IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-36
[2014] NZHC 2371

BETWEEN	IAIN BRUCE SHEPHARD AND CHRISTINE MARGARET DUNPHY Plaintiffs
AND	MALCOLM EDWARD RABSON First Defendant
AND	MALCOLM EDWARD RABSON AND RICHARD JOHN CRESER Second Defendant
AND	WAYNE SEYMOUR CHAPMAN Third Defendant

Hearing: 17 July 2014

Counsel: H Thompson for Plaintiffs
M E Rabson in Person
R J Creser in Person
B J Maltby for Third Defendant

Judgment: 26 September 2014

JUDGMENT OF ASSOCIATE JUDGE SMITH

Introduction

[1] The second defendants, Mr Rabson and Mr Creser, apply for summary judgment on certain claims brought against them by the plaintiffs. They say they have a complete answer to those claims, and that they should not be required to go to trial on them.

[2] The background of the application is as follows.

[3] The plaintiffs are the liquidators of companies called Vision Ltd (in liquidation) and Double Zero Holdings (in liquidation).

[4] Mr Rabson was adjudicated bankrupt on 18 March 2013, but by deed dated 18 November 2013 the plaintiffs took an assignment from the Official Assignee of all claims and causes of action held by the Official Assignee as assignee of Mr Rabson's estate. The plaintiffs say that Mr Rabson (in his personal capacity) has valid claims against a trust called the Malcolm Rabson Family Trust (the MRFT), which they are entitled to pursue under the assignment.

[5] Mr Rabson and Mr Creser are the current trustees of the MRFT.

[6] The plaintiffs rely on three deeds of acknowledgement signed in 2003 by the then-trustees of the MRFT, in support of a claim that the MRFT then owed Mr Rabson $675,750. The 2003 deeds of acknowledgement are said to represent three separate advances made by Mr Rabson to the trustees of the MRFT, which were made to enable the MRFT to purchase three residential properties. The plaintiffs say that the debts were repayable on demand.

[7] In January and February 2003 Mr Rabson is said to have made further advances to the MRFT, totalling $250,001.16. These advances are also said to have been repayable on demand.

[8] A further deed of acknowledgment of debt was signed by the then-trustees of the MRFT on 29 September 2004. In this deed, the trustees acknowledged their indebtedness to Mr Rabson and to his former de facto partner, Ms Gallagher, in an additional sum of $342,753. That debt is said to be owed by the trustees of the MRFT to Mr Rabson and Ms Gallagher as tenants in common in equal shares. The plaintiffs say that some of this amount has been repaid, but there is a balance of $163,331 still owing by the MRFT to Mr Rabson. This debt is also said to be repayable on demand.

[9] The plaintiffs commenced this court proceeding in December 2013, claiming from Mr Rabson in his capacity as a trustee of the MRFT the total sum of $1,089,082.16 (the total of the amounts referred in paras [6], [7] and [8] above). The plaintiffs also claim interest and costs.

[10] Clearly Mr Rabson as an undischarged bankrupt cannot pay that sum. However as a trustee of the MRFT he is entitled in the ordinary way to be indemnified out of trust assets. The plaintiffs allege that there *are* some assets in the MRFT, namely a debt owed to the MRFT by a trust called the Gallagher Rabson Family Trust (the GRFT).

[11] The third defendant, Mr Chapman, is the sole trustee of the GRFT.

[12] The plaintiffs say that, as at 31 March 2009, the MRFT's financial statements recorded a debt due to it by the GRFT of $2,021,911. The GRFT does not have the money to pay that sum, but as at 11 July 2014, Mr Chapman did hold a fund of approximately $163,000. Subject to the deduction of further costs incurred by Mr Chapman as trustee of the GRFT, and the possibility that claims of other creditors may dilute the amount of the fund available to pay the MRFT, this fund is available to partially satisfy the debt owed by the GRFT to the MRFT.

[13] The plaintiffs say that this fund is the sole remaining asset of the GRFT, and the right to recover (or share in) the fund is the sole remaining asset of the MRFT. They ask for an order that the third defendant pay the fund direct to the plaintiffs.

[14] The plaintiffs do not ask for any order or judgment specifically against the second defendants. The relief they seek is judgment against Mr Rabson as first defendant, and the direction that the third defendant pay the fund to the plaintiffs.

[15] The plaintiffs initially sought summary judgment on their claims, but subsequently abandoned that course. Costs on the dismissal of the plaintiffs' summary judgment application were reserved. However a notice of opposition to the plaintiffs' summary judgment application filed by the second defendants incorporated a (defendants') summary judgment application of their own.

[16] In their application for summary judgment, Mr Rabson and Mr Creser acknowledge that the MRFT is owed a substantial amount of money by the GRFT. But they deny that the MRFT owes any money to Mr Rabson in his personal capacity, saying that the MRFT has made payments to, or arranged payments on

behalf of, Mr Rabson, sufficient to extinguish the debts claimed by the plaintiffs. Mr Rabson and Mr Creser also say that they are entitled to summary judgment on the basis that no relief is sought by the plaintiffs against the first or second defendants.

Defendants' applications for summary judgment – legal principles

[17] Under r 12.2(2) of the High Court Rules, 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.

[18] The Court of Appeal considered the principles applicable on a defendant's application for summary judgment in *Westpac Banking Corporation v M M Kembla NZ Limited*.[1] That case is authority for the following propositions:

(1) A defendant applying for summary judgment has the onus of proving the plaintiff cannot succeed. Usually, summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.

(2) The Court must be satisfied that none of the claims can succeed: it is not enough that they are shown to have weaknesses.

(3) Summary judgment will only be suitable where all the material facts are not in dispute and can be put before the Court efficiently in affidavit form.

(4) The procedure may be inappropriate if the case is likely to turn on a judgment which can only be reached properly after hearing all the evidence at trial.

(5) Developing points of law may require the added context and perspective provided by a full trial.

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[1] *Westpac Banking Corporation v M M Kembla NZ Limited* [2001] 2 NZLR 298; (2000) 14 PRNZ 631 (CA).

The issues to be determined

[19] The following are the issues which fall to be determined:

(1) Are Mr Rabson and Mr Creser entitled to summary judgment on the basis that no relief has been sought against the second defendants?

(2) Have Mr Rabson and Mr Creser shown that they have a complete answer to the plaintiffs' claims, namely that the MRFT does not owe Mr Rabson any money?

Are Mr Rabson and Mr Creser entitled to summary judgment on the basis that no relief has been sought against the second defendants?

[20] I am satisfied that there is no merit in this argument.

[21] The issue is whether the trustees of the MRFT have been properly joined in the proceeding.

[22] The plaintiffs have clearly set out in their statement of claim the amount they say is owed by the trustees of the MRFT to Mr Rabson (and therefore to themselves as assignee of Mr Rabson's claims against the MRFT). And the plaintiffs' statement of claim quite clearly seeks an order that an asset of the MRFT be paid directly to the plaintiffs (the debt owed by the GRFT to the MRFT).

[23] Where the plaintiffs have sought an order directing that the MRFT's sole remaining asset is to be paid to them, I have no difficulty in concluding that relief *has* been sought against the trustees of the MRFT.

[24] Furthermore, it is clear that the trustees of the MRFT are interested parties in the relief sought by the plaintiffs against Mr Rabson as first defendant. If and to the extent that judgment is given against Mr Rabson as first defendant (in his capacity as a trustee of the MRFT), he would normally have a right of indemnity out of the assets of the MRFT. Any such right of indemnity now belongs to the plaintiffs as assignee, and it is appropriate in those circumstances that the current MRFT trustees should be a party to, and bound by, any findings on liability as between Mr Rabson

in his personal capacity and Mr Rabson in his capacity as trustee when the MRFT entered into the transactions described in paras [6] – [8] above. I accept Mr Thompson's submissions that if it is necessary or appropriate that a defendant be bound by an order sought in a court proceeding, even though the order may not directly call on that defendant to do or pay anything, that defendant may be joined as a defendant in the proceeding. [2]

[25] A further point is that the rights of the trustees of the MRFT to recover money from the trustees of the GRFT will clearly be directly affected by any order the court might make on the plaintiffs' claim against the third defendant.

[26] The application for summary judgment based on this ground is dismissed.

Have Mr Rabson and Mr Creser shown that they have a complete answer to the plaintiffs' claims, on the basis that the MRFT does not owe Mr Rabson any money?

[27] In a statement of defence to the plaintiffs' claims, Mr Rabson and Mr Creser admit having received demands totalling $1,089,082.16 as set out in the plaintiffs' statement of claim, and say that "this amount has been fully repaid prior to the demands being made".

[28] The statement of defence filed by Mr Rabson and Mr Creser also pleads affirmatively that the deeds of acknowledgement of debt on which the plaintiffs rely were "incorrectly and negligently prepared by a solicitor who agreed to rectify them and negligently failed to do so." However that was not a ground pleaded by the second defendants in their formal application for summary judgment, and in circumstances where they say they have repaid the amounts in full,[3] the allegations are clearly not suitable for resolution on a defendants' summary judgment application. I note too that the Court of Appeal has held that at least the sums of $675,750 and $163,331 referred to in paras [6] and [8] above *were* owing by the MRFT to Mr Rabson.[4] If the facts underpinning the relevant parts of the Court of

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2 *McKendrick Glass Manufacturing Company Limited v Wilkinson* [1965] NZLR 717 at 724 (SC); *Johnston v Johnston* [1991] 2 NZLR 608 (HC).

3 Second defendant's statement of defence, para [17].

4 *R v G* [2011] NZCA 669.

Appeal judgment are now being challenged (as appeared to be the case at the hearing of the second defendants' application), that is clearly not a matter suitable for resolution (if it is capable of resolution in the second defendants' favour at all) on a defendant's summary judgment application.

[29] The only question, then, is whether Mr Rabson and Mr Creser have shown that they have a complete defence to the plaintiffs' claims based on payment in full of the total $1,089,802.16 pleaded at para [17] of the plaintiffs' statement of claim.

The evidence for the plaintiffs in support of their substantive claim

[30] The evidence for the plaintiffs consisted in substantial part of a report prepared by a forensic accountant, Mr Parsons, on 12 August 2013. The report was requested by the Official Assignee following Mr Rabson's bankruptcy in March of that year. Although Mr Parsons did not give evidence, there was no objection to his report being admitted in evidence.

[31] The Official Assignee asked Mr Parsons for his opinion on whether the deeds of acknowledgment of debt had ever been reflected in the financial statements for the MRFT, and if not, whether there was any argument that the debts owed by the MRFT to Mr Rabson under the deeds of acknowledgement have been repaid. The Official Assignee also asked if anything else contained in the financial statements for the MRFT suggested that the original debt of $675,750 had been repaid in full.

[32] Mr Parsons started with the latest available financial statements for the MRFT, which were the financial statements for the year ended 31 March 2009. He then considered various subsequent judgments given in the High Court and the Court of Appeal in litigation between Mr Rabson and his former partner, to see what adjustments to the MRFT financial statements as at 31 March 2009 were required in the light of the court's judgments.

[33] Mr Parsons concluded that, as at 31 March 2009, Mr Rabson was due a total of $782,531 from the MRFT. That figure was said to be made up of the amounts owing to Mr Rabson under the three deeds of acknowledgement of debt referred to in para [6] of this judgment ($675,750), together with a further sum of $163,331 (as

found by the Court of Appeal in a judgment in the litigation between Mr Rabson and his former partner on 20 December 2011), less the sum of $56,550 which Mr Parsons identified as an advance by the MRFT to Mr Rabson which remained unpaid as at 31 March 2009. Mr Parsons was unable to identify anything suggesting that the original debt owed to Mr Rabson had been paid at 31 March 2009, and he stated that he was not aware of any transactions subsequent to that date which may have reduced the debt owed by MRFT to Mr Rabson.

[34] The Official Assignee wrote to Mr Rabson and Mr Creser within a few days after receiving Mr Parsons' report. She noted that the debts resulting from the three deeds of acknowledgement (the $675,750) had never been reflected in any of the financial statements for the MRFT, and (in accordance with the Court of Appeal decision given on 20 December 2011), should have been included. The Official Assignee also advised that a review of the financial statements for the MRFT for prior years had revealed that the $675,000 had not been reduced as a result of gifting, as had at first been thought. The Official Assignee also noted that on 5 March 2012, Mr Rabson had drawn to Mr Chapman's attention certain further advances he had made to the MRFT, totalling $250,001.16 (the advances referred to in para [7] of this judgment). The Official Assignee made demand for repayment of that sum.

The case put forward by Mr Rabson and Mr Creser

[35] In their written submissions prepared for the hearing on 17 July, Mr Rabson and Mr Creser noted that the claims against them are based upon Mr Parsons' report, which is in turn based on the MRFT financial statements as at 31 March 2009. They then said:

> While these 2009 accounts are not disputed and the forensic analysis undertaken by Mr Parsons is able to be rationalised as a result of the Court of Appeal rulings there is now clear evidence before the court of repayment of monies which means that the amount identified by Mr Parsons as outstanding as at 31 March 2009 is completely cleared.

[36] In his affidavit, Mr Rabson states that there have been numerous payments made by the MRFT to him or at his direction since 31 March 2009. He says that those sums will have been included in the accounts for each year after

31 March 2009.[5] Mr Rabson says that this is the way the accounts were done each year: there was a reckoning, and adjustments were made in the current accounts to reflect payments to or for the benefit of those holding current accounts with the MRFT. Mr Rabson produced a schedule of payments which he says were made by the MRFT to or for his benefit, in the period from 18 May 2009 to 7 March 2012. The total of these payments is $1,439,593.59.

[37] Looking at the schedule produced by Mr Rabson, I note that only 12 of the total 33 entries, totalling $53,222.15, are shown as having been paid directly from the MRFT. The other 21 payments, totalling $1,386,371.40, are shown as having been paid from "Casino".

[38] "Casino" refers to the company Casino Properties Ltd (1101796), now in liquidation. Mr Rabson has been a director and shareholder of Casino.

[39] Mr Creser was appointed as a trustee of the MRFT in 2012. He says that he has reviewed the schedule of payments identified by Mr Rabson as monies paid to him, and can confirm that the payments have been made by the MRFT to Mr Rabson, or for him at his direction.

[40] In a second affidavit sworn on 3 June 2014, Mr Creser provided a copy of a letter sent by the second defendants to the Official Assignee on 30 May 2014. The letter was accompanied by copies of bank statements which were said to support the payments made by the MRFT to Mr Rabson in repayment of his current account.

[41] In a third affidavit, sworn on 3 July 2014, Mr Creser stated that, although most of the payments to Mr Rabson or for his benefit were made from Casino's bank account the funds were "routed through the MRFT", as that was the way all withdrawals were dealt with by the accountants for Mr Rabson's various entities, and it is "sensible and proper to do so". That was because money was said to be owed by Casino to MRFT, and by MRFT to Mr Rabson.

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[5] No accounts for the MRFT for the years after 31 March 2009 were produced. That is said to be because the second defendants have been declined access to information which they say is necessary to complete those accounts.

[42] Mr Creser says that Mr Rabson was at the relevant times a director of the Casino, and was a signatory on company bank accounts as well as being a trustee of the MRFT. He asserted that Mr Rabson was entitled to deal with the assets/money in the way he did.

The plaintiff's evidence in opposition

[43] In his affidavit in opposition, Mr Shephard questions Mr Rabson and Mr Creser's claim that the payments listed in Mr Rabson's schedule represent repayments by the MRFT on the debt owed by it to Mr Rabson. He notes that the full computation of the plaintiffs' claim was not made until August 2013, and that it followed findings of the Court of Appeal which were only made in December 2011. Those findings required significant adjustments in the financial statements of the MRFT, including in respect of current accounts.

[44] In respect of Mr Rabson's schedule of payments and the spreadsheet and bank statements produced by Mr Creser, Mr Shephard notes that three payments shown as having been made to three different lawyers, totalling $26,171.44, were made from the bank account of Casino. He points out that Mr Creser did not provide evidence of the nature and type of work undertaken by these lawyers, so it is not possible to confirm that their work was done for Mr Rabson's benefit.

[45] Mr Shephard also refers to three substantial cash withdrawals made by Mr Rabson from Casino's bank account. Mr Creser says they were made "to Mr Rabson via the MRFT". These were:

(1) $600,000 withdrawn on 13 September 2011;

(2) $350,000 withdrawn on 7 December 2011; and

(3) $350,000 withdrawn on 7 March 2012.

It was not disputed by the second defendants that these withdrawals were made by Mr Rabson.

[46] Following the liquidation of Casino, its liquidators file a proof of debt in the estate of Mr Rabson in a sum which appears to correspond with the total of these three withdrawals. Mr Shephard invites the court to infer that the liquidators, at least, considered that Mr Rabson was liable to refund these monies to Casino. (In his third affidavit, Mr Creser expressed his understanding that the liquidators of Casino have accepted that the withdrawals were made by an authorised person.)

[47] Mr Shephard also produced a copy of the statement of affairs Mr Rabson provided to the Official Assignee in April 2013. In this document, Mr Rabson ticked the "Yes" option in response to the question "Does the trust [i.e. the MRFT] owe you any money?"

Further submissions from Mr Rabson and Mr Creser

[48] Following the hearing, Mr Rabson and Mr Creser submitted a further memorandum. They contended that they had not been served with the plaintiffs' submissions and copies of authorities by 10 July 2014, as the court had directed. In response to that allegation, Mr Thompson provided the Court with a copy of a covering letter dated 9 July 2014 enclosing the plaintiffs' submissions, together with a New Zealand Post courier receipt dated the same day. Mr Thompson pointed out in an email to the Court dated 24 July 2014 that Mr Rabson made no mention at the hearing that he had not received the plaintiffs' written submissions.

[49] I accept that the matter was not raised at all at the hearing by Mr Rabson or Mr Creser. Nevertheless, I have considered the further submissions made by the second defendants on 24 July 2014.

[50] Mr Rabson and Mr Creser repeated the submission that the evidence shows that the way in which the accounts for the MRFT and Mr Rabson's other entities were prepared each year was to treat all drawings used by Mr Rabson (e.g. from Casino) as drawings made by the MRFT to repay advances made by Mr Rabson. They repeated the assertion that Mr Rabson had the authority to withdraw the funds or to make the payments which were made, and submitted that he followed the arrangements approved by his accountancy advisors. They submitted that there is no

requirement to individually record each withdrawal when there has been a customary arrangement approved each financial year.

[51] In respect of Mr Rabson's statement of affairs provided to the Official Assignee, they submitted that Mr Rabson did not know the correct position, and was assisted by the Official Assignee's representatives to complete the statement. As the document was in the form of a declaration, Mr Rabson did not wish to omit any possible claim. They submitted that further investigations now show that nothing is owed by the MRFT to Mr Rabson.

Discussion

[52] Mr Rabson and Mr Creser rely on the Court of Appeal decision in *Westpac Banking Corporation v M M Kembla New Zealand Ltd*.[6] However, I cannot see that that case assists them. The Court of Appeal noted that, except in clear cases such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary judgment procedure the sufficiency of the proof of the plaintiff's claim. That would "permit a defendant, perhaps more in possession of the facts than the plaintiff … to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled".[7]

[53] In this case, it seems to me that the second defendants' argument is entirely dependent upon proof that various payments which were apparently made by Casino direct to Mr Rabson (including $1.3 million in cash) were made:

(1) in the discharge, or partial discharge, of a debt or debts owed by Casino to the MRFT; and

(2) at the MRFT's direction, direct from Casino to Mr Rabson in discharge of the debt owed by the MRFT to Mr Rabson.

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6 *Westpac Banking Corporation v ANZ Banking Group (New Zealand) Limited & M M Kembla New Zealand Ltd*, above n 1.

7 At [63].

[54] But there is nothing in the evidence to explain the nature of the alleged indebtedness of Casino to the MRFT, and nothing in the nature of a minute or other written record of the trustees directing Casino to pay Mr Rabson direct. It may well have been the way Mr Rabson operated his companies and the MRFT over the years, but that does not provide the court with a sufficient basis for finding that Mr Rabson and Mr Creser have a complete defence to the plaintiffs' claims, especially before the plaintiffs have been able to inspect the MRFT documents.

[55] In *Walker v Gibbston Water Services Ltd & Ors*, Mander J noted that the requirements of the Companies Act had "simply been ignored".[8] The learned judge went on to say:[9]

> While the requirement of documenting such steps [the completion of a special resolution under s 129 of the Companies Act approving a major transaction] may at first blush appear to be preferring "form ahead of substance", it is the very fact that an individual may wear different hats within a wider corporate structure that necessitates the required procedural steps to be taken and recorded. On the face of the record the only asset of [Gibbston Water Holdings Ltd] without authority from its owner, FTG, was transferred from it by an interested director…

[56] I accept Mr Rabson and Mr Creser's submission that the factual and legal issues in *Walker* were different from those with which I am concerned in this case, but it remains the case that Mr Rabson was wearing at least three relevant hats in this case (director of Casino, trustee of the MRFT, and creditor of the MRFT), and it may well be important to determine which particular hat he was wearing when he took particular steps. The absence of minutes or other documents formally recording that particular withdrawals or payments from Casino's accounts to Mr Rabson were intended to effect both repayments by Casino to the MRFT, and by the MRFT to Mr Rabson, is an important factor which makes this issue unsuitable for resolution on a summary judgment application.

[57] I take into account also the fact that Mr Rabson picked the "Yes" option in answering the Official Assignee's question as to whether the MRFT owed him any money. While he explained in the second defendants' further submissions that he did that because he was then uncertain of the position, three of the withdrawals from the

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8 *Walker v Gibbston Water Services Ltd & Ors* [2014] NZHC 1638 at [62].
9 At [63].

Casino bank accounts which Mr Rabson made were large enough on their own to have extinguished the debt now claimed by the plaintiffs (with over $200,000 left over), if those withdrawals were in fact payments made by the MRFT to Mr Rabson in satisfaction of the debt it owed to him. It seems improbable that Mr Rabson would have overlooked payments as large as those and the reason he selected the "Yes" option in the statement of affairs form is the sort of issue that can only properly be resolved at a trial.

[58] Finally, I am unable to place much reliance on the evidence of Mr Creser, who only became a trustee of the MRFT in 2012. In respect of events occurring prior to his appointment, which would include nearly all of the repayments said to have been made by the MRFT to Mr Rabson in reduction of the debt, he must have been relying either on what Mr Rabson has told him, or on a perusal of the MRFT's accounting and other records. As to the latter, nothing has been produced apart from copies of a number of bank statements, some of which were illegible. And to the extent that he has been relying on what Mr Rabson has told him, his evidence must be hearsay.

[59] Considering the evidence as a whole, the application falls well short of the necessary standard of proof for a defendant's summary judgment. The summary judgment application is refused accordingly.

[60] The costs of the application are reserved.

Associate Judge Smith

Solicitors:
McMahon Butterworth Thompson, Auckland for plaintiff
M E Rabson in person
R J Creser in person
Buddle Findlay, Wellington for third defendant