, was married to and living with the former defendant, L C Kalff.

During the period that they continued to be married and to live together no demand was made on either defendant for payment of the balance of $53,000. In early February 1988, after the parties had separated, demand was made upon both of them. It is on the failure by the defendants to pay the amount of $53,000 in response to that demand that the plaintiff has based in its claim.

The plaintiff's claim against the defendant, L C Kalff, was not opposed and judgment has been entered against him for the principal sum together with interest at 11% per annum from 12 February 1988, the date of demand.

A number of defences have been argued before me in respect of the claim against the defendant, C I Kalff. I feel I am able to determine the matter properly on the basis of one only of those defences without considering the others. In coming to this conclusion I have had in mind the test for the existence of an arguable defence enunciated by Somers J in the Court of Appeal in ***Pemberton v Chappell*** [1987] 1 NZLR 1 pp 3/49 - 4/3:

> *At the end of the day R 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See eg* ***Wallingford v Mutual Society*** *(1880) 5 App Cas 685, 693;* ***Fancourt v Mercantile Credits Ltd*** *(1983) 154 CLR 87, 99;* ***Orme v De Boyette*** *[1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.*

The defence advanced by Mr Paterson, for the defendant C I Kalff, on which I propose to decide the application for summary judgment, is that

there is a reasonable inference - certainly an arguable case - that there was never any intention that the balance of $53,000 should be paid to the plaintiff for the following reasons:

(a) No demand was made during the period when the parties, L C Kalff and C I Kalff, were living together but only after they had separated;

(b) At no time before 1990, even up to 1989 after demand had been made, did the accounts of the plaintiff show the sum of $53,000 as owed to the plaintiff by the defendants or the defendant, C I Kalff;

(c) At no stage have the accounts of the defendants shown the amount as owing to the plaintiff;

(d) A memorandum of transfer registered in respect of the sale and purchase of the property early in 1980 acknowledged the receipt of the full amount of $83,000.

Mr Callander, for the plaintiff, has sought to meet these points by arguing:

(i) In respect of the absence of reference to the debt in the plaintiff's accounts, that there is evidence which shows that there has been a change of accountant, that records have been lost, that it has been necessary for there to be a reconstruction of records and that the omission of the debt as an asset of the plaintiff has therefore occurred in error;

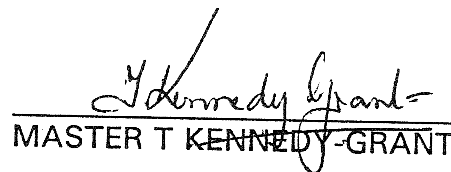
(ii) In relation to the fourth point relied on by Mr Paterson, that acknowledgment of receipt of the full amount of the purchase price was normal practice even in situations where, for example, a mortgage back had been entered into and that no inference such as argued for by Mr Paterson could be drawn.

I think the latter point is one of substance. I do not think that the former point is of sufficient substance to meet the fact that, even for a year

after the date at which the demand was made, the debt was not shown in the accounts of the plaintiff. Mr Callander has been unable, in my view, to point to any evidence which provides a counter to the first and third points relied on by Mr Paterson.

I accordingly dismiss the summary judgment application on this ground alone without considering the other defences.

I fix the costs of the summary judgment application at $1,000 and reserve them to the trial Judge.



MASTER T KENNEDY-GRANT

Solicitors

McKechnie Quirke Morrison & Lewis, Rotorua, for the Plaintiff
H G McColl, Hamilton, for the Defendant C I Kalff