IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-997
[2012] NZHC 801

	BETWEEN	SUISSE INTERNATIONAL LIMITED Plaintiff
	AND	BEVERLEY JEAN MONK Defendant

Hearing: 24 April 2012

Appearances: Mr A M Swan for plaintiff
Mr P Dalkie for defendant

Judgment: 30 April 2012

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***30.04.12 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:

Mr A M Swan, Southern Cross Chambers, Auckland – andrewswan@xtra.co.nz
Mr P Dalkie, P O box 392, Auckland – paul.dalkie@xtra.co.nz

Background

[1] The plaintiff is apparently an investor in property. The principal of the company is a Mr Watt. There are several companies in what was referred to as the "Watt Group".

[2] The defendant is a director of two companies that leant money to the Watt Group and others between 1999 and 2004. Mr Watt was adjudicated bankrupt in 2001. A Mr Sharma temporarily replaced him as the director of the plaintiff company. Mr Watt resumed control of the companies after he came out of bankruptcy but in the meantime he was ill and that is the explanation for why matters which arose nine and a half years ago have only recently been made the subject of litigation in which the present summary judgement application has been filed.

[3] It is not disputed that following a series of loan transactions certain repayments were made. One of the payments was of $500,000 on 21 November 2002. The plaintiff now alleges that the defendant had no entitlement to that sum.

[4] The plaintiff alleges that the series of loans that were made by the defendant's company Richelieu Investments Limited ("RIL") were repaid and that excessive amounts of repayments were transferred to RIL and or Ms Monk. I should add that for the purposes of this judgment nothing turns on the question of whether repayments should, strictly, to have been made to Richelieu Investments Limited rather than to Ms Monk who was a director of that company. It is assumed on both sides that any payment to Ms Monk was as a result of a direction given by RIL.

[5] The sum of $500,000 was indeed paid to the defendant on 21 November 2002. On that date the solicitors acting for the plaintiff paid that sum out of their trust account to her. The funds so paid were part of a larger amount of funds that the solicitors were holding to the credit of the plaintiff following the sale of a property at 814 Willis Street, Wellington. An unusual feature of the repayment is that it was made before the transaction for the sale of that property had settled. The funds

forwarded to Ms Monk were derived from the deposit which the purchaser paid for that property.

[6] While the way in which the pleadings were initially structured focussed upon the specific payment of $500,000.00. At the hearing before me on 24 April 2012 Mr Swan for the plaintiff produced a table which he said set out the wider history of the loans between the parties. The schedule was to the following effect.

ADVANCES

Date advanced	**Amount**	**Due date**	**Page**
3.01	$217,000	15.3.03	(page 194)
4.5.01	$252,000	15.6.03	(as varied page 204 and206)
15.6.01	$274,000	15.6.01	(page160)
22.6.01	$430,000	22.6.03	(page169)
3.5.02	$260,000	3.11.02	(page 175)
Total advanced	**$1,433,000**		

NET REPAYMENTS

23.8.02	$964,000	(page 256)
21.11.02	$500,000	(page 37,41,42)
14.1.03	$572,704.00	(page 236 para 13 & page 263)
Total repayments	**$2,036,704**	

EXCESS PAID $603,704

[7] Rather than concentrating upon the actual payment of $500,000 which was made to the defendant by the solicitors acting out of the proceeds of sale of the Willis Street property, the plaintiff now attempts a reconciliation of all advances and repayments throughout the business relationship between the plaintiff and the defendant which results, it says in a net overpayment. It is now said that when a balance is struck between the advances which the defendant made in the amounts repaid, there has been an overpayment to the defendant o $603,704.

[8] The affidavit which was filed in support of the statement of claim verifies an allegation that the individual repayment of $500,000 was unjustified and that the defendant owed them money by way of money had and received. But as I have said, as the proceeding has progressed the dispute has widened to one concerning the net amount allegedly overpaid on the overall trading account between the plaintiff and the defendant. This is a matter that is not without significance when it comes to considering whether or not the plaintiff has been able to establish that the defendant does not have a defence to the summary judgment application.

[9] A large number of documents have been filed by means of which the plaintiff hopes to establish that the defendant has no defence.

[10] There are two essential matters in respect of which I do not believe that the plaintiff has proven factual matters to the required standard. The first concerns the advance of $252,000 which was made on 4 May 2001. That particular loan makes up part of the total of the advances which in aggregate were $1,433,000 which were admittedly advanced to the plaintiff. The plaintiff says that this amount was repaid from the sale of another of the Watt companies, New Zealand Serviced Accommodation Limited which sold a property at 10 Gilmer Road in November 2002. The solicitors acting for NZ Serviced Accommodation Limited issued a statement of account dated 14 January 2003 which included the entry:

Bank transfer BJ Monk and GD Kain	
– repayment of mortgage	$1,637,437.10

[11] It is said that that repayment included the advance of $217,000 together with interest. Mr Dalkie for the defendant said that while there was no doubt that the statement of account accurately showed a "repayment of mortgage" of $1,637,437.10 we have only the plaintiff's word for it that there was included in that amount the sum of $217,000. The plaintiff says that the amounts which were repaid as part of the $1,637,437.10 included two loans that had been assigned to the defendant and which were secured over Gilmer Road as well as the $217,000.00, a total of $1,281,732.76. If that was the only amount owing then there was a substantial overpayment of about $355,000. Interest does not seem to have been accounted for in these calculations.

[12] Before I express my conclusions I also need to make reference to the approach that the defendant has taken to this summary judgment application. She takes the point that these transactions occurred nine and a half years ago approximately. She said she had disposed of most of her copies of the documents which documented the various transactions.

[13] The plaintiff essentially says that its summary of advances and repayments is an exhaustive statement of all the transactions between the parties. I am not prepared to accept that the evidential foundation put forward by the plaintiff is sufficiently solid to enable me to agree with that conclusion. There are many aspects of the dealings between the parties which seem to be informal and even irregular.

[14] Mr Swan relied upon authorities such as *Auckett v Falvey*[1] where in his judgment Eichelbaum J stated:

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[1] *Auckett v Falvey* HC Wellington, CP 296, 20 August 1986.

[15] Eichelbaum J was expressing his view about the facts in that case. One feature of the present case which cannot be ignored is that the plaintiff commenced by verifying a statement of claim which seemed to depend upon a rather different view of the facts than is now relied upon. It is also relevant that Mr Watt who has supplied affidavits for the company in support of the application for summary judgment was not the director of the company at the relevant times because of the fact that he was an undischarged bankrupt and the company was under the management and control of his nominee director, Mr Sharma. It may be assumed that Mr Sharma knew about the various payments to the defendant given that he was the director in charge of the company. I consider that it is also a reasonable inference to draw that the solicitors acting with regard to the Gilmer Street transaction would not have paid the funds out to the defendant without an authority to that effect. It is possible of course that the solicitors made a mistake or that Mr Sharma or some other person on behalf of the company gave authority for the payments to be made through a misunderstanding as to how much was owed to the defendant.

[16] The problem is that the attempted reconciliation which the plaintiff puts forward of the various advances and repayments does not prove that an overpayment has been made. A detailed examination of interest and other charges would be required to come to a clear conclusion as to whether the defendant had received more than was due to it. I do not consider that the Court could be brought to the requisite point of certainty at which judgment can be entered without evidence which reassures it on this point. Such evidence would take the form of a report from a chartered accountant or something similar.

[17] Even if I am wrong about the question of whether there is an overall balance owing to the plaintiff for which the defendant is liable, it is quite impossible in my view to fix the quantum of that amount with precision.

[18] I agree that the defendant's affidavit demonstrates a lack of particularity. However I also consider that given the convoluted character of the factual situation, and the very long period that has elapsed since the defendant was in business as a

money lender, that it is not a case which can safely be disposed of without the defendant having discovery of documents in the possession of the plaintiff.

[19] My broad conclusion is that I would feel unease about making an order that would bar the defendant in effect from defending his case given the less than satisfactory circumstances of the plaintiff's claim and the evidence which is advanced in support of it.

[20] The application for summary judgment is dismissed. The parties should confer on the matter of costs and if they are not able to agree they should file memoranda not exceeding six pages on each side relating to costs within 14 days from the date of this judgment. They should also confer on how the proceeding is to be disposed of from this point forward. If the plaintiff is minded to proceed then detailed case management orders will be required.

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J.P. Doogue
Associate Judge