IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CIV-2021-070-000218
[2022] NZDC 1160

BETWEEN	HEARTLAND BANK LIMITED Plaintiff
AND	ATTRI AND SONS LIMITED First Defendant
AND	DEVENDER KUMAR Second Defendant

Hearing: 7 December 2021

Appearances: Mr A W Johnson for the Plaintiff (via AVL)
Ms A Fuiava for the First and Second Defendants (via AVL)

Judgment: 1 February 2022

RESERVED JUDGMENT OF JUDGE D J CLARK

Introduction

[1] On 6 May 2021 His Honour Judge I D R Cameron entered summary judgment against the first and second defendants in the District Court at Tauranga. His Honour's written decision was issued on 10 May 2021[1].

[2] The first and second defendants apply to have the judgment set aside in accordance with Rule 12.14 of the District Court Rules.

[3] The plaintiff opposes the application on the basis that Judge Cameron had an opportunity to consider the proposed opposition of the first and second defendants and

[1] *Heartland Bank Limited v Attri and Sons Limited and Devender Kumar* [2021] NZDC 8364.

having done so, formed the view that the opposition did not amount to an arguable defence for summary judgment purposes. On that basis summary judgment was properly entered and the first and second defendants only option is to appeal Judge Cameron's decision to the High Court. Indeed, an appeal of Judge Cameron's decision has been filed but is stayed pending the determination of this application.

Procedural Background

[4] On 24 February 2021 the plaintiff applied for summary judgment against the first and second defendants. The basis of the summary judgment application related to defaults under loan repayments for a term loan facility between the plaintiff and the first defendant. Mr Kumar as the second defendant is a guarantor under the term loan facility agreement.[2]

[5] The defendants were served on 30 March 2021. The application was listed for its first call in the Civil List in the Tauranga District Court on 6 May 2021.

[6] On 3 May 2021 (three days before the call of the matter in the List) Mr Kumar filed a memorandum on behalf of both defendants, outlining that Mr Kumar had qualified for legal aid, but the application had yet to be determined. On that basis an adjournment was sought. The memorandum filed by Mr Kumar was accompanied by a Notice of Opposition stating generically that the defendants had an "arguable defence".[3]

[7] The matter was called in the Civil List on 6 May 2021. Mr Kumar appeared in person in the Tauranga District Court. Mr Johnson, counsel for the plaintiff appeared by way of telephone and requested that summary judgment should be entered against the defendants in accordance with a memorandum which he had filed on 4 May 2021.[4]

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[2] The term loan agreement is at 301.0001 of the common bundle-CB Vol 3A 301.0001. The guarantee is at CB Vol 3A, 301.0024.
[3] CB Vol 1, 101.009.
[4] CB Vol 1, 101.015.

[8] After hearing from counsel and Mr Kumar, Judge Cameron entered summary judgment in favour of the plaintiff and issued his reserved decision on 10 May 2021.[5] The appeal of Judge Cameron's decision was filed on 2 June 2021 and this application to set aside the summary judgment was filed on 18 June 2021.

[9] The second defendant is in receipt of a grant of legal aid in respect of these proceedings.

Factual Background

[10] In June 2016 the first plaintiff entered into a franchise agreement with Paper Plus NZ to operate a franchise store in Otorohanga. Mr Kumar was a guarantor under the franchise agreement. This was one of several businesses which were purchased by the first defendant, the others being New Zealand Post, Kiwibank, Sports World and a Lotto outlet. All businesses were being run together from the same location but under two leases.

[11] To support the operation of the businesses, the first defendant entered into the term loan facility with the plaintiff for the sum of $270,600. That term loan facility agreement was signed on 7 July 2016. Mr Kumar signed the agreement as a guarantor.

[12] Security in respect of the term loan was by way of a general security deed in favour of the plaintiff.[6]

[13] Initially the businesses operated well. However, issues arose in respect of the Paper Plus franchise, particularly during 2019. Mr Kumar says one of the main reasons for this was that pursuant to the franchise agreement, Paper Plus NZ determined what products were to be supplied and charged for, irrespective of whether the first defendant needed that stock. He deposes that on numerous occasions throughout 2019 he reached out to Paper Plus NZ complaining that the requirement to purchase stock meant that his store was being unnecessarily overstocked. He put

[5] Supra at fn 1. A copy of the Decision is at CB Vol 1, 101.026.
[6] CB Vol 3A, 301.0038.

forward a number of proposals to remedy the situation, all of which were rejected by Paper Plus NZ.[7]

[14] Matters came to a head on 31 December 2019 when Paper Plus NZ issued a notice of demand stating that the first defendant owed Paper Plus the sum of $119,937.29. The notice of demand required payment on or before 21 January 2020.

[15] Mr Kumar says the timing of the issuing of the demand was extremely concerning. He was not able to get any legal advice as law offices were closed. The demand expired, unsatisfied. Two days following the expiry of the demand, receivers from BDO Tauranga were appointed by Paper Plus NZ on 23 January 2020.

[16] Mr Kumar believed, following his initial discussions with the receivers, that the receivership would be relatively short. Through a combination of the existing funds which were held at the commencement of the receivership by the first defendant, as well as an ability to trade through the receivership, Mr Kumar was confident that the debt owed to Paper Plus NZ would be satisfied. Up until that point all obligations owed to the plaintiff were current. Mr Kumar was able to engage legal counsel and communications with the receivers through his lawyers proposing the way forward were made.

[17] Mr Kumar also engaged the assistance of Mr Robert Hucker, an insolvency law specialist in Auckland. Mr Hucker wrote several letters to the receivers and the plaintiff seeking information relating to the status of the receivership, stocktaking values and the relationship between the plaintiff and the receivers. One of the principal concerns of Mr Hucker, on behalf of the defendants, was that the receivers were acting as the agents of the plaintiff and any losses associated with the actions of the receivers could be attributed back to the plaintiff. Those losses could impact on what was owed to the plaintiff.

[18] The receivership was not concluded in the short period initially thought by Mr Kumar. Instead the Paper Plus business continued to be operated and was sold as a going concern in August of 2020 for the sum of $104,286.01. Stock from the

[7] Paras 16 to 18 affidavit of Mr Kumar CB Vol 2 201.009.

remaining businesses were also sold via auctions or allegedly given away. From the sales proceeds of the business and stock the plaintiff was paid a combined total of $51,700.[8] A demand from the plaintiff was received by the defendants on 3 November 2020 for the sum then remaining of $67,969.69.

[19] Mr Kumar expresses significant concern over the way in which the receivership progressed. This included the way the businesses were operated by the receivers, the fees which were charged by them and the manner in which the assets of the business were dealt with and ultimately sold. He is of the view that all of the assets/business were sold at a gross undervalue resulting in a shortfall in the amounts owing to the plaintiff and Paper Plus NZ.

[20] Mr Kumar also argues that the plaintiff failed to take control of the receivership given the priority security it held. In any event he says that because of the plaintiff's dealings with the receivers, the receivers were acting as the plaintiff's agents. As such, the losses attributable to sale of the business assets can be set off against what is claimed by the plaintiff.

The Proceedings Issued by Heartland Bank and Steps Taken by the Defendants

[21] As noted, summary judgment proceedings were issued by the plaintiff against the defendants for the recovery of the outstanding amount. Following the service of the proceedings on the defendants on 30 March 2021, Mr Kumar approached Mr Hucker who then referred him to his current lawyers Denham Bramwell. Denham Bramwell were able to accept civil legal aid instructions.

[22] An application for legal aid was made on 9 April 2021. On 23 April 2021 Mr Kumar received confirmation that Legal Aid was considering the application and would advise him in due course of the outcome.

[23] With the proceedings being called in the Tauranga District Court on 6 May 2021, the defendants lawyers requested that the plaintiff (through their lawyers) agree to an adjournment of the first call given the delay in receiving confirmation of the legal

[8] Paras 43 and 49 Mr Kumar's affidavit.

aid grant. The plaintiff declined to agree to the adjournment and Mr Johnson for the plaintiff filed his memorandum on 4 May 2021 seeking judgment.

The Decision of His Honour Judge Cameron

[24] In his judgment, Judge Cameron identified the steps which had been taken by the defendants, both in respect of the filing of the Notice of Opposition (albeit out of time), as well as the background steps in relation to Mr Kumar's application to obtain legal aid. Judge Cameron also noted a letter from Denham Bramwell dated 5 May 2021 which Mr Kumar handed to him in Court. The letter confirmed legal aid had been sought and was being processed. The letter also stated that in the view of the defendants' lawyers, an arguable defence to the claim (together with the possibility of a counterclaim) existed. No details were provided in the letter as what the opposition was.

[25] Judge Cameron then proceeded to inquire of Mr Kumar what the nature of the opposition was. I set out the relevant paragraphs from the judgment as follows:[9]

> [6] I inquired of Mr Kumar what the nature of the defence was. He advised the Court that his company, the first defendant, had been placed into receivership by Paper Plus on 23 January 2020. The chartered accountants BDO were appointed. The Court was advised that the receivership terminated on 30 March 2021. It became apparent from what Mr Kumar told the Court that he considered that the receivers had sold the company assets for gross undervalue. I advised him that this would not affect the validity of the loan from the plaintiff bank, and at best would be a separate claim against the receivers. Mr Kumar also advised that the creditor Paper Plus had wrongly sought the appointment of the receivers. Again, Mr Kumar was advised that this would have no effect on the validity of the loan from the plaintiff.
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> [7] Mr Kumar was unable to identify any defence to the claim by the plaintiff for repayment of the money lent. Nor was there anything in the letter from Denham Bramwell dated 5 May 2021 they have identified any defence to the plaintiff's claim.
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> [8] I am satisfied that there was no arguable defence to the plaintiff's claim and for this reason entered summary judgment against both defendants.

[9] *Heartland Bank Limited v Attri and Sons Limited and Devender Kumar* [2021] NZDC 8364 at paras [6], [7] and [8].

Issues and Submissions

[26] The defendants have applied, pursuant to Rule 12.14 to set aside Judge Cameron's judgment. District Court Rule 12.14 states:

> **12.14 Setting aside judgment**
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> A judgment given against a party who does not appear at the hearing of an application for judgment under rule 12.2 or 12.3 may be set aside or varied by the court on any terms it thinks just if it appears to the court that there has been, or may have been, a miscarriage of justice.

[27] The criteria to set aside under the Rule then is a two-step process. Firstly, an assessment as to whether an "appearance" was made when the matter was called at the hearing and, secondly, whether a miscarriage of justice has occurred, justifying the setting aside of the judgment. The first step determines whether the District Court has the jurisdiction to set aside the judgment.

[28] Ms Fuiava argues that "no appearance" was made by or on behalf of the defendants when the matter was called in front of Judge Cameron. She argues that the Mr Kumar's appearance in Court on 6 May 2020 was for one purpose only, namely, to obtain an adjournment while a determination of his legal aid grant was being made. In support of her submission Ms Fuiava refers to the decision of the full Court of the High Court in *R P Stainton v King House Removals (Southland) Limited.*[10] This case was an appeal from the District Court and heard by Hansen and Pankhurst JJ.

[29] In *Stainton* Mr Stainton's counsel appeared in the District Court when the matter was called but had not filed a Notice of Opposition until the day before the hearing. No supporting affidavit was filed as, at that stage, counsel had not received sufficient instructions to do so. Leave was sought to allow the Notice of Opposition to be filed late and, an affidavit out of time. Judge Green in the District Court declined leave and entered judgment.

[30] An application to set aside the judgment was made. Judge Doherty found that Mr Stainton did not "appear" which gave him the jurisdiction to move to the second

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[10] *R P Stainton v King House Removals (Southland) Limited* (1999) 13 PRNZ 202.

step. His Honour held that a defence sufficient for summary judgment purposes was not made out and dismissed the application.

[31] Both Mr Stainton and King House Removals (Southland) Limited (King) appealed, King against the first decision and Mr Stainton against the second. A full Court was convened given the number of conflicting authorities concerning (the then) Rule 165 of the District Court Rules.

[32] In terms of whether an appearance was made, Hansen and Pankhurst JJ preferred the approach of Williams J in *Rothwell v Mawhinney*,[11] where His Honour stated:

> … the party could hardly be said to have appeared on an application for summary judgment when the Court had no ability to assess whether or not there was an arguable defence.

[33] Hansen and Pankhurst JJ held a distinction was made between appearing on the summary judgment application itself and, appearing for a lesser ancillary purpose such as an application for an adjournment. Any appearance on the ancillary purpose (the adjournment) provided the Court with the jurisdiction to set aside. Their Honours found:[12]

> … the appearance was an attempt to obtain leave from the Court to file documentation in opposition, out of time and to be viewed. Judge Green refused that, and in those circumstances, we do not think it can be said that the defendant "appeared" at the summary judgment hearing.

[34] Acknowledging then that while a physical appearance was made its purpose was to support an application to obtain leave to appear on the summary judgment application and it was this application which was refused. Ms Fuiava argues the same position arises in this case.

[35] Mr Johnson for the plaintiff argues to the contrary. He says there was not only a physical appearance by and on behalf of both defendants, and while accepting there was an application for an adjournment of the summary judgment proceeding, Judge Cameron went further and inquired into the nature and merits of the proposed

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[11] *Rothwell v Mawhinney* [1998] 2 NZLR 87.
[12] Supra at p 11.

opposition. In doing so, and after hearing from Mr Kumar, Judge Cameron reached the conclusion that an opposition sufficient for summary judgment purposes had not been made out and entered summary judgment. On that basis, not only an appearance was made by and on behalf of the defendants, the merits of any potential opposition were also considered and rejected.

[36] Mr Johnson goes further and says that in any event, even now that the Notice of Opposition has been properly articulated, together with a supporting affidavit, which formulates the basis of the application to set aside, none of what has been disclosed establishes that there has been a miscarriage of justice. In the circumstances, the decision to enter summary judgment should remain.

Discussion

[37] Since the decision of *King House Removals (Southland) Limited* the Court of Appeal has also considered the issue of setting aside a summary judgment in the case of *Erwood v Glasgow Harley*.[13] The Court endorsed what was held in *Rothwell v Mawhinney* and *Stainton,* although overruled both cases in part:

> [35] Where however we depart from these two decisions is in their formulation or endorsement of the proposition that for a party to have appeared under r 143 (or r 165) it must have done so to such an extent that the Court ordering judgment had been able to assess whether or not an arguable defence was available. This approach puts a gloss on the language of r 143 that requires an assessment of the quality and scope of submissions in opposition which neither the language of r 143, nor the purpose of the summary judgment procedure, supports. To follow it would frustrate the purpose of the summary judgment procedure which is concerned with providing a speedy means by which a plaintiff can obtain a judgment against a defendant who proffers no arguable defence.
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> [36] In the present case the appellant filed a notice of opposition and an affidavit in support. He was entitled to and did appear on the day before the Master at the time scheduled for the hearing of the application. In our view he must be taken to have prepared and that is not negated by his disabilities. These did not impede him from expressing his opposition to summary judgment in his documents and supporting his position at the hearing.

[38] In *Erwood* a concession had been made by counsel for the plaintiff that an appearance had not been made by Mr Erwood in the High Court and despite what the

[13] *Erwood v Glasgow Harley* [2002] 1 NZLR 251.

Court held above, proceeded to assess the merits of whether a miscarriage of justice occurred.[14]

[39] It is clear that in terms of the authority of *Erwood,* an appearance may not occur if leave is sought for a lesser ancillary purpose (such as applying for an adjournment) which is refused. However, an appearance will be made on the summary judgment where a defendant has the right to appear or, leave is granted to appear. An "appearance" will occur even if an assessment of the whether there is an arguable defence or not has been made by the Court.

[40] What then did Judge Cameron do in this case? Mr Kumar had filed his notice of opposition late (three days instead of three working days) and needed leave to be heard. He clearly was granted leave as His Honour heard from Mr Kumar and considered the merits of the proposed defence. In doing so, he reached the decision that no arguable opposition was available. Because of that conclusion, Judge Cameron refused the application for the adjournment, but only because he considered that no defence was available.

[41] It is possible that Judge Cameron may have reached a different conclusion if he had had the same information in front of him that is now before the Court. However, he was entitled to deal with the matter based on what material was before him at the time, including what he was told by Mr Kumar. Having heard from Mr Kumar on the merits of his proposed defence, an appearance, for the purposes of Rule 12.14 was made.

[42] Given that I have found that an appearance by and on behalf of the defendants was made, it follows that I do not have the jurisdiction to set aside the judgment of Judge Cameron's. A consideration then of the merits of any proposed defence by the defendants is unnecessary. In saying that however, an opportunity to test the merits of their opposition will be dealt with on appeal.

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[14] Ibid at [37]. The Court held that a miscarriage of justice did not occur.

Result

[43] The application to set aside judgment is declined. I reserve the issue costs pending the outcome of the appeal in the High Court.

Signed at Auckland this 1st day of February 2022 at 2.15 pm

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Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 01/02/2022