IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2008-419-1607

BETWEEN	ANTHONY JOHN MORRIS Plaintiff
AND	WILLIAM HETARAKA AND STEPHANIE ANNE ELIZABETH HETARAKA Defendants

Hearing: 13 February 2009

Appearances: N D Smith for plaintiff
D M O'Neill for defendants

Judgment: 27 February 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.30 pm on Friday 27 February 2008

Solicitors/Counsel :
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[1] This case concerns two loans made by the plaintiff to the first named defendant, and arguably the second named defendant also. An initial loan of $56,000 was followed a few weeks later by a further advance of $280,000. It is common ground that the advances were in fact made by the plaintiff, and that the defendants needed the money to assist them in the purchase of a residential property in Hamilton.

[2] The issues for the Court are:

a) Were the loans made for a fixed or determinable term?

b) What is the position regarding interest?

c) Was the second-named defendant a party to the loan agreement as a borrower?

[3] The plaintiff's position is that the advances were made for a term of six months, commencing on 22 January 2008, and that the borrowers are in default by reason of their failure to repay the loans on that date. He seeks summary judgment against both defendants.

[4] The defendants for their part say the loans were not for a fixed term, but rather were not repayable until the defendants had got back on their feet in a financial sense. They say further that there were no arrangements about interest, and that the second-named defendant was not a party to the loan. In addition, they argue that the plaintiff's stance is oppressive, and that the Court ought to exercise its discretion under s 120 of the Credit Contracts and Consumer Finance Act 2003. All of this, Mr O'Neill argues, renders the case unsuitable for summary judgment.

[5] There is no formal document recording the loans. All of the arrangements were made orally, but some assistance is to be derived from e-mails passing between the parties, and from a file note made by the defendants' solicitor, of a discussion with the plaintiff.

Summary judgment principles

[6] Rule 12.2 (formerly r 136(1)) provides:

> **Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[7] A useful synopsis of the Court's approach to summary judgment applications appears in the judgment of the Court of Appeal in *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02 5 June 2003 at [28].

> **Summary judgment considerations**
>
> [28] In order to obtain summary judgment under Rule 136 of the High Court Rules a plaintiff must satisfy the Court that the defendant has no defence to its claim. In essence, the Court must be persuaded that on the material before the Court the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant. Once the plaintiff has established a prima facie case, if the defence raises questions of fact, on which the Court's decision may turn, summary judgment will usually be inappropriate. That is particularly so if resolution of such matters depends on the assessment by the Court of credibility or reliability of witnesses. On the other hand, where despite the differences on certain factual matters the lack of a tenable defence is plain on the material before the Court, to the extent that the Court is sure on the point, summary judgment will in general be entered. That will be the case even if legal arguments must be ruled on to reach the decision. Once the Court has been satisfied there is no defence Rule 136 confers a discretion to refuse summary judgment. The general purpose of the Rules however is the just, speedy, and inexpensive determination of proceedings, and if there are no circumstances suggesting summary judgment might cause injustice, the application will invariably be granted. All these principles emerge from well known decisions of the Court including *Pemberton v Chappell* (1987) NZLR 1, 3-4, 5; *National Bank of New Zealand Ltd v Loomes* (1989) 2 PRNZ 211, 214; and *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205, 209

[8] The Court will take a robust approach to summary judgment applications where it concludes that a defendant is advancing a spurious defence, or relying on a

plainly contrived factual conflict: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 at 85-86.

[9] But, as was emphasised in *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341E, the Court is not bound, in assessing factual conflicts:

> To accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents, or other statements by the same deponent, or inherently improbable in itself it may be.

[10] Having said that, the Court must consider evidence which has the appearance of credibility and may not treat factual material as uncontradicted evidence, when it is in truth very strongly contradicted: *Attorney General v Jones* (2003) 16 PRNZ 715 at [11] (PC).

Factual background

[11] The parties were former acquaintances. The detail of their earlier relationship is of no significance for present purposes. Late in 2007, the defendants made it known to the plaintiff that they desired to purchase a house, but were precluded from doing so by reason of their limited financial means. The plaintiff indicated that he was prepared to assist.

[12] On 22 December 2007 the defendants identified a suitable property. Mr Hetaraka telephoned the plaintiff to indicate that they had found something suitable and asked the plaintiff if he was prepared to assist by lending a deposit, which was likely to be between $30,000 and $39,000. The plaintiff confirmed his willingness to help and it was arranged that the defendants would collect a cheque from the plaintiff. That occurred on 3 January 2008 when the defendants called at the plaintiff's house at Mt Maunganui and uplifted a blank cheque signed by the plaintiff. The amount was to be filled in by the defendants when the precise amount of the deposit was known. The plaintiff recorded the cheque as being made payable to "Willie & Steph Hetaraka" on his cheque book butt. As matters transpired the

required deposit was $36,000, and it was for this amount that Mr Hetaraka completed the cheque and banked it into his business account.

[13] Mr Hetaraka says that his arrangement with the plaintiff was that he would pay much as possible over a period of six months, and then the parties would review the situation after that period of time. He says also that there was no discussion as to an interest rate, or any arrangement for making monthly payments. However, he says that he:

> … wanted to … pay back as much as I could off principal and pay some interest to Anthony. This was done off my own bat.

[14] The parties evidently contemplated that the balance of the purchase price for the Hamilton property would be financed by way of a mortgage advance from a third party lender, but it rapidly emerged that the defendants, by reason of their lack of an established recent credit history in this country, would encounter significant funding obstacles.

[15] The defendants approached the plaintiff once more; initially by way of e-mail from Mr Hetaraka who was at that time overseas. This e-mail timed at 5.45 am on 16 January 2008 and reads:

> Hi Anthony
>
> 1. Had a call only last night from Carla at Loanmarket Brokers stating that we need to go through a tier 2-3 lender at huge fees and interest rates.
> 2. Glad I kept you posted. She waited till last minute to tell us.
> 3. Anthony we go unconditional at 4 pm today and have to sign the deposit over.
> 4. We will need to go to our plan B, I really need to look at a funder through you.
> 5. Everyone was just so excited, I don't wanna lose the deal and all.
> 6. We have already ordered the paint and fence and all the extras.
> 7. I will ring you. There is no such word in our vocabulary as 'You Cant'.
> 8. Anthony I wanted to take the mortgage out for 272K interest only for 2 years for tax purposes in hbi consultants and steph name.

9. My daughter and son in law are with us and between all of us we have ample funds to service the mortgage, but buddy we cant afford to lose the deposit.

i weil;I (sic) ring you. Willie

[16] Later that day the plaintiff spoke to the defendants' solicitor, Mr Ellison. The latter rang the plaintiff on Mr Hetaraka's instructions. Mr Ellison made a file note of the phone discussion which reads as follows:

Anthony Morris t/f 16/1/08

Happy to lend him money. Not too sure. Could loan him money for six months or longer if he had to.

Has already loaned him money for deposit. Probably loan him money at first tier lenders interest rate.

Until he can get back on his feet.

[17] Mr Ellison says in respect of the telephone call to Mr Morris:

No terms were discussed. My memory of the conversation with Mr Morris was that Willy could pay him back anytime. Mr Morris did not want a mortgage, and did not want anything in writing. I recall asking him whether he wanted advice from his own lawyer. He said no. He said he was wealthy and wanted to help Willy get back on his feet. The money was transferred into the Jo Watson Law Office trust account on 22 January 2008 in time to settle the purchase of the property at 65 Lewis Street, Glenview, Hamilton.

[18] The plaintiff's response to Mr Ellison's evidence is set out in a reply affidavit, and reads:

9. Later that day I received a call from Daniel Rhys Ellison at Joe Watson Law. As I recall he called me, however I missed the call and called him back. He asked me if it was true that I was lending Mr and Mrs Hetaraka the balance of the money that they needed to settle the house they were buying. I said that yes, that was correct and that I had already paid their deposit. He then asked me what terms I wanted and I said that I wanted to be as fair as possible and asked him if a standard bank interest rate would be fair. He said yes that would be more than fair. He then asked what other terms I wanted. I said nothing, other than that we review it in 6 months time as I might need the funds by then and also Willie and Steph would have had 6 months trading in their business so they should have a proven income to secure a loan for themselves. He then asked me if I wanted him to draw up a mortgage, as he was happy to do that. I said no that I trusted Willie & Steph, and they needed a break and I was more than happy to help them out. I did not say that I was 'wealthy' as asserted by Mr Ellison in his affidavit.

[19] On 22 January 2008 the sum of $280,000 was transferred from the plaintiff's bank to the trust account of the defendants' solicitor. On 24 January 2008 the defendants' purchase was settled and the Hamilton property was transferred into the sole name of Mrs Hetaraka.

[20] Without going into detail, the plaintiff describes his oral agreement with the defendants in the following way:

> 4. On 2 and 16 January 2008 I entered into an oral agreement with the defendants (the agreement). The terms of the agreement were:
>
> (a) I would lend the defendants, Mr and Mrs Hetaraka, the sum of $316,000 by way of an initial advance of $36,000 and a further advance of $280,000.
>
> (b) Mr and Mrs Hetaraka would use the money to purchase a property at 65 Lewis Street, Glenview, Hamilton;
>
> (c) The loan would be for a term of six months from 22 January 2008;
>
> (d) Interest would be charged on the loan at a rate of ten percent (10%) per annum due in monthly instalments.
>
> …
>
> 7. Between February 2008 and July 2008 the defendants made interest payments to me. Although the monthly interest payments were not exactly on time or for the exact amount each time, the defendants generally made the interest payments as required and at the end of the six months the total interest owing had been paid. Annexed to this affidavit and marked 'D' are highlighted copies of my bank statements showing these payments being received.

[21] For his part, Mr Hetaraka denies that there was any firm arrangement for payment of interest at the time at which the appellant advanced the funds. Rather, he says that following settlement of purchase of the Hamilton property, the plaintiff visited the defendants at their house and asked that interest be paid on the entire amount advanced. At that point, Mr Hetaraka says, he realised that the loan was made directly by the plaintiff from his own resources, rather than simply organised by the plaintiff with a third party lender. Mr Hetaraka says that after that visit had concluded he calculated a daily interest rate on the $36,000 advance for an entire year at 14%, which was 4% above what he thought banks were currently lending at. This calculation produced a figure of $5000, to which he added $1 a day for hidden

costs, and he then "rounded the figure up to $5356.00". Mr Hetaraka believed that a payment of $5356 would pay the whole of any interest owing for a period of 12 months on the advance of $36,000, and that any further payments would go in reduction of the principal sum.

[22] The payment of $5356 was made on 27 March 2008. There followed payments of $2470 on 9 May 2008, $3400 on 19 June 2008, $2240 on 27 June 2008, $2240 on 28 July 2008 and $2240 on 27 August 2008. Mr Hetaraka explains that the figure of $2470 was not the product of a precise calculation. At the time it was organised he was travelling through New Zealand, and he simply paid the money on account by way of an internet banking transaction while he was in Rotorua. Likewise, the payment of $3400 on 19 June 2008 was made from a computer kiosk at Auckland International Airport when he was about to travel overseas to Guam on business. Again, it was not the product of a precise calculation.

[23] Mr Hetaraka says that following a further visit to Mrs Hetaraka by the plaintiff at a time when Mr Hetaraka was overseas, he decided to pay $2240 on a regular monthly basis and set up arrangements to pay this sum through a computer at the business centre at the Marriot Hotel in Guam. He says that:

> This was an amount I decided would be a reasonable amount to pay off the deposit sum.

So the payments of $2240, at least, were regarded by Mr Hetaraka as payments in reduction of principal, rather than interest instalments.

[24] In summary, Mr Hetaraka's evidence is that the $5356 represented a year's interest on the advance of $36,000, and that subsequent repayments were made in reduction of the principal sum of $36,000, but that no interest payments were made in respect of the advance of $280,000 because nothing was ever discussed about payment of interest on that sum.

[25] In about the middle of 2008 (the precise date is not in evidence), Mr Hetaraka returned from Guam and telephoned the plaintiff, who advised that he had purchased a commercial property in Hamilton and needed the loan repaid as soon as possible.

Mr Hetaraka says that the plaintiff referred him to a mortgage broker in Hamilton, with a view to assisting the defendants to organise a mortgage advance which would enable the plaintiff's loan to be repaid. Mr Hetaraka says that his advice from the broker was that, by reason of his past credit history, local mortgage funding would be difficult and he should look off-shore.

[26] Mr Hetaraka left New Zealand on 22 September 2008 to return to Guam. Soon after he arrived he received a text message from the plaintiff, advising that the plaintiff wanted interest at 20% per annum.

[27] Mr Hetaraka responded by e-mail on 25 September 2008. It reads:

> 1. I received your text messages en route to Guam.
>
> 2. Your messages that I have used you and that you implore me is absolutely unjustified.
>
> 3. Low document loans and these type of providers provide at 10-12 percent not 20 percent.
>
> 4. We have had automatic payments coming through for your interest on the agreed terms.
>
> 5. We had agreed to review after six months, and then take it from there. There was no review only that you had purchased a property and required funds.
>
> 6. The property market has taken a downturn and there is no way 19 or 20 percent is realistic or affordable.
>
> 7. I am now angry that we are made to look the big baddies. Our lawyer clearly advised all parties of the circumstances of the agreements.
>
> 8. I will now look to my off shore contract which is a priority for all concerned.
>
> 9. I will forward my cell when it is supplied.
>
> Willie.

[28] The plaintiff responded by e-mail dated 8 October 2008 in the following terms:

> Willie and Stephanie,
>
> I am very saddened at the situation we both find ourselves in.

I am also saddened at the stance you have chosen to take.

I was not in the country when I got your texts so I imployed(sic) you to meet with me before you left for your 7 week overseas stint.

We had a gentleman's agreement to buy you a house.

I would loan you the money for six months and I would re-evaluate it then as I wanted to be able to free up that money to move on and more importantly as you did not have a credit rating or any trading history with your new business, it would give you time to get that. I also told you that the interest rate would be just what the banks would charge me to be as fair to you as I could. You missed some payment dates along the way, but I didn't charge you penalty interest. How fair is that.

I told you at the end of April that I would be needing that money back in June as I had bought a building in Hamilton. As June came around you still hadn't arranged repayment. I introduced you to a friend of mine to help you out with a mortgage, but you were still adamant to get the money offshore. I kept asking you for progress reports and wanting my money back, you kept putting me off or not even replying.

As I settled my property in August I had to arrange for additional funding due to the $320K shortfall due to you not repaying your debt.

I text you stating that as of 20 August the interest rate would be 19% because of bridging finance. No reply from you so I took that to mean you accepted that.

When your interest payment in September was not at the correct rate I again text you asking that you make amendments for Sept and for further payments to be correct.

Then came the text that my request was not affordable and unreasonable!!!

I do not think I am being unfair or unreasonable, quite to the contrary. I have done everything I have promised.

Have you?

Yours sincerely

Anthony Morris.

[29] Mr Hetaraka's response is dated 29 October 2008. It reads:

Anthony I did reply to your mail.

As stated in my e-mail you portrayed me as a baddy and that I used you, this is after I paid 20k in interest, more than 2 percent what banks were paying.

To double interest rates in 5 months as stated is unrealistic and not affordable.

> After receiving the text message from you stating you felt very used I have put a halt to all payments and am securing my job abroad so I can get funding abroad.
>
> The house markets have dropped and lending criteria have changed drastically through no fault of anyone, with the down turn in economics.
>
> I have inquired through funding offshore and have to build banking records for the next six months even to stand a chance.
>
> I will pay all outright in one once my bank records qualify me. You mentioned you purchased the property in April, 2 months after our arrangement??? It is best now for all parties we have e-mail transactions so we have records, it disappoints me that I am said to have used you, by having records it leaves no room for misinterpretation. I am away until end Nov begin December and will touch base on return so we can meet.
>
> I did go and see your friend in princess st and he advised to go off shore, new valuations were done showing a loss of 20k in house markets.
>
> Willie.

[30] On 6 November 2008 the plaintiff's solicitors wrote to the defendants demanding repayment of the loan and outstanding interest. No payment was received and this proceeding was subsequently commenced.

Discussion

[31] The first issue is as to the term of the loans made by the plaintiff. In his e-mail of 25 September 2008 to the plaintiff, Mr Hetaraka records an agreement to review the loan after six months. That is consistent with the plaintiff's position as it appears in his affidavit, and also with the explanation given by the plaintiff in his e-mail of 8 October 2008 to Mr Hetaraka in which he says that it was a gentlemen's agreement, under which the plaintiff would lend the money for six months and then:

> … re-evaluate it then as I wanted to be able to free up that money to move on and more importantly as you did not have a credit rating or any trading history with you (sic) new business it would give you time to get that.

[32] The plaintiff's evidence is consistent also with Mr Ellison's file note which records Mr Morris as indicating that he could lend the money for six months or longer if he had to. On its face that note suggests an initial term of six months with a review at the end of that time.

[33] In my view, the evidence, both of the plaintiff and Mr Hetaraka, establishes that these two loans were made for a term expiring in July 2008.

[34] Mr O'Neill argues that it would be open to the Court at trial to conclude that these loans were not to be repaid until the defendants were able to get back on their feet in a financial sense. For that submission he relies on a mere scintilla of evidence; namely, the last sentence in the file note made by Mr Ellison.

[35] There is no prospect at trial that the Court might conclude, in the face of all the other evidence, that rather than making a six month loan with a subsequent review, the plaintiff had advanced these funds to the defendants until such time as it could be said they were back on their feet. Mr O'Neill concedes the concept is wholly subjective in character, and would require a detailed analysis of the defendants' financial circumstances at trial. In response to a question from the bench, Mr O'Neill accepted that if the defendants' financial circumstances did not stabilise, there would come a time at which, nevertheless, the plaintiff would be entitled to repayment of his loans; in other words Mr O'Neill accepted that there would need to be an implied term that after a reasonable period the loans would become repayable in any event.

[36] The problem with that approach of course, is that the loan must in those circumstances be treated as being made for an undefined term. The law treats such loans as being repayable upon demand: see *Chitty on Contracts* 30th ed Sweet & Maxwell 2008 paragraph 38-247; *Harpes v Brown* HC HM CP88/86 19 November 1987 at 5 and *Lauder v Lauder* HC ROT CIV 2003-463-107 23 April 2007 at [29].

[37] In my opinion there is no credible basis for the defendants' contention that these loans were not repayable at the expiration of six months, or alternatively, upon demand. That conclusion disposes also of Mr O'Neill's alternative argument based upon s 120 of the Credit Contract and Consumer Finance Act 2003, Mr O'Neill accepting that if the loans were repayable at the expiration of six months or alternatively upon demand, the making of demand by the plaintiff could not be challenged as oppressive for the purposes of the Act.

[38] The next issue is that of interest. Mr Hetaraka says that although at a later point the plaintiff demanded interest, there was no discussion of it at the time of the advances, and he suggests that the plaintiff is therefore not entitled to interest. This claim lacks credibility, and to be fair to Mr O'Neill he accorded no prominence to the question in his argument.

[39] The plaintiff's position is that the parties agreed that interest at 10% would be payable on the whole of these loans until repayment. Mr Hetaraka's claims are inconsistent with:

a) the statement in his e-mail of 25 September 2008 to the effect that "… we have had automatic payments coming through for your interest on the agreed terms";

b) the statement in his e-mail of 29 October 2008 to the effect that "…this is after i paid 20K in interest …";

c) the defendants' solicitor's note of his discussion with the plaintiff in which the plaintiff advised that he would "probably loan him money at first tier lender's interest rate";

d) Mr Hetaraka's complaint, in his e-mail of 29 October 2008, that the interest rate of 20% more recently sought by the plaintiff, would double the existing interest rate;

e) the fact that actual interest paid by the defendants over the period of six months ending in July 2008 totalled an amount effectively equivalent to 10% of the total sums advanced.

[40] Mr Hetaraka's position is inconsistent with the contemporaneous documents and with what he actually did. There is no prospect in my view that a Court might uphold his claim that he had no responsibility to pay interest, at least on the loan of $280,000. It is moreover inherently improbable that Mr Hetaraka could have believed that a loan for such a large amount made by someone who was a mere

acquaintance, would not carry interest at a reasonable rate. The plaintiff has established his entitlement to interest at 10% on the whole of the principal sum.

[41] The final issue is as to whether Mrs Hetaraka is liable along with her husband. It is plain that the primary relationship was between the plaintiff and Mr Hetaraka. But Mr Smith relies upon the following matters as establishing Mrs Hetaraka's liability:

a) Mrs Hetaraka's presence at both the meetings at the plaintiff's house when the initial request for a loan advance was made and discussed, and a deposit cheque provided:

b) the fact that the plaintiff recorded the names of both defendants in his cheque book when he provided a blank cheque for the deposit;

c) the fact that property has been registered in Mrs Hetaraka's sole name;

d) the e-mail of 16 January 2008 from Mr Hetaraka to the plaintiff refers throughout to "we" and "our" - in other words Mr Hetaraka represented to the plaintiff that the house purchase proposal was a joint proposal of the defendants, and implies any loan would be made to the defendants jointly;

e) similar references in the plural are contained in Mr Hetaraka's e-mail of 25 September 2008.

[42] In his reply affidavit, the plaintiff describes the active role taken by Mrs Hetaraka at his meetings with the defendants. In particular he says that she explained their financial problems and the reasons for their inability to source funds from family and elsewhere. The thrust of his evidence is that Mrs Hetaraka played an active role in the discussions over the proposed financial assistance.

[43] Mrs Hetaraka has filed a brief affidavit in which she says she has met the plaintiff formally only five times in her life, that she never agreed to borrow any

money from the plaintiff, that she had nothing to do with any discussions between the plaintiff and Mr Hetaraka, and that all agreements and arrangements to uplift any loan moneys were between them and did not involve her.

[44] Mr Smith submits that, given the totality of the evidence, Mrs Hetaraka's assertion that the loan was not made to her as well as her husband does not pass the threshold of credibility. I accept that submission. Mrs Hetaraka was present at the meetings at which the loans were negotiated, and on the plaintiff's evidence played an active role in explaining the background to the defendants' financial plight. Obviously the plaintiff regarded her as a borrower – he wrote her name in his cheque book as a joint recipient of the cheque, and in mid-2008 he sought her out in order to discuss with her (in her husband's absence), issues relating to interest and loan repayments. Moreover, she became registered as the sole proprietor of the house purchased with the plaintiff's advances, knowing that those advances had been made for the express purpose of facilitating the purchase.

[45] Given the circumstances in which these loans were made, it was incumbent upon Mrs Hetaraka to do rather more than swear a three paragraph affidavit by way of opposition. Her claim, that although she was present at the time the loan was discussed between Mr Hetaraka and the plaintiff she had nothing to do with those discussions, is inherently improbable.

Result

[46] The plaintiff is entitled to summary judgment for:

a) The sum of $316,000;

b) Interest on that sum at the rate of 10% per annum from 27 August 2008 to the date of judgment.

Costs

[47] The plaintiff is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J