

IN THE COURT OF APPEAL OF NEW ZEALAND

16/4

CA No. 141/91**HIGH
PRIORITY**BETWEEN

AUSTRALIAN GUARANTEE
CORPORATION (NZ) LIMITED
a limited liability company
having its registered office at
Auckland and carrying on
business as a financier

AppellantA N D

FREDERICK DONAL McBETH
and ROBYN MAY McBETH,
company directors, both of 26
Cooke Road, Napier

Respondents

Coram: Richardson J (presiding)
Gault J
Greig J

Hearing: 14 February 1992

Counsel: B C Patel for Appellant
S J Webster for Respondents

Judgment: 15 April 1992

JUDGMENT OF THE COURT DELIVERED BY GREIG J

The appellant is a financier. It provided finance for the operations of Coastal Rentals Limited, a company of which the respondents were the principals and the guarantors of the financing arrangements. The appellant commenced these proceedings applying for summary judgment for the balance claimed to be due after credit given for recoveries and other payments. The Master in his judgment of 8 May 1991 gave judgment against the respondents on liability but dismissed the application as to quantum. The

appellant brings this appeal contending that it ought to be given judgment for a part of the amount claimed, being such part or parts of the claim as, it is said, is indisputably due, together with interest and costs.

In 1988, after about two years of financed operations, there was a re-organisation of the financing arrangements between the appellant and Coastal Rentals Limited in which the amount which was to be secured by the loan arrangements was fixed after consultation between the appellant and the chartered accountants consulted by the respondents. There was some disagreement as to the details of the make up of the principal sum but the final amount was agreed and security documents, dated 17 August 1988 signed by the parties, acknowledge the principal sum to be \$324,093.14. Under the loan terms that principal sum was secured by a memorandum of contract for loan, a debenture, an instrument by way of security and a guarantee given by the respondents supported by a mortgage registered over their house. The term of the loan provided for interest at 20% per annum, repayment of the principal and interest by three monthly instalments of \$6,000, eight monthly instalments of \$9,000 and a final instalment of \$296,343.72. The first instalment was to be paid on 17 September 1988.

The instalment due in May 1989 was not paid and no further instalments were paid. By letter dated 5 July 1989, signed by the respondents and to which the Common Seal of Coastal Rentals Limited was affixed, the appellant was advised that the company was unable to repay its current repayment commitments and the vehicles were surrendered voluntarily to the appellant. In fact some of the vehicles were retained under the control of the respondents while others were taken into control by the appellant. All of the vehicles were sold except one which was involved in a collision but the proceeds of insurance over it were made available in its place. All the proceeds of the sale, whether by the appellant or by the respondents, and of the insurance were acknowledged in accounts of the appellant. The respondents sold their house and paid the proceeds thereof to the appellant. Under date 13 February 1990 the appellant made demand of the respondents for the sum of \$202,803.84, being the balance said to be due after giving allowance for all receipts and proceeds of sales as recorded in a statement dated 24 January 1990.

In correspondence which then followed certain enquiries were made of the appellant and eventually responded to. Proposals for settlement were made and rejected. In one letter, written by the respondents' solicitors dated 22 August 1990, there is this sentence:

" As we advised previously, our client spent much time and effort in assisting with the marketing and sale of vehicles charged to AGC without payment to himself and thereby enabled AGC to realise the best prices on sales of vehicles notwithstanding the slump in the car market. "

These proceedings were then commenced and the appellant made its claim for \$202,803.84 as follows:

" Total amount payable under the loan	\$386,343.73	
Less deposit and instalments paid	79,646.42	
Less net proceeds of sale of residential property and vehicles	119,582.00	(sic)
Plus penalty interest (remedying breaches of agreement	15,688.64	
	\$202,803.84	"

There was a further claim for interest at 20% per annum. The amount of the net proceeds was, it seems, \$119,582.09.

The respondents in their notice of opposition raised the following grounds:

" 1. THE Plaintiff has not proved all of the allegations set out in the Statement of Claim. The Plaintiff has not produced

evidence of the truth or otherwise of the matters set out in the annexures to the Affidavit of GEOFFREY MICHAEL POWELL sworn 30th January 1991. In particular, there is no proof that the alleged sum of \$324,093.14 was advanced as alleged in Paragraph 6 of the Statement of Claim.

2. THE Plaintiff has breached its duty to the Defendants to strictly account for all amounts incurred by and received from the Defendants.
3. THE Plaintiff has failed in its duty to obtain the best possible price for the motor vehicles repossessed by it. "

Although it was not expressed in the notice of opposition, during the argument before the Master there was opposition on the question of liability on the ground that the transaction was oppressive within the meaning of that term under the Credit Contracts Act 1981. That contention was rejected by the Master and, there being no cross-appeal, there is no need to consider it further.

As far as quantum was concerned, however, the Master dealt with this by way of analysing the details available to him in the material before the Court on the history of each vehicle and its disposal. He found a number of discrepancies and conflicts in the identification of the various vehicles and in the chain of evidence as to their disposal. In the result the Master expressed himself thus:

- " The quantum of claims for summary judgment requires to be proved to the same standard and with the same precision as questions of liability. The imprecision of numerous aspects of the claim as regards liability is demonstrated by the review just undertaken. In those circumstances, this Court is driven to the conclusion that it would be quite unsafe for it to take the view that the plaintiff has discharged the onus on it of proving quantum to the requisite standard. "

In those circumstances there was no need to consider the further grounds of opposition that there was a failure to account or that sales were made at an undervalue and the summary judgment, so far as it related to quantum, was dismissed.

In this Court the appellant abandoned its claim under the heading of penalty interest in the sum of \$15,688.64, accepting that there was insufficient evidence to substantiate that claim. It also accepted that there was a discrepancy of \$117.64 because of an omission of a debit entry and abandoned that amount. Furthermore, if the respondents' claim as to the undervalue on the sale of three particular vehicles was accepted or left the matter in doubt, then it was prepared to accept the respondents' alleged values and make a further reduction amounting to \$14,201.00. The result, then, was that there was a reduction of the claim from \$202,803.84 to \$186,998.56 or, if the undervalue was also taken into account, to \$172,797.56.

Counsel for the respondents was not prepared to accept that basis of claim or to concede that any amount was not in dispute. He persisted in the contention that he was not able to quantify any undisputed amount, and that each ground of opposition went to the heart of the whole claim and thus the respondents were entitled to proceed on the basis that the full amount was in dispute and to have their opposition fully canvassed in Court.

This was a case where the respondents raised in their notice of opposition three particular grounds for defence. These remained as substantial issues on the appeal.

The first was a challenge as to the amount of the original principal sum advanced. Although that claim, in terms, was not considered by the Master in his judgment, in discussing the claim as to oppressiveness the Master noted that the respondents had had the advantage of the assistance from their chartered accountants, security documents were plain on their face, that they executed all of them and continued to make payments so long as they could and co-operated with the appellant in the disposal of the assets of the company and of their own home in reduction of the indebtedness. Such a challenge was insupportable in the circumstances of this case. It seems to have been based upon a letter written in response to a request from the

respondents in October 1988 which set out some details of vehicles as at that time but it could not be taken to concede a different amount as originally due or to derogate from or estop the appellant's assertion of its claim for the base principal sum.

The second ground of opposition was an alleged failure to account for "all amounts incurred by and received from" the respondents. That wide allegation was narrowed, in the supporting affidavit in opposition, to a claimed failure to account for the proceeds of three particular vehicles, two of which were sold by the respondents themselves and one which was the subject of the insurance claim. Those were fully answered in the appellant's affidavit in reply and credit was noted and given in full for the amounts received.

Under this head the respondents asserted that they were not satisfied that the appellant had provided all the information necessary to enable them to confirm the accounting of the item described by the appellant in its claim as "deposit and instalments paid" and the item "penalty interest (remedying breaches of agreement)".

As to the latter item, it has been abandoned, judgment is not sought for it and so no further claim arises on it. As to the former, the accounts show by date and amount all payments received and credited to the account and these have been confirmed on oath by officers of the appellant. Without some further particularisation, and there is none, there can be no basis for any defence on that score.

That second ground of opposition must fail.

The last ground of opposition that the appellant failed to obtain the best price for the vehicles sold is again narrowed to a specific complaint about three vehicles, although it is couched in general terms. The first named respondent asserts in his affidavit sworn on 14 March 1991 that in two cases offers were made for vehicles substantially in excess of the amount received on sale and in the other case there was a valuation in excess of the price obtained. By affidavit in reply made on its behalf, the appellant asserts that it had no knowledge of the alleged offers and explains the method by which these vehicles were sold. As to the third vehicle, it is asserted that the first

named respondent was himself a party to and agreeable to the final sale which was undertaken at arms length and in light of other valuations comparable to the sale price. It is hardly credible that the appellant would have failed to accept a genuine offer at the prices referred to by the respondent or that it would have failed to have ensured a price for a vehicle at or near a proper valuation. These are implausible claims which are adequately answered by the appellant and afford no basis for a defence.

In undertaking his own analysis of the underlying claim of the appellant the Master was diverted from the specific allegations made by way of defence and was led into an inquiry behind and beyond the sworn assertions made on behalf of the appellant as to the truth of the claims in respect of which no complaint was made.

The summary judgment procedure is a simple expeditious way to enable a plaintiff to obtain judgment where there is no real defence to the claim made: see *Pemberton v Chappell* [1987] 1 NZLR 1 at p 2. The essence of the procedure is the plaintiff's own verification by affidavit of his own statement of claim and the allegations made in it: *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co. Pty Ltd* (1978) 29 ACTR 21. There has to be a balancing between the right of the defendant to have his day in court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: see *Bilby Dimock Corporation Ltd v Patel* [1987] 1 PRNZ 84 and *Cegami Investments Ltd v AMP Financial Corporation (NZ) Ltd* [1990] 2 NZLR 308 at 313. Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong.

In this case the appellant quite rightly did not attempt to deal in detail one by one with the vehicles and other assets but asserted and verified its claim overall, accompanied by the documentation which provided the essential support for that. To enter into an analysis of that, as the Master did, pre-empted any answer that might have been raised or explanation that might have been made by the appellant and, by implication, questioned the appellant's verification when the respondents had not done so themselves. Moreover, in undertaking his own analysis the Master fell into error in his

calculations by overlooking the fact that all the indebtedness had been refinanced so that loans previously secured over individual vehicles were repaid and then re-advanced. While the plaintiff must verify its claim it is not required to prove the details with the same precision as might be required in a viva voce hearing where everything might be in issue. That standard would undermine the simplicity and the benefit of the summary judgment procedure.

Given the sworn assertions of the appellant, its further explanations in response to the notice of opposition and the respondent's affidavit and the abandonment of the two particular items, there remained no real defence to the remaining balance which can properly be said to be indisputably due and owing.

The question then remains whether, in those circumstances, the appellant is entitled to judgment, both as to liability and quantum, to part of the claim.

It is convenient, first, to refer to the terms of RR 136 (1) and 137 which are as follows:

" 136. (1) Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant.

137. Where, in a proceeding to which this rule applies, the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim, or to a particular part of any such claim, except as to the amount claimed, the Court may give judgment against that defendant on the issue of liability and direct a trial of the issue of amount at such time and place as it shall think fit. "

That, by its ordinary construction, would seem to permit the giving of judgment on a particular part of a claim both as to liability and as to quantum. The reference to claim or the word "claim" is to be distinguished from the phrase "cause of action": cf. R 108 (b) requiring the statement of claim to

show the cause of action and R 110 as to joinder of several causes of action in one statement of claim.

In England, RSC Order 14, r 1 (1) is as follows:

" Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant. "

There, judgment may be given for part of the amount of a claim whether that is applied for by the plaintiff or appears during the course of the hearing: see *Lazarus v Smith* [1908] 2 KB 266, *Contract Discount Corporation Ltd v Furlong* [1948] 1 All ER 274 and *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyds Rep. 33. But in a case where the claim is for unliquidated damages and the whole claim for damages is in issue, an order for part will be refused on the ground that it cannot be said that any definable or quantified part of the claim is not in dispute: see *Associated Bulk Carriers Ltd v Koch Shipping Inc.* [1978] 2 All ER 254.

In New Zealand judgment has been given for part of a claim although it appears without any argument on the point. Cases mentioned include *Soteris v Papadopoulos* (unreported, High Court, Wellington Registry, McGechan J, CP No. 590/86, 20 February 1987) in which, in a claim for summary judgment directing sale in lieu of partition and for equal distribution of proceeds of sale, summary judgment was given on the claim for order of sale alone. In *Burbery Mortgage Finance and Savings Ltd v Henderson* (unreported, High Court, Christchurch Registry, Holland J, CP No. 67/87, 14 May 1987) a claim for a mortgage debt comprising principal and interest, the Judge was prepared to enter judgment for the principal or the balance due as part of the claim. In *Westpac Merchant Finance Ltd v Carey* (unreported, High Court, Hamilton Registry, Doogue J, CP No. 294/89, 3 May 1990), a claim based on a deed of guarantee and indemnity, the Judge in that case identified only one item as being in dispute and entered judgment for the balance of the claim. In *Euro-National Corporation Ltd v Monash Investments Ltd* (unreported, High

Court, Auckland Registry, Master Towle, CP No. 96/90, 24 May 1990), a claim for summary judgment on a mortgage against the mortgagor and the guarantor, judgment was entered for a particular part of the claim with the balance reserved for trial.

In *D Clive Davis Ltd v Waugh and Rimmington* (unreported, High Court, Palmerston North Registry, Eichelbaum J, CP No. 63/88, 4 August 1988) the plaintiff's claim for a summary judgment was for its final account for the price of the fabrication and installation of a verandah to a building owned by the defendants. The defendants did not, it seems, dispute that they owed a substantial sum but they did dispute an item of GST and claimed a set-off against the contract price for losses because of the delay and defects in the supply and installation of the verandah. The plaintiff was apparently willing to reduce its claim by the amount of the alleged losses and not out-of-pocket expenses said to have been incurred by the defendants, but would not concede, as well, the amount of the GST. The Judge concluded that the defendants had an arguable case for some set-off which could not be determined on the affidavit evidence. He concluded, therefore, that the plaintiff had not satisfied the Court that there is no arguable defence on quantum. He held that he was unable to order a judgment as to part, saying this:

" However, as the rules relating to summary judgment are presently framed, no remedy of that kind appears open, at least not on the present facts. Rule 136 refers to a defendant having no defence to a claim in the statement of claim 'or to a particular part of any such claim' and provides that in that case the Court may give judgment for the plaintiff; and the reference to 'a particular part of any such claim' is repeated in R 137. No doubt those provisions at least empower the Court to deal separately with distinct causes of action. They may go further and enable judgment to be given in respect of a distinct item of claim not in dispute. I do not decide that as it is not the present situation. The well established rule of law of course is that absent statutory authority a single cause of action cannot be split. In some circumstances the desired result might be achieved by entering judgment for the plaintiff on his claim without prejudice to the defendant's right to pursue a counterclaim, see the

examples cited in Sim and Cain's *Practice and Procedure* 12th Ed at p 205. Here however the dispute regarding quantum, in so far as the GST element is concerned, directly affects the question of the amount for which judgment should be entered. "

That conclusion was followed by Master Hansen in *AMP Finance NZ Ltd v Kendall* (unreported, High Court, Christchurch Registry, CP No. 77/89, 5 July 1989) in a claim for the balance due under a mortgage following the realisation of the security by mortgagee sale. There the defendant conceded that he owed something and on his own admission that was \$42,000. But following the decision in *D Clive Davis Ltd* the Master refused to order summary judgment for part of the amount.

We think this is to place too much emphasis on the cause of action and not on the claim or particular part of such claim which are the very words of RR 136 and 137. We see no reason to prevent judgment being given for an amount which is indisputably due and owing but which is only part of the claim and therefore not the whole of the relief sought under the particular cause of action. This is not to say that Courts are to strive to find some indisputable amount and then to give judgment for it. It is not suggested that, in unliquidated claims, it would be right to say the plaintiff will eventually recover some quantifiable sum and then give judgment, as if on account. Rather this recognises the right to judgment, in the words of Lane LJ in *Associated Bulk Carriers Ltd v Koch Shipping Inc.* at p 265:

" ... where the amount ordered to be paid has already been ascertained or is capable of being ascertained by mere calculation without further investigation, or is admittedly due. "

There will be other cases where it would be unjust to give summary judgment, even on part of the claim, without allowing the cross-claim, set-off or counterclaim to be brought into account. As Somers J stated in *Grant v NZMC Ltd* [1989] 1 NZLR 8.

" The principal is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the

plaintiff to have judgment without bringing the cross-claim to account. "

Equally the dispute as to quantum may be such as to leave in doubt the whole of the plaintiff's claim, thus making it impossible to particularise any undisputed amount or amounts. So, too, with a counterclaim which may equal or exceed the amount of the plaintiff's claim it may be unjust to allow the plaintiff the advantage of judgment and its execution before the counterclaim has been canvassed and decided upon. The English practice is, in such cases, to enter judgment but to stay execution until the counterclaim has been dealt with and that can be a practical solution to the difficulties involved. On the other hand it is equally unjust that by raising some dispute as to a part of a claim the defendant should be entitled to prevent the entry of judgment at all. That would seem to defeat the purpose of the summary judgment procedure.

In this case the plaintiff was entitled to an entry of summary judgment in the amount which was undisputed and undisputable, namely, \$186,998.56, together with interest thereon at the contracted rate of 20% per annum from 23 January 1991 to the date of judgment.

The appeal is therefore allowed and the matter is remitted to the High Court for entry of judgment in accordance with the opinion of this Court together with costs to be fixed by the Master. The appellant is entitled to costs in this Court which we fix in the sum of \$3,500 together with travelling expenses and accommodation for counsel and disbursements to be fixed by the Registrar.

A handwritten signature in dark ink, appearing to read 'L. G. White', is located in the lower right quadrant of the page.

Solicitors:

Simpson Grierson Butler White, AUCKLAND, for Appellant

Sainsbury Logan & Williams, NAPIER, for Respondents