IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP 57/00

BETWEEN **SHARON JUDITH HUSSEY**

Plaintiff

AND **THE NATIONAL BANK OF NEW ZEALAND LTD**

First Defendant

513

AND **ANDERSON LLOYD**

Second Defendant

NOT RECOMMENDED

Date of Hearing: 16 May 2001

Judgment Released: 18 May 2001

Counsel: Plaintiff appears in person
D Chan for First Defendant
R S Cunliffe for Second Defendant

JUDGMENT OF MASTER VENNING
On Defendants' Applications For Summary Judgment/To Strike Out

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Solicitors:
Rudd Watts & Stone, Wellington for First Defendant
Buddle Findlay, Auckland for Second Defendant
Cc:
Ms Hussey, PO Box 1066, Princes St, Dunedin

[1] The Defendants both seek summary judgment against the Plaintiff, or in the alternative orders that the Plaintiff's claim against them be struck out.

BACKGROUND

[2] At all material times the Plaintiff was a customer of the First Defendant bank. She was never a client of the Second Defendant solicitors.

[3] On 30 October 1992 the Plaintiff then trading as the Coastal Observer Publishing House completed a mandate form. It requested the bank to open an account for her business. At that time the bank also agreed to provide the Plaintiff with a personal loan of $49,000.

[4] To secure the borrowing the Plaintiff executed a memorandum of mortgage in favour of the bank as first mortgagee. The mortgage was registered against a property owned by the Plaintiff at 940 Brighton Road, Brighton, Dunedin. A loan repayment insurance policy was also taken out by the bank.

[5] Over the next two years the borrowing was increased. In January 1993 it was increased to $66,000 and in April 1994 it was increased further to $80,800. The Plaintiff's borrowing was restructured in April 1994 as a home loan of $68,800 and a personal loan of $12,000.

[6] To support the additional borrowing a valuation of the property at Brighton was obtained from valuers Brendon Burns & Partners. On 30 September 1993 they reported that the estimated completed value of the property was $86,000. In their valuation summary the property was noted as:

> "A compact dwelling renovated and extended to a high standard, in a stable locality enjoying expansive views of the Pacific Ocean."

[7] In October 1993 the same valuer reinspected the property and valued it at $96,000, taking into account the additional work that had been carried out on the property and on the assumption that certain further work would be completed.

[8] In addition to the home and personal loans granted by the bank to the Plaintiff, the Plaintiff also operated a cheque account for the Coastal Observer Publishing House business with an overdraft limit of $2,000 (the business account).

[9] On 31 March 1995 the bank made a further agreement with the Plaintiff regarding the overdraft facility on the business account. The overdraft facility was increased to $3,000 on a temporary basis. The letter of 31 March setting out the overdraft increase recorded the bank required the overdraft to be reduced by a minimum of $500 per month from that $3,000 limit, so that by May it was to be reduced to $2,500, $2,000 by June, $1,500 by July, $1,000 by August, $500 by September and cleared by October 1995. The bank advised:

> "The Bank also requires that your account operates within the appropriate facility at all times. Failure to do so will result in dishonour of cheques and default in your loan repayments together with further action for recovery by the Bank."

[10] The Plaintiff was unable to keep to that arrangement. She met with a bank officer on 5 July 1995. At that time the account was still overdrawn by $2,568 when in accordance with the 31 March agreement it ought to have been reduced to $1,500. The bank diary note records that Ms Hussey advised she had $2,500 due within eight days and that she would lodge $1,068 to clear the excess. The bank diary note also records:

> "Advised Sharon that no further extensions or variations will be entertained by the bank.
> Advised that if funds not to hand as promised the bank will seek full repayment of all debt.
> Letter sent in confirmation and diarised to follow through."

[11] In fact the bank did not send a letter confirming that an extension of eight days would be provided for the Plaintiff to bring the account within the agreed overdraft limit. Instead it appears that on 6 July the bank received advice that another creditor was pursuing the Plaintiff. The bank then wrote to the Plaintiff on 10 July in the following terms:

> "Further to our recent discussions, your cheque account is presently $2,760-27 overdrawn against the agreed limit of $1,500 which is reducing at $500-00 per month.

> Since our discussions, we believe that it is possible that other creditors may take action against you and therefore the bank is no longer prepared to grant extension of time.
>
> Due to insufficient funds in your cheque account, your loan repayments are now in default and we find it necessary to enclose our formal demand.
>
> Unless the debt is repaid within 14 days from the date of demand, then I will have no alternative but to make an appropriate recommendation to my Corporate Headquarters regarding the collection of the debt."

Enclosed with the letter was a letter of demand seeking repayment of the sum of $81,832.98 being the sum then due and owing under the two loan accounts with the bank.

[12] The Plaintiff failed to answer the demand. By letter of 27 July 1995 the bank instructed the Second Defendant firm of solicitors to issue a s92 Property Law Act Notice, to seek an increased priority from the Plaintiff under the mortgage (then at $60,000) and to seek a market appraisal of the property from an independent party.

[13] The Plaintiff did not answer the demand in the s92 Property Law Act Notice. Fisken & Associates valued the property in October 1995 at between $58,000 and $68,000. It recommended that in the event of a mortgagee sale the property would be best sold by way of tender process. The bank proceeded to mortgagee sale by way of tender. Tenders closed on 18 December 1995. The highest tender received was $12,500. The bank did not accept the tender.

[14] The position was unsatisfactory both from the bank's and the Plaintiff's point of view. In January 1996 they entered a fresh agreement. The agreement was recorded in a letter of 16 January 1996. It recorded the outstanding balances under the existing loan accounts on loan 1001(the home loan) $74,454.41, loan 1002 (the personal account) $11,410.34, and Coastal Observer Publishing Account (overdrawn) $2,340.34. The bank recorded that loan 1001 was to be repaid by weekly payments of $148.78 and loan 1002 by weekly payments of $38.74. The Plaintiff agreed to pay $250 per week into her cheque account to meet those payments. The surplus was to clear the arrears outstanding on the loans.

[15] In May 1996 the Plaintiff wrote to the bank and advised she was then on the Domestic Purposes Benefit and she proposed to pay the $250 per week by $130 from rental for the property at Brighton, with the balance $120 paid from the Domestic Purposes Benefit on a fortnightly basis of $240. She sought time to "pick up the pieces". The bank acknowledged the letter and noted that at that time the outstanding debts were:

- loan 1001 $70,555.44 (including arrears of $3,182.16),
- loan 1002 $11,201.47 (including arrears of $833.18);
- The Coastal Observer Publishing House account was still overdrawn by $2,087.95.

The bank indicated it was prepared to give her until 28 June 1996 to "pick up the pieces".

[16] The situation did not improve. On 17 December 1996 the bank noted that the arrears under loan 1001 had increased to $6,159.84 and under loan 1002 to $1,321.88. The arrears related to defaults by the Plaintiff from July 1995. The bank made demand for repayment. The bank issued a further Property Law Act Notice.

[17] Upon receipt of the Property Law Act Notice the Plaintiff again contacted the bank and sought further time to repay. She and the bank continued to discuss the situation during February 1997. On 26 February 1997 the bank made a further agreement with the Plaintiff that she would pay the outstanding loan arrears by making a payment of $310 per week to the bank. That payment was to be applied $190 towards the payment of ongoing loan instalments and $120 towards loan arrears.

[18] The bank noted that the agreement was in the following terms:

> "1. That should there be one default under the arrangement then the same will be at an end and no further arrangements will be entered into.
>
> 2. That the arrangement is entered into without prejudice to the bank's rights under the Default Notice dated 14 January 1997 due to expire on 10 March 1997. If any default occurs under the above arrangement then it will not be necessary for the bank to

> reissue a further Default Notice and the bank will proceed with the sale of your properties under the above Notice.
>
> 3. If the Dunedin City Council makes demand on the bank for the rate arrears presently owing then the repayment arrangement will be at an end."

[19] The last weekly payment received pursuant to that agreement was received by the bank on 17 March 1997. No further payments were made.

[20] On 17 April 1997 the bank wrote and advised the Plaintiff that the arrangement was at an end and the bank had instructed solicitors to proceed with a mortgagee sale.

[21] The Second Defendant obtained a further valuation of the property from a Mr Sharp. He valued the property at $66,000 and noted that as at 14 May 1997:

> "...vehicular access is formed up to the dwelling site but has been eroded by surface water run-off and although not impassable nevertheless requires significant general recovery. The land lies mainly to the east where there is an extensive coastal outlook, but rising ground at the west would suggest that the property tends to lose afternoon sun during winter months."

The valuer also noted that:

> "Other than for basically formed access, which requires some recovery, and open parking at one side of the dwelling, the grounds are not developed in any significant sense beyond initial benching out of the building platform.
>
> The unrefined nature of the surrounds does not assist from a presentation or selling point of view and obviously that will not improve the present if vacant state of the property continues.
>
> I have some concern over the stability of the benched out sector of the site where a bank at one side of the dwelling was showing some slumping and the excavated face immediately behind the dwelling is backfilling against the structure also. Coversteel cladding is noted along that side which will probably only endure a short to medium term protection.
>
> There could accordingly be some eventual cost incurred in addressing those issues and saleability may suffer accordingly."

[22] The bank also obtained advice through their solicitors from a real estate agent as to the likely sale value of the property. The solicitors advised that the real estate agent considered that on a forced sale the property might be expected to sell between $55,000 to $60,000 but noted that it might take some time to find a vendor at that price and that a bottom line sale price at mortgagee sale was likely to be $40,000 to $50,000. The solicitors' advice was:

> "Mr Skirton commented that if the property was lived in and sold with nice furniture in it by residents who had taken a bit of care in the property and section it would probably sell for $55,000 to $60,000. In its present state at mortgagee sale he estimated its value as more likely to be between $40,000 and $50,000."

[23] The bank proceeded to tender the property for sale. Three offers were received. Two unconditional offers of $36,000 and $37,500 respectively, and a conditional offer of $45,000. That offer was subsequently made an unconditional offer of $44,000 which was the highest unconditional offer overall.

[24] In light of the valuer's earlier comments as to the property having a value of $66,000 the bank obtained further advice from the Second Defendant. The Second Defendant advised the bank:

> "We spoke again with the valuer who had assessed a sale value of some $66,000. ... I asked him whether in his opinion the bank should take one of the offers made, continue in the efforts to sell at a higher price or rent the property for a period prior to attempting to sell again. I explained to him the efforts made by Brian Skirton Associates to find buyers. He thought the market had been well explored and continued efforts to sell the property were unlikely to produce higher offers in the near future. Because of the issues as to subsidence and building permits, he would be concerned about the maintenance obligations of the bank if it tenanted the property. He was of the view the bank should accept offers in the $40,000 range."

[25] The bank accepted the tender for $44,000. The bank subsequently pursued the Plaintiff to judgment in the District Court for the shortfall. Judgment was entered in the District Court on 7 May 1998 in the sum of $57,557.27.

[26] The bank then issued bankruptcy proceedings against the Plaintiff. When the petition was before the Court the bank withdrew the petition due to a change in its

policy regarding bankrupting former customers. The judgment held by the bank against the Plaintiff remains owing and unpaid.

THE PLAINTIFF'S CASE – FIRST DEFENDANT

[27] The Plaintiff represents herself. She has prepared her own claim. The amended statement of claim filed by her on 29 January 2001 identifies the following complaints against the bank:

- The bank is in breach of the provisions of the Credit Contracts Act by failing to disclose the banking mandate form completed by her on 30 October 1992.
- That the bank acted unlawfully in exercising its rights under the mortgage without complying with the Credit Contracts Act, in that it failed to disclose the banking mandate form.
- That the bank ought not to have relied upon the advice from a third party concerning a creditor's claim.
- Related to above that the bank acted unreasonably in making demand in July 1995 when she was not in default of any banking arrangement at that time.
- That the bank failed to sell her property at the best price reasonably obtainable and rather sold at a gross undervalue.
- That the bank without any proper basis sought to institute bankruptcy proceedings that were subsequently struck out.

THE PLAINTIFF'S CASE – SECOND DEFENDANT

[28] The Plaintiff alleges that the Second Defendant passed on the information to the bank that a third party creditor was pursuing the Plaintiff, that the Second Defendant should have taken steps to verify the information before doing so, and that in passing on the information the Second Defendant defamed her. The Plaintiff also refers to the Privacy Act.

PRINCIPLES

[29] The application for summary judgment by the Defendants is made under R136(2). The Defendants must satisfy the Court that none of the causes of action in the Plaintiff's statement of claim can succeed against them.

[30] The principles to apply on a Defendant's application for summary judgment have been set out in the recent decision of the Court of Appeal in ANZ Banking Group (NZ) Ltd v MM Kembla NZ Ltd (CA 51/00, 9/11/00):

> "[62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (Pemberton v Chappell [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.
>
> [63] 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 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 (as is not uncommon where a plaintiff is the victim of deceit), 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.
>
> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial."

THE PLAINTIFF'S CLAIM AGAINST THE FIRST DEFENDANT

[31] The Plaintiff's concern and frustration at the events that occurred in July 1995 are understandable at one level. Although she was in default in relation to the agreement she had with the bank to reduce the overdraft account, she had recognised that and met with the bank officer to address the issue. At the meeting on 5 July, on the basis of the Plaintiff's advice to the bank that she would make a payment within

the next eight days to reduce the overdraft within the previously agreed limit, the Plaintiff understood she had an agreement with the bank that it would not take action against her. That appears to have also been the bank's understanding and intention at that time insofar as the diary note of 5 July records that a letter was to be sent in confirmation.

[32] However, instead of receiving a letter from the bank that confirmed an extension of time to bring the overdraft within the agreed limit the Plaintiff received the letter of 10 July that made demand of her for the full amount of her borrowing from the bank. The change in stance was apparently on the basis of the information that other creditors may be taking action against her, and also that there were insufficient funds in the current account to meet the loan repayments for the home loan account.

[33] While understanding the Plaintiff's concern and frustration at the turn of events, the question is whether she has sustained any loss or has an arguable cause of action against the bank as a result of the bank's change of position.

[34] As at 5 July 1995 the Plaintiff was in breach of the previously agreed overdraft limit with the bank. The bank was not bound by any waiver of rights unless it was in writing. Clause 12 of the mortgage document, which provided security for all the Plaintiff's banking accommodation with the bank, recorded in the event of default, inter alia:

> "12.2 Any acquiescence, delay or failure to act by the bank after acquiring knowledge of the events specified in clause 12.1 [ie default] shall not prejudice or operate as a waiver of the power of the bank under this clause unless the bank agrees in writing to the particular event and, in any such case, that agreement shall relate only to that case and shall not prejudice the rights of the bank in respect of other future events to exercise any of the powers provided in this mortgage."

[35] Pending confirmation of the agreement in writing, the bank was not strictly bound to the extension of time.

[36] Mr Chan also submitted that there was no consideration for the bank's agreement to grant the extension of time in any event. The Plaintiff only agreed to

pay what was required to bring the account down to the level that it ought to have been in any event. The Plaintiff was not doing anything more than she had previously contracted to do. There was no fresh consideration on her part.

[37] Further, the bank records in its letter of 10 July that given the overdrawn account the loan repayments were in default. That appears to be a further and fresh default on the Plaintiff's part.

[38] More significantly, however, the demand made on 10 July 1995 did not lead to the losses claimed by the Plaintiff in that it did not lead to the sale of her property. Although the bank put the property to tender in late 1995 the only tender received was unacceptable. The bank and the Plaintiff entered a new arrangement in 1996. Pursuant to that new arrangement the Plaintiff was given the opportunity to maintain her accounts with the bank, provided she adhered to a repayment schedule. The effect of the previous demand had been spent.

[39] The Plaintiff did not keep to the arrangement made in early 1996. She sought and was granted more time in mid 1996. By December 1996 the Plaintiff was substantially in default and the bank issued a fresh Property Law Act Notice. Despite that the bank agreed to give her more time to repay her debts. An agreement was made on 26 February 1997 about that. Four weeks later the Plaintiff defaulted again. It was only following that further default that the bank moved to sell and sold the property. The bank issued and relied upon the second s92 Property Law Act Notice to sell the property.

[40] Despite the Plaintiff's complaint about the bank changing its position and issuing the demand on 10 July 1995 the bank's actions do not lead to any arguable claim for loss. The losses claimed by the Plaintiff are orders making good the loss of the realisable value of the property, being its most recent valuation for the sum of $96,000, and $60,000 by way of damages and compensation for the loss of enjoyment of the property. All those losses flow from the ultimate sale of the property. That sale followed the breach of the agreements made in 1996 and 1997, not from the July 1995 agreement.

[41] The second issue arising out of the demand of 10 July is the Plaintiff's claim that the bank should not have issued the demand because it was based on incorrect information, namely that other creditors were taking action against her, and the bank ought to have verified the position.

[42] The above comments apply equally to this submission. The demand made on 10 July 1995 did not lead to the sale of the property in August 1997. More particularly, however, in relation to this claim the information that other creditors were going to pursue the Plaintiff was subsequently proven to be correct.

Credit Contracts Act Claim

[43] The Plaintiff suggests that the provisions of the Credit Contracts Act 1991 required the bank to make disclosure of the banking mandate form to her.

[44] However, that submission is based on a misunderstanding of the nature of the mandate form. The mandate form is essentially a request by the customer to the bank to open an account. It authorises the bank to debit all cheques, drafts and other orders or receipts for monies signed by the customer to the customer's account. It is an acknowledgement of the customer's liability to pay the bank. However, it does not include any specific terms concerning interest or the cost of borrowing. They are dealt with in the separate loan agreements.

[45] The Credit Contracts Act requires disclosure of controlled credit contracts: s16. The effect of s15(2) is that the operation of a bank account does not per se create a controlled credit contract, even where a debit may put an account into overdraft. On that basis the mandate relating to the operation of a cheque account for the Plaintiff's business was arguably not part of a controlled credit contract at all.

[46] If there was a controlled credit contract, s16(2) requires initial disclosure in accordance with s20. Section 20 requires disclosure in accordance with the disclosure documents referred to in s21. The disclosure documents set out in s21 refer to the information, statements and other matters specified in the second schedule to the Act. The second schedule identifies the information to be disclosed

as the name and address of the creditor, amount of credit, total cost of credit, finance rate, payments required, other terms of contract and the cash price. None of those items are applicable or relevant to the banking mandate which is a request by a customer for the bank to open an account. The Plaintiff has no claim against the Second Defendant arising out of the Credit Contracts Act.

Sale Of The Property In 1997

[47] The Plaintiff says that the bank failed to sell the property at the best price reasonably obtainable.

[48] The bank has a statutory obligation as mortgagee when exercising the power of sale to take reasonable care to obtain the best price reasonably obtainable as at the time of sale: s103A Property Law Act 1952.

[49] The Plaintiff's complaint is that the bank failed to obtain the best price. However, that complaint is based upon a valuation of the property in 1993 which valued the property at $96,000 assuming certain work was carried out. The positive opinion the valuer took of the property at that time is apparent from a reference to the expansive views over the Pacific Ocean.

[50] The reality of the property's situation 1997 when it was sold was substantially different. By then it was unoccupied. The section had not been completed, the driveway had been subject to erosion and there were concerns regarding the physical stability of aspects of the property.

[51] The bank obtained a valuation before selling the property. The valuation suggested the property was worth $66,000. The bank also received advice from an experienced real estate agent in the area that the property ought to be put to tender, and in the condition it was in a price in the region of $40,000 to $50,000 might be appropriate.

[52] The bank received three tenders which would suggest some interest in the property. Those tenders were at $36,000, $37,500 and $45,000 (subject to finance).

After taking further advice from its solicitors and the valuer who had suggested the property was worth $66,000, the bank resolved to accept an unconditional offer for $44,000.

[53] In light of the evidence before the Court the bank satisfies the Court that it has met the duty owed to the Plaintiff as mortgagor to take reasonable care to obtain the best price reasonably obtainable at the time of sale. There is no other evidence to suggest the bank could reasonably have obtained a better price in the circumstances the property was in and the market that prevailed in 1997.

Bankruptcy Claim

[54] The Plaintiff also claims $80,000 in damages for loss of her professional reputation by the wrongful acts of the First Defendant in seeking to bankrupt her when it had no right to do so.

[55] The Plaintiff cannot sustain this claim. The bank obtained a judgment against the Plaintiff. She had opportunity to be heard in those proceedings. The bank then issued a bankruptcy notice that went unanswered. The creditor's petition followed. The bank was entitled to issue the creditor's petition: s19(1)(d) Insolvency Act 1967. The petition was only withdrawn because the bank changed its policy in relation to bankrupting former customers.

THE BANK'S JUDGMENT

[56] As noted the bank currently holds a judgment against the Plaintiff for $57,557.27. Even if the Plaintiff had a claim against the bank, the bank would be entitled to an automatic set-off for that sum. That judgment has not been appealed. Nor has there been any application to set it aside. Any claim the Plaintiff has would therefore need to exceed the sum of that judgment before there was any value in any claim.

[57] Although Mr Chan did not have instructions on the point, it appears from the bank's decision to withdraw the bankruptcy proceedings and the fact no other steps

have been taken since then, that the bank does not presently intend to enforce that judgment against Ms Hussey.

Summary

[58] There is nothing in the papers before the Court and in the affidavits of the Plaintiff or Mr Dixon-McIvor that would suggest, even with amendment or further discovery, a claim might be maintained against the First Defendant. There will be an order for summary judgment in the First Defendant's favour against the Plaintiff.

THE PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT

[59] The Plaintiff's claim against the Second Defendant cannot succeed. It is based upon the premise that the Second Defendant advised the bank in July 1995 that there was a third party creditor pursuing the Plaintiff to judgment. It is apparent that such advice must have been given between 5 and 10 July because the bank's attitude to the Plaintiff changed between those dates.

[60] The Plaintiff's claim against the Second Defendant is based upon suspicion. The Second Defendants were acting for a creditor who pursued the Plaintiff during 1995, and indeed pursued the Plaintiff to judgment in 1995. Shand Computer Systems Ltd obtained a judgment in the District Court at Dunedin against the Plaintiff in the sum of $17,265.56. The Second Defendants acted for Shand Computer Systems Ltd.

[61] However, the Second Defendant had no reason to discuss the Plaintiff's position or Shand Computer Systems Ltd's claim against her with the First Defendant between 5 and 10 July 1995 as at that time the Second Defendant held no instructions from the bank. It is apparent from the letter of instruction sent to the Second Defendant by the bank that they were not instructed to act for the bank until 27 July 1995. It is also apparent that the bank initially attempted to instruct Mitchell & Mackersey on the matter on 24 July 1995 but that firm was unable to accept instructions as coincidentally it acted for the Plaintiff. It was only after the

instructions were returned to the bank by that firm that the Second Defendants were instructed by the bank.

[62] Mr Guthrie, a partner in the Second Defendant firm, has deposed that:

> "4. It is true that in early July 1995 the Second Defendant was representing a client named Shand Computer Systems Ltd who instructed it to pursue the Plaintiff for a debt of $17,265.56. Exhibit 9 to the Plaintiff's affidavit of 29 January 2001 is a copy of a letter of demand issued by the Second Defendant on 13 July 1995.
>
> 5. However, the First Defendant did not instruct the Second Defendant in the Hussey matter until 27 July 1995. Attached and marked 'A' is a copy of the letter of instruction dated 27 July 1995.
>
> 6. This letter of instruction was the first communication between the First and Second Defendants on the Hussey matter. Until the Second Defendant was instructed, it had no reason to believe that the Plaintiff was indebted to the First Defendant and therefore no reason to pass on the information complained of.
>
> 7. I further note that the First Defendant was aware that other creditors were pursuing the Plaintiff prior to it instructing the Second Defendant. As is recorded in the letter of instruction to the Second Defendant dated 27 July 1995, the First Defendant was '... aware that creditors are seeking judgment against Ms Hussey and are most concerned that if a judgment is enforced by way of charging order over the properties the bank may face a loss situation.' If, as the Plaintiff contends, this information was conveyed to the First Defendant by the Second Defendant, there would be no need to advise the Second Defendant of it.
>
> 8. Furthermore, the Second Defendant has a practice of keeping file notes of all communications whether verbal or written. The Second Defendant has perused its files and can find no correspondence or file notes which supports the Plaintiff's claim that the Second Defendant did pass on the information alleged."

[63] In light of Mr Guthrie's evidence which is supported by the date of the letter of instructions from the First Defendant, there is no factual basis to the Plaintiff's claim against the Second Defendant.

[64] Nor is there a claim at law. If the Plaintiff's claim were in defamation, the Second Defendant would have an absolute defence of truth available to it given that

Shand Computer Systems Ltd obtained a judgment against the Plaintiff during 1995. The information the Plaintiff complains of (that a judgment of $18,000 was being sought against the Plaintiff by creditors) is clearly either true or not materially different from the truth. Shand Computer Systems Ltd obtained a judgment for $17,735.56 on 8 December 1995.

[65] Further, any claim based on defamation is statute barred. It has been filed outside the two year limitation period without leave of the Court: s55 Defamation Act 1992 and s4 Limitation Act 1950. The defamatory statement, if there was one, was made in July 1995.

[66] Although the Plaintiff did not address on any further basis of law, counsel for the Second Defendant accepted that a tort of breach of privacy has been acknowledged at law: P v D [2000] 2 NZLR 591 where Nicholson J identified four factors necessary for the tort. At least two of those four factors are not present in the current case:

- The statement that judgment is being sought for $18,000 is not of the kind that can be described as highly offensive and objectionable to a reasonable person of ordinary sensibilities; and
- The fact is not a private fact, nor was it disclosed publicly.

[67] The Plaintiff's complaints against the Second Defendants cannot form any other cause of action known to law. The Second Defendants were never the Plaintiff's solicitors. They owed no contractual or tortious duties to her. There is no basis for the Plaintiff's claim against the Second Defendants.

[68] The Second Defendant is entitled to summary judgment against the Plaintiff. There will be judgment for the Second Defendant accordingly.

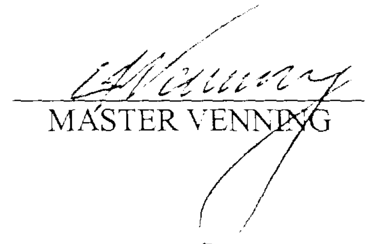
[69] The Plaintiff objected to the late filing by the Second Defendant of two affidavits. There is force in her complaint in that the affidavits were filed outside the time directed by the Court. However, the affidavits were only filed to annex documents. The first annexes the judgment obtained by Shand Computer Systems Ltd. The second annexes the correspondence from the bank to Mitchell &

Mackersey in July 1995. They are matters of record. They are not matters that require a response from the Plaintiff. They ought, however, to have been filed within time and that is a matter that may be relevant to the issue of costs if costs are pursued. I accept the affidavits, even though they are filed out of time.

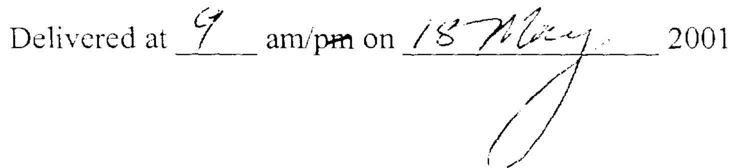
COSTS

[70] Costs are reserved to be dealt with by submission if necessary. However, in the circumstances I invite the First and Second Defendants to consider carefully whether there is any purpose in an order for costs.

[71] If costs are pursued submissions are to be filed within seven days by the Defendants, with the Plaintiff to have seven days to respond.



MASTER VENNING



Delivered at 9 am/~~pm~~ on 18 May 2001