843 NZCR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.365/95

NOT RECOMMENDED

BETWEEN PETER WILLIAM BUTLER AND REGINALD MICHAEL SWEENEY AS TRUSTEES OF THE FLOTER FAMILY TRUST

Plaintiffs

AND R F & S A BLUCK LIMITED

First Defendant

AND RICHARD FREDERICK BLUCK AND SHERYL ANN BLUCK

Second Defendants

Hearing: 10 February 1997

Counsel: *John Turrall* for Plaintiffs
*Patricia Mills* for Defendants

Judgment: 10 February 1997

---

## ORAL JUDGMENT OF TOMPKINS J

---

Solicitors:
J G Turrall, Auckland for Plaintiff
Dyer Whitechurch and Bhanabhai, Auckland for Defendants

The plaintiffs have claimed $178,315.18 against the first and second defendants. The defendants applied for an order striking out the plaintiffs' claim on the grounds that the proceedings did not disclose a cause of action and that the proceedings are frivolous, vexatious and an abuse of process. In a judgment delivered on 18 July 1996, Master Gambrill granted the application, struck out the plaintiffs' claim and awarded the defendants $2000 costs. The plaintiffs have applied to this court to review that decision. An earlier application for review was struck out on 2 August 1996 because the plaintiffs or their counsel failed to appear when the application was called.

Since the hearing before the Master, the plaintiffs, on 21 October 1996, filed a further amended statement of claim. Miss Mills is justified in her objection to this course. For the purposes of this application for review, I ignore that further amended statement of claim.

**Factual background**

The plaintiffs are the trustees of a trust known as the Floter Family Trust. As trustees they are owners of land situated at Te Atatu Rd, Te Atatu, which there is a motel known as Sunset Lodge. By deed of lease dated 30 June 1984, the trust leased the lodge to the first defendant. In 1988 the first defendant sold the business to Bocon Investments Ltd. The plaintiffs agreed to a surrender of the 1984 lease, granted a new lease dated 4 October 1988 to the first defendant as lessee, the second defendants being the covenantors of the lessee's obligations, and consented to an assignment of that lease to Bocon. I refer to this as the 1988 lease.

On 22 August 1989 Bocon abandoned the lodge and on or about the same time Countrywide Finance Ltd, who held a first charge over the chattels owned by Bocon, took possession of the chattels and removed them. A few days later the plaintiffs took possession of the lodge.

Shortly afterwards a partnership was formed between four persons, one of whom was the first named plaintiff, Peter William Butler. The plaintiffs granted a lease to the partnership for a term of 16 years commencing on 1 December 1989 ("the 1989 lease"). In January 1990 the partnership sold the lodge business to Production Sales Ltd to whom the 1989 lease was assigned. The plaintiffs allege that on that sale, for which the purchase price was $425,000 of which $200,000 was

paid in cash, the balance being met by a vendor mortgage of $200,000. Performance of the 1989 lease was guaranteed by Mr McKegg, a director of Production.

On 22 September 1991 Production abandoned the premises and was subsequently put into liquidation. Mr McKegg has been adjudicated bankrupt.

The plaintiffs then ran the business under its own management until it sold the business on 22 April 1996, granting a new lease to the purchaser for 20 years commencing on 22 April 1996 ("the 1996 lease").

**The statement of claim**

The plaintiffs' claim against the first defendant as lessee under the 1988 lease is based on an allegation that the first defendant remained liable for payment of all the monies due under that lease for the whole of the term of that lease. The plaintiffs calculate the total rental for the period to be $689,917.80, calculated at the rate of $90,000 per annum, the rental due under the 1988 lease. The plaintiffs then give credit for various amounts it has received by way of rent under the subsequent leases totalling $511,602. The plaintiffs' claim against the first defendant is for the balance of $178,315.80 plus interest.

The cause of action against the second defendants is founded on the covenant contained in clause 42 of the 1988 lease pursuant to which the second defendants "... guarantee to the lessor the due and punctual payment of the rent hereby reserved and the due and regular performance of all and each of the said covenants, agreements, declarations and conditions ...". The second defendant's liability to the plaintiff as lessor is, under the clause, not to be affected or diminished by any consent by the plaintiffs to any assignment. The plaintiffs allege that the second defendants as covenantors remain liable for any losses suffered by the plaintiffs in respect of the 1988 lease.

**The Master's judgment**

In her judgment the Master reviewed the factual history and the basis upon which the claim was brought. She records that in the course of the hearing before her, certain amendments to the amended statement of claim filed on 8 July

1996 were granted. These were necessary because that statement of claim erroneously described the nature of the 1989 lease. For present purposes I incorporate those amendments into the statement of claim. She concluded for the reasons set out in her judgment that the statement of claim, together with affidavit evidence to which she refers, disclosed a case so untenable that it cannot succeed on the pleadings presently before her. She also concluded that the damages claimed are too remote.

**Does the statement of claim disclose a cause of action?**

Miss Mills accepted that a cause of action could exist against the first defendant as lessee under the 1988 lease and the second defendants as guarantors. But it was her submission that the damages sought by the plaintiffs are not the normal measure of damages because they are seeking damages that arise from the breach of the 1989 lease. Alternatively, she submits that the plaintiffs have failed to establish any loss because it has failed to take into account the payments it has received on the grant of the 1989 lease and the 1996 lease and has failed to take into account the payments it could have received had the plaintiffs exercised its rights against the partnership under the 1989 lease.

The first of these grounds cannot succeed on an application to strike out. The plaintiffs, following the breach of the 1988 lease, were under an obligation to mitigate its loss, which it attempted to do so by entering into the 1989 lease. That that lease also failed does not in my view remove the right of the plaintiffs to seek to enforce the first and second defendants' obligations under the 1988 lease. The plaintiffs are not seeking damages arising from the breach of the 1989 lease. They are seeking damages arising from the breach of the 1988 lease, reduced by the amounts it received from the 1989 lease.

As to the second, whether the plaintiffs are bound to give credit for the $95,000 received on the granting of the 1989 lease and the $365,000 it received on the grant of the 1996 lease, involve issues of fact that cannot be properly determined on an application to strike out. As to the former, the plaintiffs claim that in order to receive that $95,000 it had to borrow $225,000 from its bank in order to equip the motel. It is not immediately apparent to me in that case why, out of the cash payment the partnership received from Production of $200,000, only $95,000 was paid to the plaintiff. These are matters which would need to be

considered by the court after hearing the relevant evidence. Similarly, whether the plaintiffs were, pursuant to its duty to mitigate its losses, bound to sue the partnership in respect of its obligations under the 1989 lease, is also a matter that can only be determined after a full hearing and determination of the facts by the court.

As to the second payment in relation to the 1996 lease, it is the plaintiffs' contention that credit for this amount does not need to be given because the term of the 1996 lease was far longer than the balance of the term under the 1988 lease. It may be that the plaintiffs are bound to give credit for part of that payment, but if so, it will be necessary for the court to hear the evidence before it can determine how much credit should be given.

As to the second defendants, Miss Mills' submits that the pleadings are inadequate because all the statement of claim contains is, after a recital of clause 42 of the 1988 lease, the plea:

> "The second defendants as covenantors remained liable for any loss suffered by the plaintiffs as landlord on account of the repudiation of [the 1988] lease by [Bocon]."

I accept that this pleading is sparse, but the intention read in the context of the statement of claim as a whole is clear namely that the plaintiff is seeking from the second defendants damages equal to the first defendant's liability under the 1988 lease.

The frivolous and vexatious ground is based on the same submissions as the no cause of action ground.

I conclude that the statement of claim does disclose a cause of action that the plaintiffs are entitled to have determined on a full hearing.

## Conclusion

For the reasons I have expressed, I am satisfied that the issues upon which the defendants rely can only be properly determined following a full hearing. It follows that the statement of claim should not have been struck out. The

application for review is granted and the order striking out the statement of claim revoked.

**The future conduct of the action**

It is my firm impression that this is a case that cries out for resolution by agreement, probably preferably as the result of a mediation. Although I have concluded that the plaintiffs have a good cause of action, I can also appreciate that there should be substantial merit in the defences raised by the defendants. In particular, the plaintiffs may well have been in breach of their duty to mitigate by failing to enforce the terms of the 1989 lease against the partnership. To do so would require Mr Butler to resign as a trustee and a further independent trustee be appointed. I am informed that the other members of the partnership are the beneficiaries of the trust. They may well be prepared to recognise that a court is not likely to look kindly on making the guarantors of the 1988 lease liable without taking into account the liability that the partnership also has to the trust arising out of the 1989 lease.

These considerations, together with the payments that the trust have received on the two sales of the businesses, indicate to me that this is a case where if all the parties approached the issue with a desire to obtain a resolution by agreement, a mediation could well succeed.

Miss Mills, after obtaining instructions, has confirmed that the second defendants will agree to a mediation. Mr Turrall has said that he will recommend it and he considers it likely that the trustees will accept his recommendation.

Miss Mills has indicated that if this matter went to trial the defendants would join Mr Butler as a third party and as a member of the partnership that entered into the 1989 lease, in respect of what the defendants would claim is his continuing liability under the 1989 lease. In order to save costs, it is my suggestion that for the purposes of the mediation the defendants should by letter indicate the nature of any claim against Mr Butler so that he can be a party to the mediation if he wishes in his personal capacity.

I will allow one month for the mediation to be held. Counsel are to see the fixtures registrar now to obtain a date for a directions conference some time after

10 March 1997. If the mediation is held and is successful within the next month, the court should be notified and the date for the conference vacated. If it is not, I anticipate that the conference will make the orders necessary to have the matter ready for hearing and direct that a fixture be made.

## Costs

The plaintiffs are entitled to costs on this application. However, in view of the pending mediation I do not propose at this stage to make an order. If the mediation is unsuccessful, the costs can either be fixed at the directions conference, or if the judicial officer taking that conference prefers, they can be referred back to me to fix the amount of the costs. Consideration will also need to be given to the order for costs made by the Master.

Thompkins J

MEDIUM PRIORITY

**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**AP 77/97**

**BETWEEN** **GREGORY SHANE BUTTERFIELD**

**Applicant**

**A N D** **THE QUEEN**

**Respondent**

**Hearing:** 10 & 13 June 1997

**Counsel:** M I Sewell for Appellant
J A Farish for Respondent

**Judgment:** 26 JUN 1997

---

## JUDGMENT OF PANCKHURST J

---

This matter first came before me on 10 June 1997, as an application for special leave to appeal to the Court of Appeal pursuant to s144(2) of the Summary Proceedings Act 1957. As a result of submissions and exchanges with counsel, it emerged that the application might better be one to rehear the decision of this Court on 16 April 1997, whereby the applicant's original appeal against sentence was dismissed. However, that suggestion immediately raised the question of jurisdiction to order a rehearing of an appeal against sentence following its dismissal in the High Court. Accordingly the case

was adjourned to 13 June to enable argument on the jurisdictional question to proceed.

Before turning to the issue of jurisdiction it is necessary to say something of the factual background. On 12 March 1997 the applicant was sentenced in the District Court to 18 months imprisonment upon each of two charges of driving while disqualified. At the same time he was also disqualified from driving for a period of 12 months. Importantly, one of the driving while disqualified offences had been laid indictably, and the other on a summary basis. The indictable matter related to events at Invercargill on 8 December 1995. To that charge the applicant eventually pleaded guilty on arraignment. The second offence was committed in Christchurch on 3 July 1996, to which the applicant likewise pleaded guilty. Following his sentencing the applicant appealed against the sentence of 18 months imprisonment by filing, as was required, notices of appeal in the Court of Appeal in respect of the sentence on the indictable offence and in this Court in respect of the summary offence. Legal aid was sought in both jurisdictions. On 9 April notice was given to the applicant that aid had been refused in relation to the appeal to the High Court. On the same day the applicant was advised that the High Court appeal would be heard on 16 April.

On the other hand legal aid was granted in relation to the appeal to the Court of Appeal. In that instance counsel for the applicant received notification of the grant in about mid April. In the meantime, appreciating that he would not be represented by counsel in the High Court, the applicant sent

submissions by facsimile in support of his appeal in the High Court. Such submissions were in the applicant's own handwriting. I have read them. In large measure the submissions refer to the fact that legal aid was declined for the appeal and that the applicant was handicapped in securing funds to arrange for counsel to represent him. The submissions contained little in the way of argument as to the merits of the case.

On 16 April 1997 the appeal was called before Holland J. The Crown was represented by counsel. The notice of appeal was endorsed by the learned Judge as follows:

> *"Appellant has submitted his plea in writing.*
> *I have read the submissions.*
> *I agree with the conclusion and reasons of the sentencing Judge.*
> *Appeal dismissed.*
>
> *A D Holland J*
> *16.4.97".*

The notice of general appeal upon which the above was endorsed, referred to the offence in respect of which the appeal was brought as: *"driving while disqualified (2)".* I have considered the papers relevant to the appeal hearing, in particular the notice of general appeal itself and the decision of the learned Judge. It appears that Holland J dealt with the matter in the understanding that the appeal related to two offences of driving while disqualified. Certainly there was nothing in the appeal file to alert the Judge to the circumstance that the appeal related to only one of the driving while disqualified offences. Had the true position been apparent, assessment of the merits may well have been

different. Further I am in no doubt that had Holland J been aware of the separate appeal he would have considered it appropriate to adjourn the High Court appeal until that in the Court of Appeal had been heard. This approach would have ensured that the hearing where the applicant was to have the benefit of representation proceeded first. As it is, the appeal to the Court of Appeal has been rendered virtually redundant, since a concurrent term of 18 months imprisonment has been upheld in this Court. In these circumstances it is my view that the appropriate course is to order a rehearing of the High Court appeal, if there is jurisdiction to do so.

I have been referred to certain authorities and considered further cases decided both here and in England. Counsel drew attention to ***Tapara v Police*** (1988) 3 CRNZ 346 and ***Spencer v Police*** AP 224/94 Christchurch Registry, 18 October 1994. In the former Doogue J was faced with a situation where the merits dictated that a rehearing should be ordered of an appeal against conviction dismissed a few weeks earlier. He held that as s121(6) of the Summary Proceedings Act 1957 empowered the High Court on hearing a general appeal to *"exercise any power that the Court whose decision is appealed against might have exercised"*, power to order a rehearing existed. Relevantly S75(1) of the Act enables a District Court Judge or Justices to grant a rehearing of an information or complaint.

In ***Spencer*** however, Holland J professed to grave doubts whether the Court had jurisdiction to grant a rehearing of an appeal which it had dismissed. The Judge held that with due respect to the view formed by

Doogue J it was difficult to see how, after a case had been disposed of so that there was no longer an appeal before the Court, a rehearing could nevertheless be ordered. I agree. Moreover, in my view s121(6) contemplates no more than that this Court may in the disposition of an appeal order a rehearing of the charge in the District Court. That is altogether different from employing the section to order a rehearing of the appeal itself after a dismissal on the merits.

Counsel also referred to ***Sherlock v Police*** [1958] NZLR 526, a judgment of F B Adams J. It was there held that the High Court has jurisdiction to rehear an appeal where it had been dismissed otherwise than on its merits, in that instance by abandonment by the appellant's counsel in error. The Judge was influenced by English authorities where an abandonment had occurred as a result of a misapprehension or mistake of fact. But in ***R v Pellikan*** [1959] NZLR 1319 the Court of Appeal doubted the correctness of the decision in ***Sherlock***. North J in delivering the judgment of the Court held that the preferable approach was for the intending appellant to seek to withdraw the earlier notice of abandonment. Even then, it would be necessary to find something amounting to mistake or fraud which would enable the Court to say that the notice of abandonment should be regarded as a nullity. I do not regard these cases as of assistance in the present context where there has been a dismissal on the merits.

A further approach is exemplified by the decisions in ***R v Daniel*** (1977) 1 QB 364 and ***Hart v Police*** AP 126/92 Auckland Registry, 14 August

1992, Temm J. In these cases administrative error or oversight by the Court administration itself resulted in non appearance of counsel, and non abandonment of an appeal (where the sentence was doubled at the hearing), respectively. In each case jurisdiction was recognised to order a rehearing on account of the respective administrative errors not of the appellant's making. This approach also has no application in the present circumstances.

I have also considered, and regard as most relevant, the Court of Appeal decision in ***R v Nakhla (No 2)*** [1974] 1 NZLR 453. The appellant sought to set aside as having been given per incuriam a decision of the Court of Appeal dismissing his general appeal against conviction and sentence. At the same time an order for rehearing of the original appeal was sought. Various grounds were advanced in support of the application arising from the manner in which the Court of Appeal had dismissed the general appeal. Factually the case is entirely different to the present but matters of principle outlined in the judgment I regard as highly pertinent. Two propositions emerge:

(1) that once a judgment of the Court has been finally recorded the Court is functus officio and its inherent power to vary its judgment is lost, but

(2) the Court always has a power in its inherent jurisdiction to set aside its own order if that order can be described as a nullity.

The position in this Court can be no different.

The issue is, therefore, whether the decision of Holland J to dismiss the appeal on its merits can be characterised as a nullity on account of

the fundamental misunderstanding which existed at the time. A number of cases exist where the concept of nullity has been considered at the highest level in relation to s204 of the Summary Proceedings Act : ***Police v Thomas*** [1977] 1 NZLR 109, ***Rural Timber Limited v Hughes*** [1989] 3 NZLR 178, ***Hall v Ministry of Transport*** [1991] 2 NZLR 53, and ***R v Blackmore*** [1994] 1 NZLR 268. Perhaps of greatest help is a citation from ***Thomas***, Cooke J at p 121:

> *"No doubt s204 is unavailable if a defect is so serious as to result in what should be stigmitised as a nullity. But nullity or otherwise is apt to be a question of degree : compare* ***Broome v Chenoweth*** *(1946) 73 CLR 583, 601, per Dickson J;* ***New Zealand Institute of Agricultural Science Inc v Ellesmere County*** *[1976] 1 NZLR 630, 636, and the authorities there cited. In practice the questions of miscarriage of justice and nullity will often tend to merge."*

And Cooke P again, in ***Rural Timber*** at p 184:

> *"None of the defects can be regarded as so radical as to require the (search) warrant to be treated as a nullity ... . That is a question of degree, answerable only by trying to apply a commonsense judgment against the statutory background; in a case like the present, one can hardly elaborate further, apart from referring to the particular facts."*

The application of such a general test to the present case is not without difficulty. However, it is my view that where a combination of circumstances have conspired to result in a Judge dealing with an appeal in the understanding that two identical concurrent sentences are the subject matter, when in fact only one such sentence is before the Court, then the resulting decision should be viewed as a nullity.

It is therefore appropriate to order that the decision of this Court on 16 April 1997 to dismiss the applicant's general appeal against sentence be set aside as a nullity. I direct that the appeal be reheard, but not be allocated a fixture until after the appeal in respect of the indictable offence has been disposed of by the Court of Appeal. It may of course prove to be the case that the appeal to this Court is rendered effectively redundant, but only time will tell.

Solicitors:
Glover Sewell, Christchurch, for Applicant
Crown Solicitor, Christchurch, for Respondent

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP 77/97

BETWEEN GREGORY SHANE BUTTERFIELD

Applicant

A N D THE QUEEN

Respondent

---

JUDGMENT OF PANCKHURST J

---