IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV-2012-454-469
[2012] NZHC 3114

IN THE MATTER OF	section 72 of the District Courts Act 1947
BETWEEN	PIONEER FARMS LIMITED Appellant
AND	HAMISH ALEX STODDART AND LYNETTE ANNE RITCHIE Respondents

Hearing: 7 November 2012

Counsel: E J H Morrison for Appellant
J G Krebs for Respondents

Judgment: 22 November 2012

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 11.30am on the 22nd November 2012.

JUDGMENT OF WILLIAMS J

Solicitors:
Kirkland Morrison, Lawyers, PO Box 1290, Auckland
Jonathan Krebs, Barrister, PO Box 754, Napier

Introduction

[1] In December 2011, the appellant, Pioneer Farms, commenced proceedings against the respondents, Mr Stoddart and Ms Ritchie, in relation to an unpaid debt of around $10,000. They were served with a notice of claim, but failed to take any formal steps to defend the claim. Default judgment was subsequently entered against them on 27 February 2012.

[2] The respondents applied to the District Court to forestall enforcement and to set aside the judgment. On 5 June 2012, Judge Ross set aside the judgment on the grounds that the respondents had put forward an arguable defence to the claim through letters sent to the appellant's solicitors dated 15 December 2011 and 11 February 2012. The appellant:

(a) appeals against that judgment; and

(b) applies for leave to adduce further evidence on appeal.

Background

[3] In 2009, Mr Stoddart and Ms Ritchie sold their farm in Hawkes Bay and were in the process of buying another farm in Manawatu. On the advice of their lawyers, they decided not to proceed with the purchase. They urgently needed somewhere to graze their cattle. They contacted PGG Wrightson at the beginning of July 2009, and were subsequently contacted by Warren Smith.

[4] Mr Stoddart and Ms Ritchie say that during July 2009 they concluded an oral agreement with Mr Smith regarding the grazing of their cattle. Their requirements for grazing were as follows:

(a) electric fencing;

(b) sufficient grass to feed the heavy pedigree stock;

(c) fresh trough water in every paddock;

(d) grazing to the 31 December 2009; and

(e) grazing to be suitable for calving cows.

[5] Mr Stoddart and Ms Ritchie say that Mr Smith advised that he was able to provide grazing that met and exceeded their criteria. It was agreed that the cattle would be divided over three properties; one property at each of Bulls, Longburn and Flygers Line in the Manawatu. Mr Stoddart and Ms Ritchie say because they urgently needed grazing, they arranged for the cattle to be transported to the properties site unseen. Mr Stoddart and Ms Ritchie say that the cost of the grazing was agreed at $15 per head per week. They thought this was appropriate because they were assured that their criteria for the grazing land were met. In addition, they say that the termination date of 31 December 2009 was crucial to their agreement because 70 cows were due to calve while on the property, and the calves needed time to grow strong enough for on-transport to their final destination.

[6] Pioneer Farms says that until Mr Stoddart and Ms Ritchie were required to vacate the property, they never raised any concerns about the quality of the grazing with the exception of a vet call out on 31 July 2009. Pioneer Farms credited the deduction on the account.

[7] Mr Stoddart and Ms Ritchie say that at the time they made that arrangement, they believed that Mr Smith owned the properties. But when they received the first invoices for the use of the two portions of land, one was from Beef City Limited and another was from Pioneer Farms. Mr Stoddart and Ms Ritchie say that they found this confusing and were unclear about who they were actually dealing with.

[8] On Friday 24 July 2009, the cattle were transported from Central Hawkes Bay to the properties in Manawatu. Mr Stoddart and Ms Ritchie say they were unable to contact Mr Smith by telephone despite repeated attempts to arrange to view the cattle, until two days after they were transported. On Sunday 26 July 2009, they were able to view the cattle at the properties. They say that it was immediately

apparent that what they had been told regarding the properties was inaccurate. They claim that:

(a) none of the properties had electric fencing and the standard fencing was damaged and inadequate to handle the extra large Charolais cattle they were grazing;

(b) none of the properties had trough water available in the paddocks;

(c) the amount of grass was insufficient for the cattle and a veterinarian advised Mr Stoddart and Ms Ritchie to start feeding out hay to the cattle to maintain their condition;

(d) two cows became entangled in fencing wire which had to be removed by a veterinarian, and the cows had to be treated with antibiotics.

[9] Less than two months later on 9 September 2009, Mr Stoddart and Ms Ritchie received a letter from Mr Smith requesting that all stock be removed because his cropping programme was due to begin on 1 October. Mr Stoddart and Ms Ritchie say that the termination date was agreed to be 31 December 2009, but in any event their cows were still calving. In October 2009, Mr Stoddart and Ms Ritchie say that Mr Smith texted them demanding that their cattle be removed immediately because the farms were to be sprayed in preparation for cropping. They say that while feeding out on the day they received Mr Smith's text, they discovered that the properties had in fact been sprayed with herbicide the day before.

[10] They discussed this with the vet, who apparently said that spraying while the cattle were still on the property was bad animal health practice. The usual practice was for animals to be removed before spraying and then returned no less than four days after the spraying, depending on the type of spray used. They say the spraying was particularly careless as there were in-calf cows and newborn calves present.

[11] Following the spraying and stock losses on the Bulls and Longburn properties, Mr Stoddart and Ms Ritchie decided to move the cattle. There was a

delay in removing the cattle from the Longburn property as the yards were in such a dangerous state of disrepair (according to Mr Stoddart and Ms Ritchie) and that the trucking company would not use them. Mr Smith refused to bring them up to standard.

[12] Mr Stoddart and Ms Ritchie paid the July, August, September and October 2009 invoices when due. But they made deductions from the invoices for November 2009 for costs incurred because, they say, of Mr Smith's misrepresentations. They deducted the vet account and the cost of the feed.

[13] Two years later in early November 2011, Pioneer Farms instructed their solicitors to recover the outstanding amount on the November 2009 invoice. The firm sent a letter of demand dated 16 November 2011 to Mr Stoddart and Ms Ritchie advising that they were to pay Pioneer Farms $9,122.50 by 30 November 2011, and failing payment, Pioneer Farms would commence enforcement action against them without further notice. Mr Stoddart and Ms Ritchie did not respond.

[14] On 6 December 2011, Pioneer Farms filed a notice of claim in the District Court to recover the debt. On 15 December 2011, that notice was served on Mr Stoddart and Ms Ritchie. The notice included "notes for Defendant" which explained the steps that a defendant should make to defend the claim.

[15] On 15 December 2011, Mr Stoddart and Ms Ritchie wrote a letter to Pioneer Farms' lawyers setting out their grievances as described at [8] above. Pioneer Farms says it only received this letter on 16 January 2012. Counsel for Pioneer Farms responded to this letter on 9 February 2012 saying "our client disagrees with its contents and we are instructed to pursue this matter." Mr Stoddart and Ms Ritchie did not take any formal steps to defend the proceeding. After 30 working days Pioneer Farms made an application to the District Court for default judgment. Default judgment was granted against Mr Stoddart and Ms Ritchie in the sum of $9,112.50 plus costs of $1,167.50. On 1 March 2012, the sealed judgment together with a letter of demand for payment of the judgment sum was served on Mr Stoddart and Ms Ritchie. Mr Stoddart and Ms Ritchie failed to comply with the letter of demand by the due date for compliance.

[16] Pioneer Farms subsequently obtained a certificate of judgment from the District Court and issued bankruptcy notices against Mr Stoddart and Ms Ritchie. On 19 April 2012, the bankruptcy notices were served.

[17] Around 1 May 2012 (after expiry of the bankruptcy notices), Pioneer Farms' solicitors received a letter from Mr Krebs, the barrister employed to represent Mr Stoddart and Ms Ritchie, saying that they intended to file an application to set aside the judgment. On 7 May 2012, Pioneer Farms' solicitors advised that they would nonetheless pursue the bankruptcy.

[18] In explanation for failing to defend the proceeding, Mr Stoddart and Ms Ritchie said that they thought that open and honest communication with Pioneer Farms' lawyer would solve the matter, without them having to incur the cost of legal representation. They say they did not realise how serious the matter was until judgment was given.

[19] Mr Smith says the following in substantive response to Mr Stoddart and Ms Ritchie's complaints:

(a) He would not have agreed to a termination date of 31 December 2009 because his cropping programme was to begin in October 2009 as it had done for the previous five years, and it was not viable to graze stock simultaneously on land that was being worked for cropping.

(b) The farm did have a substantial and adequate water supply. It had been a dairy farm up until the cropping programme commenced and it is operating as a dairy farm again now. He says that the farm has been grazed each year with substantially larger numbers of cattle and water for livestock has never been a problem.

(c) Neither Mr Stoddart nor Ms Ritchie advised that the cows were calving. He says that calving requires a more "delicate and hands on approach" to dealing with the livestock. He says that, had he known the cows were calving, he would not have allowed the grass lease

because it is not normal practice for absentee land owners to facilitate calving.

(d) Mr Stoddart and Ms Ritchie took over total management of the premises and made arrangements for electrifying fences as needed.

(e) There was more than sufficient grass over the 55 hectares available.

Applicable principles

[20] Rule 12.34 of the District Court Rules 2009 provides:

> Any judgment obtained by default may be set aside or varied by the court on any terms it thinks fit, if it appears to the court that there has been, or may have been, a miscarriage of justice.

[21] The principles that apply under r 12.34 depend on whether the judgment was "irregularly obtained" or "regularly obtained". In this case it was accepted by the parties that the judgment was regularly obtained because all proper steps under the rules were followed in obtaining the judgment. The relevant principles where a judgment has been regularly obtained are set out in the Court of Appeal decision in *Russell v Cox*.[1]

[22] The discretion under r 12.34 is unfettered, but will be guided by three well-established considerations:

(a) whether the defendant has a substantial ground of defence;

(b) whether the delay is reasonably explained; and

(c) whether the plaintiff will suffer irreparable injury if the judgment is set aside.

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[1] *Russell v Cox* [1983] NZLR 654 (CA) at 659. Although that case concerned the application of r 236 of the Code of Civil Procedure, nothing turns on the slight variation in wording between that rule and r 12.34: *Norwich Winterthur Insurance (New Zealand) Ltd v Erikson* CA370/921, 2 October 1992 at 3.

[23] It is important to note, however, that these are not exclusive considerations or prerequisites. The crucial question is still whether it appears that there has been or may have been a miscarriage of justice when judgment was entered.[2] As the Court of Appeal noted in *Russell v Cox*:[3]

> We think that in the light of *Evans v Bartlam* the passage to which reference has just been made should be read as doing no more than emphasising three matters which, as a matter of common sense and practice, the Court will generally regard as of importance in deciding whether it is just to set aside a judgment. But it should not be regarded as laying down a general rule that an application to set aside a judgment must satisfy these conditions as a necessary prerequisite to the exercise of the discretion; it should be taken as doing no more than highlight factors which on any application to set aside a judgment may generally be regarded as relevant to an inquiry which will determine where the justice of the case will lie.

[24] In relation to whether there is a substantial defence, the onus is on the applicant to satisfy the court.[4] Proof of such defence should be in the form of an affidavit or draft statement of defence.

District Court decision

[25] In determining the application to set aside the judgment, the learned Judge examined whether there was an arguable defence, a reasonable explanation for the delay in advancing a defence and whether there would be irreparable prejudice to the plaintiff in setting aside the original default judgment.

Arguable defence

[26] The Judge held that there was an arguable defence to the claim for the debt. Although the respondents had not taken formal steps to defend their position, their defence was set out in the letters dated 15 December 2011 and 11 February 2012. These letters, the Judge said, put the appellant on notice. He held that whether or not the alleged misrepresentations could be described as a defence or a counterclaim was not relevant.

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2 *Caltex Oil (NZ) Ltd v MacIntosh* HC Napier CP123/87, 10 November 1988.
3 *Russell v Cox*, above n1, at 659.
4 *Sandall v Cardno* HC Blenheim 2/87, 10 June 1987 at 3.

Delays

[27] The Judge held that less hinged on this point. The appellant, he said, had also delayed between when the cause of action arose and the commencement of proceedings. But when the appellant finally commenced proceedings, everything moved at a "helter-skelter pace", and time was all of sudden of the essence to the appellant.

Prejudice to the appellant

[28] The Judge was satisfied that enforcing the debt did not involve "financial life or death" for the appellant. Rather, the appellant was concerned about the possible wasted costs from the proceeding being delayed. The Judge accepted that there were significant costs, and to remedy this he granted the appellant costs up until the date of Mr Krebs' letter of 27 April 2012, advising the appellant's solicitors that the respondents would now be taking steps.

[29] The learned Judge:

(a) set aside the judgment of 27 February 2012;

(b) awarded the appellant costs for the expenses it incurred prior to 27 April 2012 in bringing the proceeding; and

(c) transferred the proceedings to the Disputes Tribunal for final adjudication.

Powers on appeal

[30] The decision under appeal was made pursuant to r 12.34 of the District Court Rules 2009.[5] I must be satisfied that the learned Judge proceeded on a wrong

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[5] This rule is substantially the same as to r 15.13 of the High Court Rules 2008, and its predecessor, r 469 of the High Court Rules 1985. In the context of r 469, the Court of Appeal

principle, took into account an irrelevant consideration, did not take into account a relevant consideration or was plainly wrong.[6]

Analysis

[31] I address each of the appellant's grounds of appeal in turn.

Alleged errors of law

[32] The appellant says that the District Court Judge erred in law and/or fact by finding that:

(a) the respondents only needed to show that they had a defence on the balance of probabilities and not that they had a strong defence;

(b) there is no legal difference between a set-off, counterclaim and a defence for the purposes of the application to set aside a judgment;

(c) no reason for the respondents' failure to file a notice of response was required;

(d) the respondents' letter sent to the appellant's solicitors adequately discharged the respondents' duties to file notices of response within the time period set out in the notice of claim.

[33] In relation to the first point regarding the need for a "strong" defence, Hardie Boys J described the relevant standard as follows:[7]

> ... although the cases show the use of different expressions to describe what I have referred to as "a substantial ground" of defence, for example "reasonably arguable", "prima facie" and "serious", they all make it clear

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has affirmed that the decision to set aside or vary a judgment obtained by default involves the exercise of a discretion: *Norwich Winterthur Insurance (New Zealand) Ltd v Erikson* CA370/921, 2 October 1992 at 4-5. I infer that the same principles apply to an appeal against a decision made pursuant to r 12.34.

6 At 4-5.

7 *Sandall v Cardno* HC Blenheim 2/87, 10 June 1987 at 3.

> that the defendant must show more than a substantial (*sic*) or flimsy defence but rather one which appears sufficient to justify delaying the plaintiff in obtaining the fruits of his judgment. Clearly the Court cannot embark on more than a most superficial examination of the merits.

[34] The Judge in the present appeal did not claim that the respondents had established a defence on the balance of probabilities rather he said they had established an "arguable" defence. There is, in any event, little difference between a "substantial" and an "arguable" defence, at least within the context of this case. The real question is whether the defence now mounted is strong enough to suggest that a miscarriage of justice may have occurred when judgment was entered against the respondents without the court having had the benefit of hearing from them. The learned Judge's analysis is consistent with the application of this standard. Even then, that is only one factor, albeit an important one.

[35] The second argument is that the respondents may have a counterclaim for the amounts deducted from the November 2009 bill, but that is not a defence. The short point is that I do not agree. At the very least, the deduction made related (according to the respondents) to:

(a) inadequate fencing; and

(b) insufficient feed and water;

both of which had been (they say) the subject of misrepresentation by the appellant. The deductions are therefore linked inextricably to the grass lease. At the least, the respondents can mount a very arguable case for a set-off. It is, perhaps, arguable that the respondents affirmed the contract with full knowledge of the misrepresentation (see s 7(5) Contractual Remedies Act 1979) but this is a question of fact not relevant to the appeal here. It may become very relevant if the matter gets to trial, and the respondents may suggest that there was little choice but to stay in the circumstances because of a calving herd. These arguments will need to be tested on the evidence.

[36] In relation to the third point regarding the necessity to explain their delay, the Judge considered that the reason for the delay was that the respondents thought that they could settle the matter with the appellant. Just as importantly, the respondents

explained at an early stage what their complaints were and they have not diverted from that list of complaints. In any event, this is only one factor to be taken into account when determining whether there has been a miscarriage of justice such as to order that a judgment be set aside.

[37] In relation to the fourth point, the Judge did not say that the letters to the appellant's solicitors "adequately discharged" the respondents' duties to file notices of response within the time period. Rather, the Judge said that it was wrong of the respondents to fail to take any formal steps (see [8] of judgment). The Judge simply noted that the letters from the respondents to the appellant's solicitors gave the latter notice of their defence, thus effecting the purpose of the notice of response, if not its form. This fact went to broader considerations of justice and whether there was a risk of miscarriage.

Took into account irrelevant considerations

[38] The irrelevant considerations argued for by the appellant are:

(a) the appellant's alleged delay in bringing its proceedings against the respondents;

(b) the appellant's solvency and whether payment of the judgment sum would have any bearing on the financial "life or death" of the appellant;

(c) considering the appellant's conduct when determining to set aside a judgment and balancing that with the respondent's conduct.

[39] In my view, these are all factors that the Judge was entitled to take into account.

[40] In relation to the first point, this factor was also considered when determining whether to set aside a judgment in *Padden v Fidelity Life Assurance Co Ltd*.[8] In my view, balancing the delay in issuing proceedings against the pace in which judgment was sought and entered may be relevant to whether there was a miscarriage of justice albeit not a particularly strong point. A long period of inaction on the part of the appellants may well have lulled the respondents into complacency. In this context, the appellant sought leave to adduce evidence of its diligence in sending regular letters of demand to the respondents. The application was not vigorously opposed and I consider it appropriate to admit the evidence. It does, I think, meet the learned Judge's point, the Judge not having had the benefit of that evidence. I do not, however, think the evidence makes a great deal of difference in the overall merits of this case. It was, as I have said, not a particularly strong point against the appellant anyway. The key point in this case, in my view, is that the respondents had a substantive response to the appellant's case and raised it with the appellant's solicitors at an early stage. Pressing ahead to default judgment in those circumstances always carried risk.

[41] In relation to the second point, the appellant's solvency is an obviously relevant factor in determining whether setting aside the judgment would cause irreparable injury to the appellant. If the appellant was to become insolvent without the judgment sum, that may be considered to be irreparable injury to the appellant.

[42] In relation to the third point, the only matter in which the appellant's conduct was balanced against the respondents' conduct was in relation to the delay, and I have already dealt with that issue.

Failure to take into account relevant considerations

[43] The appellant says that the Judge failed to consider:

(a) the appellant's responses to the letters of 15 December 2011 and 11 February 2012;

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[8] *Padden v Fidelity Life Assurance Co Ltd* HC Whangarei CP2/00, 6 March 2001 at [14].

(b) the fact that the respondents' instructing solicitors in relation to the application to set aside were the respondents' solicitors from before the date the appellant's notice of claim was served on them;

(c) the delay between service of the judgment and the application to set aside only once bankruptcy notices had been served and expired;

(d) the importance of recognising the finality of judgments;

(e) the respondents' payment of earlier invoices issued by the appellant without dispute; and

(f) the prejudice that the appellant would suffer as a result of the judgments being set aside.

[44] The first three points are all related to delay in the respondents taking steps. The first point is that the appellant's responses clearly notified the respondents that they were proceeding, and that the notice of claim set out what the respondents were to do. The Judge did take this into account (see [13]).

[45] On the second point, the appellant argues that even though the respondents' solicitor had left the firm, the firm itself was still their "solicitors" at the time of the notice of claim. In my view, that is beside the point in this case. The respondents did not have legal advice as to how to deal with their claim and thought they could settle the matter themselves. (They were wrong about this as it turns out.) Whether they could have got legal advice is hardly going to count decisively against the respondents on the question of whether there has been a miscarriage of justice.

[46] In relation to the third point, this is once again part of the question of delay, which was dealt with by the Judge.

[47] The fourth point was considered as a further important consideration in the District Court decision in *Garmonsway v Gresson*.[9] The finality of judgments is important but the legislature has considered that judgments can be set aside to avoid either a miscarriage, or a risk of miscarriage, of justice. The overall question then is whether there is a risk of miscarriage of justice in this case or whether, on balance, the finality principle should prevail. I agree with the learned Judge's conclusions in that respect.

[48] The fifth point is possibly relevant to whether the respondents affirmed the contract pursuant to s 7(5) of the Contractual Remedies Act 1979. But, as noted above at [35], that is question of fact that may be relevant if the matter goes to trial but is not relevant to this appeal.

[49] In relation to the sixth point, the Judge did turn his mind to the prejudice to the appellant. He found that setting aside the judgment would not cause irreparable harm.

Pre-determination

[50] The appellant also says that there was an element of "pre-determination" in that the matter was not as appeared on the evidence and that there was a "back story". It refers to the Judge's comment that the appellant's conduct was analogous to Shylock in Shakespeare's Merchant of Venice. This claim has no merit – the reference to a "back story" was a reference to the background to the debt that was the subject of the notice of claim. The background, including how the grazing arrangement was formed, is relevant to the question of whether the respondents have a substantial defence. In addition, the Judge's comment relating to the Merchant of Venice was during his discussion of the background, and did not appear to influence his final judgment in favour of the respondents.

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9 *Garmonsway v Gresson* DC Hastings CIV-2006-020-228, 14 June 2006 at [16].

Disposition

[51] The appeal is dismissed accordingly. I am minded to leave costs where they lie on this appeal, but will receive submissions if necessary.

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Williams J