IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2014-470-053
[2014] NZHC 2542

UNDER	the District Courts Act 1947 and the Judicature (High Court Rules) Amendment Act 2008
IN THE MATTER	of an appeal against a decision of the District Court at Tauranga
BETWEEN	SHANE ROGER THOMAS AND KMA GROUP LTD Appellants
AND	EQUIPMENT FINANCE LTD Respondent

Hearing: 21 July 2014 (at Hamilton)

Counsel: NC King for Appellants
SM Dwight for Respondent

Judgment: 16 October 2014

JUDGMENT OF BREWER J

This judgment was delivered by me on 16 October 2014 at 11:00 am pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors: Bell and Graham (Matamata) for Appellants
Cavell Leitch (Christchurch) for Respondent

Introduction

[1] This judgment determines appeals against a reserved judgment of Judge PR Spiller delivered on 6 March 2014 and against the subsequent costs judgment delivered on 2 April 2014.

Background

[2] KMA Group Ltd ("KMA") had a business that included printing sportswear and sports uniforms. It needed specialised equipment for that and approached Equipment Finance Ltd ("EFL") for finance.

[3] In 2004, EFL financed the purchase of a Roland Soljet S2-270 machine ("the Roland Soljet") through a lease to own agreement with KMA. KMA's obligations were guaranteed by Mr Thomas.

[4] In 2005, EFL lent KMA $33,750 on the security of a Metalnoz Sublimation Press ("the Metalnoz Press") and a Sars Simplex screen print machine ("the Sars Simplex"). KMA's obligations were again guaranteed by Mr Thomas.

[5] KMA's business did not prosper. It defaulted under its contracts with EFL. It then approached Data Vision Ltd ("DVL"), a specialist dealer in used printing equipment, to sell the three machines. DVL agreed and, in 2007, took possession of them, plus ancillary equipment, for that purpose. Shortly afterwards EFL took possession of the machines as it was entitled to do under its contracts with KMA. However, EFL left the machines with DVL to sell.

[6] Eventually the machines were sold. In 2008, the Roland Soljet and some of the ancillary equipment fetched $20,000 plus GST. In 2010, the Sars Simplex and some ancillary equipment sold for $4,000 plus GST. In 2011, the Metalnoz Press was sold for $7,000 plus GST.

[7] The sales of the machines did not recover what EFL was owed under either of its contracts with KMA, so it sued Mr Thomas on his guarantees.

[8] The first proceeding claimed $9,760.99 on the agreement relating to the Roland Soljet (707 proceeding).[1] The second proceeding claimed $19,733.53 and was in respect of the loan of $33,750 (717 proceeding).

[9] KMA retaliated by suing EFL for $78,000 (3451 proceeding).

[10] The three proceedings were consolidated and heard by Judge Spiller together. The Judge:

(a) Dismissed EFL's claim in the 707 proceeding. He found that EFL did not discharge its duty to sell the Roland Soljet for a reasonable price, and that the undervalue equated to the amount of EFL's claim, thus cancelling it out.

(b) Allowed EFL's claim in the 717 proceeding. He found that EFL had discharged its duty to obtain reasonable prices.

(c) Dismissed KMA's claim in the 3451 proceeding.

(d) Awarded costs to the successful parties in each proceeding.

[11] Mr Thomas contends:

(a) The Judge, in dismissing EFL's claim in the 707 proceeding, erred in finding that the undervalue of the Roland Soljet equated to the sum EFL was claiming. He should have found that the undervalue exceeded EFL's claim.

(b) The Judge erred in allowing EFL's claim in the 717 proceeding because he should not have found that EFL discharged its duty to obtain reasonable prices. Further, once the undervalue is recognised, and combined with the undervalue that should have been identified in the 707 proceeding, the amount claimed by EFL is cancelled out.

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[1] I will refer to each proceeding using the suffix of its District Court CIV number.

(c) The Judge should have given him higher costs in the 707 proceeding and imposed lower costs in the 717 proceeding.

[12] KMA contends that the Judge was wrong to find against it because he should have held that EFL failed to discharge its duty to obtain reasonable prices. Accordingly, the Judge's award of costs must be set aside.

Issues

[13] I take the issues to be:

(a) Was the Judge correct to equate the undervalue identified in the 707 proceeding with the sum claimed in the proceeding by EFL?

(b) Was the Judge wrong to have held that EFL discharged its duty to sell for reasonable prices and accordingly wrong to have allowed EFL's claim in the 717 proceeding?

(c) Was the Judge wrong to hold in the 3451 proceeding that EFL discharged its duty to sell for reasonable prices?

(d) Are the Judge's awards of costs appropriate?

Was the Judge correct to equate the undervalue identified in the 707 proceeding with the sum claimed in the proceeding by EFL?

[14] This issue arises from the value the Judge attributed to an agreement KMA had entered into with a Chinese company for the sale of the Roland Soljet for US$25,000. The Judge, so it was submitted, used a conversion rate that was higher than that which pertained at the date the contract would have been settled. Mr King submits that the Judge should have allowed a further $10,000 credit, and had he done so this amount could have been used by KMA to reduce its liability.

[15] The problem with this submission is that KMA was not a party to the 707 proceeding. It was Mr Thomas who was sued. The claim against Mr Thomas was dismissed and so he has nothing to appeal. The law is clear that an appeal does not

lie against intermediate findings of fact where the outcome of the trial is not at challenge.

[16] In *Arbuthnot v Chief Executive of the Department of Work and Income*, the Supreme Court observed:[2]

> [25] It is fundamental that an appeal must be against the result to which a decision-maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decisionmaker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision-maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

[17] I would have found, in any event, that the Judge overvalued the Chinese contract. It was not a simple agreement for sale and purchase. There was a business relationship to be established and continued, with a penalty clause that could have reduced the price considerably. There was no evidence that the contract was going to be put into effect.

[18] On the basis that the outcome of the 707 proceeding is not under appeal, I find that the Judge's decision must stand.

Was the Judge wrong to have held that EFL discharged its duty to sell for reasonable prices and accordingly wrong to have allowed EFL's claim in the 717 proceeding?

[19] The basis of the appeal on this issue is a submission that the Judge incorrectly put the onus on Mr Thomas to prove that the machines were not sold at the best price. In Mr King's submission, the onus was on EFL to prove that the machines were sold at the best price reasonably obtainable. He cites s 110 of the Personal Property Securities Act 1999 ("PPSA") as imposing the duty on a secured party to do just that.

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2 *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 (SC) see also *Amalgamated Builders Ltd v Nile Holdings Ltd* (2000) 14 PRNZ 652 (CA) and *Caie v Attorney-General* [2006] NZAR 379 (CA) at [6].

[20] The Judge was faced with a situation where specialised machinery had been placed for sale with a dealer in such machinery. It was the same dealer to which KMA had entrusted the machinery. The dealer took steps to publicise his possession of the machinery for sale and, where he could, gave estimates of what the machines might fetch. By and large, the dealer's estimates proved reasonably accurate.

[21] It took years for the Sars Simplex and the Metalnoz Press to sell. The price for the Metalnoz Press was disappointing. No doubt that was a reflection of the market. I have considered the evidence and there are none of the indicators of shoddy or hasty sales practices which have caused Judges in other cases to find that goods sold as collateral for debts were sold at an undervalue. I note particularly that the duty under s 110 of the PPSA to obtain the best price reasonably obtainable is directed to the time of sale. There was evidence that second-hand printing machinery has a high depreciation rate.

[22] On the evidence before him, the Judge was entitled to find that EFL took reasonable and appropriate steps to discharge its obligations under s 110. The Judge did not put an onus on KMA to prove that the machines had been sold at an undervalue. What the Judge did was note the absence of independent evidence from KMA or Mr Thomas which would have challenged the reasonableness of the steps taken by EFL and the prices obtained ultimately for the machines. That is not a reversal of onus.

[23] I decide this issue in favour of EFL.

Was the Judge wrong to hold in the 3451 proceeding that EFL discharged its duty to sell for reasonable prices?

[24] In the 3451 proceeding, KMA sued EFL for $78,000. The causes of action are unclear. But what is clear is that KMA maintained that EFL sold the machinery for less than was reasonably obtainable.

[25] The notice of claim showed the calculation of loss as:

Roland Soljet:	$20,000

Metalnoz Press:	$20,000
Sars Simplex:	$20,000
Ancillary equipment:	$18,000

[26] The machines were sold with ancillary equipment which was not subject to a security. However, KMA failed to prove ownership of the ancillary equipment and failed to prove, in any event, what it was worth. I concur with the Judge's findings in these respects and I do not understand that Mr King challenges the findings in this appeal. I put the matter of the ancillary equipment to one side.

[27] Mr King repeats on this appeal on behalf of KMA the same arguments he made for Mr Thomas on his 717 appeal. For the reasons I have just given, this part of the appeal does not succeed.

[28] However, there is a further argument in respect of the sale of the Roland Soljet. Mr King makes the point that the Judge, in the 707 case, found an undervalue which equated to the $9,760.99 for which Mr Thomas was sued. Therefore, the Judge should have allowed KMA's claim to at least that amount.

[29] Ms Dwight's approach to the appeal is that the Judge's decision should be upheld because KMA's claim was not pleaded under the PPSA. Instead, it was based upon theories of misconduct on the part of EFL and DVL. The onus was on KMA to prove its loss, and it failed to do so.

[30] The Judge addressed the Roland Soljet part of the claim as follows:[3]

> First, I refer to the reasons given above for my finding that the loss relating to the sale of the Roland printer should be confined to the balance of the debt due and my finding that the claim for the debt due under the loan agreement should be upheld.

[31] With respect to the Judge, this dicta does not recognise that the very decision that there is a loss equivalent to the debt requires the amount of the loss to be credited to the account of the company (KMA) which suffered it.

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[3] *Equipment Finance Ltd v Thomas* DC Tauranga CIV-2011-070-717, 6 March 2014, at [26].

[32] Ms Dwight's point that breach of the s 110 PPSA duty was not pleaded is difficult to make out given the somewhat imprecise nature of the form of proceedings in the District Court at the time (notice of claim, responses by defendant, information capsules etc). I note that in section 3 of the notice of claim under "3B Details of the duty the defendant owes the plaintiff", the following was inserted:

> 1. To abide by current legislation in accounting for the sale of any property and obtaining the best possible price for such property.
>
> 2. An equitable duty of care to the plaintiff in the dealing with such property to obtain and account for any sale in mitigation of loss.

[33] In the next section of the notice of claim ("3C What happened that led to this claim"), KMA specifically asserted that KMA had a buyer for the Roland Soljet for $34,000 and that EFL refused to sell to that buyer but instead later sold the machine for a lesser price.

[34] In the next section of the notice of claim ("3D Facts showing why the defendant should pay or give what is being claimed") appears the following:

> 2. The 1st and 2nd defendants must ensure that every aspect of the sale, including the manner, time, place and terms is commercially reasonable and in particular must use all reasonable efforts to obtain the best price.

[35] It was then asserted that KMA had failed to do this.

[36] It is true, as Ms Dwight submits, that the legal reference given is to the Credit Repossession Act 1997. That was an error since that Act could not apply to a commercial lending situation. However, I am in no doubt that the notice of claim put KMA on notice that it was being challenged on the appropriateness of its sale process and it was alleged, in particular, that the Roland Soljet was sold at an undervalue with reference to the agreement to sell which KMA had entered into with the Chinese company.

[37] I find that the Judge should have given KMA the benefit of his decision that the Roland Soljet had been sold at an undervalue.

[38] That is not the end of the appeal. This is a general appeal from the District Court and I am required to reach my own view. The Supreme Court in *Austin Nichols* held:[4]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is in error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[39] The Supreme Court further notes that the appeal court must be persuaded that the decision is wrong, but in reaching that view no 'deference' is required beyond the 'customary' caution appropriate when seeing the witnesses provides an advantage.[5]

[40] As I have already alluded, I disagree with the Judge's treatment of the contract KMA had arranged with the Chinese company. The purchase price of US$25,000 cannot be used as an expression of the value of the Roland Soljet at that time. I have referred already to aspects of the contract which preclude that. On the evidence, it is not even more likely than not that the contract would have been given effect. In any event, KMA would have had to have remained in business and purchased 13,800 garments from the Chinese buyer over a 12 month period. A shortfall in the number of garments would bring a penalty of $2 for each garment short. There was no evidence on these points.

[41] In my view, the Judge should have disregarded the contract and instead looked at the actions taken by EFL to achieve the best price reasonably obtainable at the time of sale. He would then have held, as he did, for the 717 proceeding, that EFL complied with its obligations.

[42] I answer this issue in favour of EFL.

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4 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
5 At [13].

Are the Judge's awards of costs appropriate?

[43] A costs award is an exercise of a discretion. Therefore, in order to successfully appeal a costs decision it must be shown that the Judge was wrong in principle, took into account irrelevant considerations, failed to take into account relevant ones, or was plainly wrong. Judge Spiller was correct to award costs to the respective successful parties in the 707, 717 and 3451 proceedings. A fundamental principle applying to the determination of costs in all the general courts in New Zealand is that costs follow the event. In awarding costs, Judge Spiller was not wrong in principle, nor did the Judge take into account irrelevant considerations or fail to take into account relevant ones. Nor was he plainly wrong.

[44] In regard to the reduced costs for Mr Thomas, the appellants take issue that the Judge failed to give reasons. There is no general duty on Judges to give reasons for costs orders. As the Supreme Court said in *Manukau Golf v Shoye Venture*:[6]

> We wish to make clear a court does not have to give reasons for costs orders where it is simply applying the fundamental principle that costs follow the event and the costs awarded are within the normal range applicable to that court.

[45] Judge Spiller gave costs to Mr Thomas up until the claim was transferred by Judge Ingram to the Disputes Tribunal. Mr Thomas failed to attend three separate hearings of the Disputes Tribunal in May, August and October 2012. It was only when KMA then filed its 3451 proceeding that, by agreement, the claim was transferred back to the District Court. The District Court Rules allow a Judge to take into account a party's unnecessary contribution to the time or expense of the proceeding and any other reason that justifies reducing costs.[7]

[46] I consider Judge Spiller did not err by not awarding costs from the point at which Mr Thomas failed to attend the Disputes Tribunal hearings, any one of which could have resolved the claims without requiring the District Court's renewed involvement.

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6 *Manukau Golf v Shoye Venture* [2012] NZSC 109, [2013] 1 NZLR 305 at [16].
7 District Court Rules 2009, r 4.7.

Decision

[47] The appeals are dismissed.

[48] EFL is entitled to costs against each appellant. I award these on a 2B basis. They may be calculated by the Registrar.

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Brewer J