EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT QUEENSTOWN

CIV-2014-059-000175
[2016] NZDC 9821

BETWEEN	QUEENSTOWN LAKES DISTRICT COUNCIL Plaintiff
AND	MARK LAWRENCE HILLARY Defendant

Hearing: 31 May 2016

Appearances: G Duff and B Martelli for the Plaintiff
Defendant appears in Person

Judgment: 31 May 2016

ORAL JUDGMENT OF JUDGE M J CALLAGHAN

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[1] This is an application for summary judgment by the Queenstown Lakes District Council against Mark Lawrence Hillary in respect of an agreement to pay $50,000 eight weeks after 13 March 2014 on settlement in respect of a proceeding which was before the High Court for a Weathertight Home type case.

[2] The application is based upon an agreement that was entered into between Mr Hillary and the plaintiff, the Queenstown Lakes District Council, after a letter was sent to Mr Hillary on 7 March 2014. That letter set out that the Council had settled the substantive proceeding and that it had a cross-claim against Mr Hillary, and that that was set for a hearing on 24 March 2014 and, if the hearing proceeded, the Council were going to claim judgment against him for a sum "likely to be in the region of $286,000 (20 percent of the total settlement). In addition, costs and interest would be sought against you". The letter then went on to say that based on the evidence, the Council believed that they would get judgment and it would be in excess of $300,000.

[3] They suggested a settlement being reached by Friday, 7 March, saying that they were prepared to accept $150,000 in full and final settlement of the cross-claim against Mr Hillary.

[4] The letter said at paragraph 9:

> We stress the urgency of this matter. Costs are being incurred on a daily basis and hearing fees are required to be paid to the Court. These costs will be sought from you if settlement cannot be confirmed today.

[5] As a result of receipt of that letter, Mr Hillary, who was at that stage self-represented, engaged Mr Tom Pryde of Cruickshank Pryde, Barristers and Solicitors. Mr Pryde was obviously unable to deal with the matter on that day but at 11.24 pm on 9 March he sent a message to Mr Hillary saying, in effect, that they should meet the following day because there was a pre-trial conference scheduled and "we should talk about the settlement problem".

[6] There then ensued obviously a series of communications between Mr Pryde and the plaintiff's solicitors which resulted on 13 March in an agreement being entered into whereby Mr Hillary and the Council agreed that the sum of $50,000 would be an appropriate settlement.

[7] On Friday, 14 March 2014, at 7.58 am, Mr Pryde wrote to Mr Hillary and said this:

> Hi Mark, you will see from the attached emails that the settlement of all claims against you have now been locked in and agreed as we discussed yesterday. You have agreed to settle no later than eight weeks from yesterday and you will see what David Heeney says in his letter about any default in this. I think that in all the circumstances and given the considerable litigation risks for you and the large unrecoverable costs that you would have incurred with a High Court hearing regardless of whether you were successful there, that is a very good outcome for you. After you have completed payment, the proceedings against you will need to be formally discontinued with a notice of discontinuance to be boiled by the plaintiff's lawyers, I will arrange this at the time when you confirm that you have made payment.

[8] The email went on to talk about another party to the proceedings. It then said:

> Give me a call if you have any queries or want to discuss any aspect. Well done getting this mess behind you. I am sure it will be a great relief.

[9] At 12 noon that day, Mr Hillary sent an email to Mr Pryde saying:

> Thanks Tom. I will make the arrangements for payment. This is to QLDC I assume. Kind regards, Mark, and thanks for your assistance.

[10] What happened subsequent to that was that Mr Hillary then sought some extensions to the eight week period of time and finally in an email said that he was having difficulty raising the $50,000.

[11] The $50,000 was never paid; hence the proceedings for summary judgment on the basis of the agreement reached.

[12] The defendant, Mr Hillary, says that his defence is based on three bases. He says, firstly, that Mr Pryde did not have authority, either actual or ostensible, to act on his behalf. He says, secondly, that he entered into the agreement because of duress and, thirdly, that because of his reference to the Law Reform Act 1936, and in particular s 17(1)(c), that the agreement was unlawful and therefore he should not be liable for payment.

[13] The starting point for a plaintiff's summary judgment is r 12.2 of the Rules which requires the plaintiff to satisfy the Court that the defendant has no defence to any cause of action in any statement of claim or to a particular cause of action. I summarise the general principles which I adopt in relation to this application:

(a) Firstly, commonsense, flexibility, and a sense of justice is required.

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. A Court must be left without any real doubt or uncertainty on the matter.

(c) The Court will not hesitate to decide questions of law where appropriate.

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(e) In determining whether there is a genuine or relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly

contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements or inherently improbable.

(f) In assessing a defence, the Court will look for appropriate particulars and a reasonable level of detailed substantiation.

(g) The defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the notice of opposition. In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters, if the lack of a tenable defence is plain on the material before the Court.

(h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case.

(i) Where a last minute unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.

(j) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the rules which provide for the just, speedy and inexpensive determination of proceedings.

[14] Turning to the defences, the plaintiff says that the agreement that was reached between the defendant and the plaintiff through Mr Pryde was an enforceable agreement, that Mr Pryde had clearly had the authority to act and that is evidenced from the exhibits which are provided to the Court, including the email which I have clearly already put into this judgment.

[15] As to the issue of authority, the defendant says that he did not give Mr Pryde authority although he acknowledged that Mr Pryde was acting for him in respect of the Fryer litigation, which was the name of that litigation, and that he had agreed to the settlement but says it was through duress.

[16] As to the question of whether or not Mr Pryde had any authority, I am satisfied that he clearly had the authority of Mr Hillary to enter into negotiations to try and settle this claim especially in light of the letter that was received on 7 March 2014. I clearly reject the defence that Mr Pryde did not have authority to bind the defendant to an agreement to resolve the litigation that was due to be heard on 24 March.

[17] As to the Law Reform Act claim under s 17(1)(c), that section says:

> Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[18] My interpretation in respect of that section is that the Queenstown Lakes District Council, having settled with the plaintiff who was suing them in respect of the litigation and the fact that they had issued notices of claim against the other defendants was entitled to recover a contribution from any other tortfeasor and Mr Hillary was one of those tortfeasors. There is nothing in the material which has been placed before the Court which would say that there was anything wrong with the fact that they were able to make the claim as they set out in their letter.

[19] Mr Hillary's complaint is that they did not mention s 17(1)(c) Law Reform Act when they made that claim in their letter. There was no responsibility on their part to do so. The fact that Mr Hillary, who told me in submissions today that he was at that stage acting for himself, was unaware of that particular provision of the Act is not a defence to a summary judgment application where he agreed to settle after the letter and after he had received legal advice about the implications of continuing on

in respect of the proceedings. I therefore find that there is no merit in the defence proffered under s 17(1)(c) Law Reform Act 1936.

[20] As to the issue of duress, Mr Hillary's complaint is that he was under a time pressure to settle this issue. He says that he had a paucity of information and that he had to make a decision within a very short space of time based on the letter and the fact that he later learned of material which may well have had benefit to him in defending these proceedings but he did not have that material before him.

[21] As to that defence, I do not believe that he wanted to proceed to litigation and he was more than willing and freely accepted the compromised situation which was negotiated on his behalf by Mr Pryde and that is evidenced by the email which he sent after he had been advised that the settlement had been reached in that he thanked Mr Pryde and also says that he will make arrangements for payment.

[22] When he says that he cannot raise the money within that timeframe period of eight weeks, he again does not assert that he did not want the matter to continue to be settled because he wanted some extensions to the time in respect of which he could pay the money. It is only when the proceedings, in my view, come to the Court for enforcement of the claim that Mr Hillary then makes these claims of duress and of not knowing about s 17(1)(c).

[23] My assessment is, taking a robust approach to the material that is before the Court, that Mr Hillary does not have a defence to the claim that the Queenstown Lakes District Council is entitled to judgment against him in the sum of $50,000 and accordingly the summary judgment procedure is the appropriate procedure for that claim to be made and, accordingly, I will enter judgment for the plaintiff against the defendant for that sum, together with interest and costs.

[24] A memorandum is to be filed in respect of those issues. There will be costs on a 2B basis in respect of these proceedings.

M J Callaghan
District Court Judge