IN THE SUPREME COURT OF NEW ZEALAND

SC 92/2011
[2012] NZSC 70
[SUBSTITUTE]

BETWEEN	ROBERT MICHAEL SYMONS First Appellant
AND	GREGORY JOHN SYMONS Second Appellant
AND	ROBERT MICHAEL SYMONS AND ANNETTE SYMONS AS TRUSTEES OF THE ST ANTHONY TRUST Third Appellant
AND	GREGORY JOHN SYMONS, CLAIRE ANNE SYMONS AND LORRAINE JEAN SYMONS AS TRUSTEES OF THE DRAKENSBERG TRUST Fourth Appellant
AND	WILTSHIRE INVESTMENTS LIMITED Respondent

Hearing: 17 April 2012

Court: Elias CJ, Tipping, McGrath, William Young and Chambers JJ

Counsel: S P Bryers and M A Karam for Appellants
D A Laurenson for Respondent

Judgment: 9 August 2012

Reissued: 17 October 2012: see recall judgment [2012] NZSC 86

Effective date of judgment: 9 August 2012

JUDGMENT OF THE COURT

A Leave to appeal is extended to cover the indebtedness of Fibroin Initiatives Ltd.

B The appeal is allowed with the result that the entry of summary judgment is set aside.

C **Upon disclosure of the settlement agreement to the appellants, the application for summary judgment is, at the option of the respondent, to be reheard in the High Court with the appellants at liberty to resist the claim (and, if they think appropriate, produce additional evidence) on the basis of (i) defences associated with, or arising out of the disclosure of the settlement agreement and (ii), subject to the leave of the High Court being obtained, on any other basis. The appellants are also at liberty to make such interlocutory applications to the High Court as they see fit.**

D **The awards of costs in the High Court and Court of Appeal are set aside.**

REASONS

ELIAS CJ, TIPPING AND WILLIAM YOUNG JJ

(Given by William Young J)

Introduction

[1] This appeal arises out of advances made by the ASB Bank to Opus Fintek Ltd (Opus) and Fibroin Initiatives Ltd (Fibroin) and guaranteed by, inter alia, the appellants, Messrs Gregory and Robert Symons, together with Mr Alan Wiltshire and Constellation Projects Ltd. When the bank called in the loans, the amount outstanding was paid by Wiltshire Investments Ltd, a company associated with Mr Wiltshire. This was pursuant to an arrangement under which Mr Wiltshire and Constellation Projects were released from their guarantees. The debts and associated securities, including the remaining guarantees, were assigned to Wiltshire Investments.

[2] Wiltshire Investments later sought and obtained summary judgment from the High Court[1] against the appellants for what it says is the balance of the advances. A subsequent appeal by the appellants was dismissed by the Court of Appeal.[2]

The facts

[3] Mr Wiltshire (through Constellation Projects) and Gregory and Robert Symons[3] were the equity participants in both Opus and Fibroin. At all material times, Mr Wiltshire and Gregory Symons were directors of both companies as was Robert Symons up until 25 August 2009. The primary business of Opus was the management of its investment in Hopscotch Money Ltd, which was a consumer finance company associated with Chrisco Hampers Ltd. The other major shareholder in Hopscotch was Hats Holdings Ltd which was owned by Chrisco Hampers. Fibroin seems to have been a holding company intended to hold the shareholding of Gregory and Robert Symons and Constellation Projects in Opus.[4]

[4] In October 2007 (or perhaps a little earlier), difficulties arose between Opus and Hats as to the way in which Hopscotch was operated. The associated dispute was settled on 20 November 2007 on the basis that Hats was to acquire the shares held by Opus for $5.2 million which was to be paid by way of an initial payment of $500,000 in November 2007 and two further payments, each of $2.35 million, on 20 March and 20 May 2008. The first $500,000 was paid and was used by Opus to fund a payment back to Hopscotch to discharge loans which had been made to Gregory Symons and his wife and Robert Symons. Despite this transaction, the amounts due in March and May 2008, if paid, would have comfortably enabled the indebtedness of Opus and Fibroin to ASB Bank to be repaid. Hats, however, refused to pay the second instalment which was due in March 2008.

[5] In April 2008 – in what was presumably a sequel to the non-payment of the second instalment – the bank called up the advances it had made to Opus and

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1 *Wiltshire Investments Ltd v Symons* HC Auckland CIV-2010-404-1011, 26 July 2010.

2 *Symons v Wiltshire Investments Ltd* [2011] NZCA 397.

3 There were family trusts involved but for ease of reference we will conflate Gregory and Robert Symons with their trusts.

4 The precise way in which the shares in Opus and Fibroin were held is not apparent from the papers we have seen.

Fibroin. They were not able to pay and the result was that in June 2008, Wiltshire Investments paid the bank the amount then outstanding in consideration for an assignment of the debts and supporting securities but on the basis that Mr Wiltshire and Constellation Projects were discharged as guarantors. The appellants consented to this arrangement.

[6] Opus sought to recover the outstanding balance under the settlement agreement with Hats. Attempts to settle the dispute failed and Opus then commenced proceedings against Hats which responded by counterclaiming for a significantly higher sum alleging misconduct and breach of directors' duties by the appellants who were joined as additional counterclaim defendants. All the funding for the claim is said to have been provided by interests associated with Mr Wiltshire with most coming from Wiltshire Property Management Ltd.[5] We also note that one of the parties to the litigation was Opus Fintek Investments Ltd (OFIL), the shares in which were owned by Opus. Mr Gregory Symons was the director of this company.

[7] On 4 September 2009 (by which date the litigation had been underway for more than a year), Wiltshire Investments exercised its power under the securities it had acquired from the ASB Bank to appoint Mr Paul Sills, an Auckland barrister, as receiver to take control of Opus. Around the same time Mr Wiltshire made it clear to the appellants that Wiltshire Investments was no longer prepared to fund the litigation. Mr Sills subsequently entered into settlement discussions with Hats and, in early December 2009, he concluded a full and final settlement of all outstanding claims. This resulted in both parties discontinuing their claims against each other. The terms of the settlement were recorded in a written agreement which has never been disclosed. What we do know is that it provided for Hats to pay Opus $1,400,000 in instalments and that, upon receipt, these instalments were paid on to Wiltshire Investments in reduction of the assigned debt owed by Opus.

[8] Wiltshire Investments served Gregory and Robert Symons with notices of demand dated 18 December 2009 seeking payment of $2,704,913.08 in respect of the Opus debt and $865,750.99 in respect of the Fibroin debt. In response to

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[5] It seems from an affidavit by Mr Wiltshire that Gregory and Robert Symons did in fact make some payments which were utilised for legal costs but were applied in reduction of advances to them from Opus.

subsequent requests by the appellants for clarification, the solicitors acting for Wiltshire Investments declined to provide further information, instead indicating that the quantum of the amounts claimed would be dealt with in the application for summary judgment that Wiltshire Investments proposed to file.

[9] On 10 February 2010, Wiltshire Investments served further notices of demand on the appellants in relation to the Opus debt. The notices still sought payment of the sum of $2,704,913.08. This figure had not been updated to allow for the interest accrued and payments received between 18 December 2009 and 10 February 2010, in particular some $900,000 which it appears Mr Sills had by then received from Hats pursuant to the settlement and paid on to Wiltshire Investments.

[10] Wiltshire Investments issued proceedings seeking summary judgment on 17 February 2010. The amount sought was still the sum demanded on 18 December 2010 and although the statement of claim recorded that Opus had paid Wiltshire Investments $900,000, the pleading, in a somewhat obscure way, suggested that this had been allowed for in calculating the amount claimed when this was not the case.

[11] At this point the appellants were self-represented. They filed their own notices of opposition and the affidavit which Gregory Symons swore in answer to the claim appears to have been drawn up without legal assistance. The notices of opposition simply referred to the affidavit of Gregory Symons. That affidavit suggested that as result of representations by, and correspondence from, Mr Wiltshire, Gregory and Robert Symons had understood that they were to be protected from adverse legal consequences associated with their guarantee liabilities. As well, Gregory Symons was critical of the settlement of the Hats litigation and the limited information which he had been given as to the detail of the claims made by Wiltshire Investments. To the extent that these concerns and complaints are material to the issue before us, we will deal with them shortly.

[12] Wiltshire Investments' detailed proof of quantum only came in a reply affidavit of Mr Wiltshire of 28 May 2010 which recorded that after allowing for all payments received, $1,144,504.77 remained owing in respect of the Opus debt and $840,769.05 in respect of the Fibroin debt. This affidavit did not deal in detail with

the terms of the Hats settlement. Instead, a spreadsheet annexed to it recorded the payments (by then $1,400,000) which had been received, with the last of these payments described as "final".

[13] The appellants appear to have continued to be self-represented up until a few days before the hearing on 16 July 2010 of the summary judgment application in the High Court. At that point they instructed Mr Karam to appear for them. When the proceedings were called, he applied for an adjournment and apparently noted that there "were deficiencies in their case". This application was declined by Associate Judge Bell, who, in a reserved judgment delivered on 26 July 2010, entered summary judgment against the appellants for the sums claimed. We will address shortly the aspects of his judgment which are material to the issues we must deal with.

[14] The appellants' subsequent appeal to the Court of Appeal was dismissed. We will revert to this judgment shortly to discuss the respects in which it is relevant to the further appeal to this Court.

The approved ground of appeal

[15] When leave to appeal was granted, the approved question was defined in this way:[6]

> The approved question is whether the Associate Judge ought to have entered summary judgment despite non-disclosure of the 2009 settlement agreement between Opus Fintek Ltd and Hats Holdings Ltd.

Consistently with this, the argument in this Court focussed primarily on non-disclosure of the settlement agreement.

The non-disclosure issue: how it emerged and has been dealt with

[16] We can start the narrative most conveniently a few months before the settlement.

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6 *Symons v Wiltshire Investments Ltd* [2011] NZSC 140.

[17] In September and October 2009 there were interactions between Gregory Symons and Mr Sills. Mr Sills was seeking to establish whether or not the appellants could fund the litigation which he considered would cost $1m plus GST to take to trial. Gregory Symons did not respond in terms to the questions Mr Sills asked but rather challenged his assumptions, particularly as to likely costs. On the basis of the correspondence, Mr Sills was entitled to, and did, conclude that the appellants would not – probably because they could not – fund the litigation. On 22 October 2009, Mr Sills wrote to Gregory Symons[7] saying that he considered that the case should be settled. The letter concluded with this sentence:

> As the director of the company I shall keep you informed of progress regarding settlement.

Mr Sills had a subsequent discussion with the lawyer who was then acting for Gregory and Robert Symons in which he explained that he had formed a view of the merits of the case which was "not aligned" with that of Gregory and Robert Symons.

[18] On 2 December 2009, Mr Sills wrote to Gregory Symons informing him that he had "agreed in broad terms to settlement of the dispute with Hats Holdings Limited". The letter noted that OFIL would be required to be a party to the settlement. OFIL was not in receivership and the simplest way of securing its assent to the settlement was for its "incumbent director" (as Mr Sills put it), namely Gregory Symons, to commit OFIL to the settlement. But as Mr Sills pointed out in the letter, there were other options, including Opus replacing Gregory Symons and appointing a director who would agree to the settlement.

[19] This produced a response of 3 December 2009 from Gregory Symons in which he said it was essential that he be fully acquainted with the terms of the proposed settlement before he could make a decision about it. He sought a copy of the proposed settlement agreement and any legal advice held by Mr Sills as to its merits. Mr Sills did not respond to this letter. Instead, Mr Sills, as receiver of Opus, removed Gregory Symons as the director of OFIL and replaced him with Mr Wiltshire and the Hats litigation was then settled. The date of the settlement is

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[7] In fact to Opus but marked for the attention of Gregory Symons.

not clear but for reasons to be developed, it was probably on or shortly after 18 December 2009.

[20] The formal notices by which Mr Wiltshire replaced Gregory Symons as a director of OFIL are dated 18 December 2009. This process required an amendment to the constitution of OFIL which was duly changed. As well, on the same day Mr Wiltshire executed a notice disclosing his interest in a transaction which OFIL was about to enter into. This was disclosed in this way:

> The nature of the interest is that [OFIL] will enter into a settlement in relation to Proceedings that also involve me personally and companies of which I am a director and shareholder, namely Wiltshire Investments Limited and Wiltshire Property Management Limited.

This is plainly a reference to the settlement with Hats. The disclosure is ambiguously worded, but given that Mr Wiltshire, Wiltshire Investments and Wiltshire Property Management were not parties to the Hats litigation, the language used is at least consistent with their being parties to the settlement. In saying this, we also recognise that the disclosure may simply have been intended to encompass indirect involvement by those parties in the benefits of a settlement which was just between Opus and Hats.

[21] There is also a resolution of directors of OFIL (in fact just Mr Wiltshire) dated 18 December 2009 as to transactions which the company was to enter into. This referred to the Hats proceedings which it defined as "Proceedings" and recorded resolutions that:

> 3 The Company enter into a settlement deed which amongst other things involves a sale and purchase of shares between HHL [that is, Hats] and the Company's shareholder Opus Fintek Limited (in receivership and liquidation) and a notice of discontinuance being filed in relation to the Proceedings.
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> 4 The Company enter into the documents listed in the schedule, copies of which have been produced to the directors (**Documents**).
>
> 5 The Company approves first the Documents and secondly the transactions contemplated by the Documents and the transactions described in clause 3 (**Transactions**).
>
> 6 In approving the Documents and the Transactions, the Board is of the view that the Company's entry into and performance of the

> Documents and the Transactions is in the best interests of the Company as:
>
> 6.1 The Company is unlikely to receive any money from the Proceedings; and
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> 6.2 The Company has not identified any means of financing the costs of continuing as a party to the Proceedings.

There is no indication in the material we have seen as to what the other transactions were but the structure of the resolution suggests all transactions were referable, broadly anyway, to the settlement.

[22] The documents referred to in [20]–[21] were produced as exhibits by Mr Sills. In his affidavit, he referred to these documents in this way:

> Attached, marked 'PDS2' are the copies of the amendment to the constitution and the various resolutions entered into in this regard.

The schedule referred to in the OFIL directors' resolution was presumably originally attached to it and, in any event, as an incorporated document, it was part and parcel of the resolution. The schedule, however, was not itself exhibited.

[23] Whether the settlement of the Hats litigation also occurred on 18 December 2009 is not certain but we note that the initial demands for payment of the outstanding debt against Gregory and Robert Symons were all dated 18 December 2009. Settlement must have been concluded by 22 December 2009, because on that date a memorandum as to the settlement was lodged with the High Court.

[24] Gregory and Robert Symons, through their solicitors, responded to the notices of demand by letter of 23 December 2009. This letter sought information as to the make up of the claims and copies of the loan documentation, guarantees and assignments, but not the settlement agreement.

[25] In his affidavit in response to the summary judgment application, Gregory Symons discussed his dealings with Mr Sills prior to the settlement and then in para

22 made some additional complaints as to the withholding of material relevant to the calculation of the various components of the claims. The affidavit then went on:[8]

> Point 22 [a reference to the immediately preceding para 22 of the affidavit] is frustrated further by the fact that the settlement is confidential and accordingly it is not possible to assess what Opus has received in payment(s) *or is due to receive including distribution to WIL*. ...

As we have noted, this affidavit seems to have been prepared without legal assistance and the meaning of the emphasised words is not clear. But, whatever the meaning, the point Gregory Symons was making was a fair one: that unless and until the details of the settlement were produced – so that it was clear what Opus had received and would in future receive – it was not possible for the appellants to work out their true liability to Wiltshire Investments.

[26] As we have noted, Mr Wiltshire's reply affidavit did not provide any information about the settlement agreement other than what could be inferred from one of the spreadsheets which listed six payments, the last one of which was described as "final".

[27] There is nothing explicit in the judgment of the Associate Judge to suggest that much, if anything, was made in argument by Mr Karam of the non-disclosure of the settlement agreement. This is what the Associate Judge said:[9]

> The defendants also criticise the settlement negotiated with Hats after the receiver had been appointed. The settlement has yielded payments of $1,400,000, which the plaintiff has taken into account in its claims under the guarantees. The defendants were hoping for more – enough to clear all the debt to the plaintiff.
>
> The plaintiff has not put the settlement agreement with Hats Holdings Ltd in evidence. It says that the terms of the agreement are confidential. It has brought all the payments it received into account. It is not required to do more.
>
> While the defendants complain about the outcome of the settlement, they have not adduced any evidence that would suggest that there is something in the settlement that requires further investigation. If they want to say that the outcome of the settlement gives them some defence, they have an evidential onus to show that there is a basis for the defence. It is not enough to assert that the settlement is not a good one without offering more. Those sued for

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8 Emphasis added.

9 At [42]–[47].

> shortfalls after securities have been realised frequently claim that the security holder ought to have done better. But voicing a complaint is not a defence. Most security holders are strongly motivated to get the best price they can. They prefer not to have to sue on personal covenants.
>
> In this case, the realisation of the security took the form of a settlement of complex and expensive litigation pending in this Court, when Opus Fintek could not fund the litigation without support from its shareholders. The receiver's attempt to obtain funding from the Symons brothers was unsuccessful. He is a barrister and obviously qualified to assess the litigation risks and to settle the case. Negotiating a settlement of litigation requires judgment. A range of outcomes is possible and there is no single right answer. There is nothing in the defendants' case that suggests that the settlement of the case raises any disputed questions of facts that require a full hearing.
>
> In any event, the settlement of the litigation was part of the receivership, itself the enforcement of a security. Under clause 3.2(e) of the guarantee, the enforcement of the security does not give the guarantor a discharge from the guarantee, and does not give the guarantor any claim against the plaintiff.
>
> Accordingly, the plaintiff has satisfied me that the defendants do not have any defence based on settlement of the litigation.

[28] The appeal to the Court of Appeal was based on two grounds. The first was a re-run by the appellants of the argument that there had been some sort of understanding that their interests would be protected. This argument, which had been rejected by Associate Judge Bell in the High Court, was also rejected by the Court of Appeal[10] and was not part of the appeal to us. So there is no occasion for us to discuss it further here. We do, however, need to address the other basis of the appeal which was that Wiltshire Investments had not proved the quantum of its claims.

[29] In addressing this second ground, the Court of Appeal reviewed the way in which Wiltshire Investments had addressed proof of quantum in the High Court. It noted that the evidential deficiencies were addressed by reply affidavits from Messrs Sills and Wiltshire with the latter's affidavit (and attached spreadsheet) recording the receipt of $1,400,000 and reducing the amount sought from the appellants accordingly. The relevant calculations were carried through to 28 May 2010. The judgment then went on:[11]

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[10] In the Court of Appeal, the appellants claimed that these understandings gave rise to defences by reason of estoppel and the Fair Trading Act 1986.

[11] At [31]–[33].

> Counsel for the appellants did not take issue with the manner in which Wiltshire Investments calculated the amount of principal and interest outstanding in relation to either debt. His clients' concern arose out of the refusal by Wiltshire Investments to disclose the terms of the Hats settlement. He contended that the Court could not be sure that the sum of $1.4 million represented the total amount that Wiltshire Investments had received under the terms of the settlement. He argued that the uncertainty surrounding this aspect of the plaintiff's claim was sufficient to justify the Associate Judge withholding the entry of summary judgment.
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> It needs to be remembered, however, that the appellants were principal debtors in respect of both advances. As a result, it was open to Wiltshire Investments to proceed against them individually at any time for the full amount outstanding in respect of each advance. The settlement of the Hats litigation obviously provided a potential source of funds from which the appellants' exposure to Wiltshire Investments might be reduced. The settlement was only relevant, however, to the extent that it had enabled Opus to reduce the amount outstanding to Wiltshire Investments as at the date of the hearing in the High Court.
>
> The appellants did not suggest that the schedule attached to Mr Wiltshire's second affidavit was incorrect. It only related, however, to transactions occurring up to and including 28 May 2010. Their concern arose because it did not include the period between 28 May 2010 and the hearing in the High Court on 16 July 2010. In order to clarify this issue, we issued a minute after the hearing in this Court inviting counsel for Wiltshire Investments to file a further memorandum or affidavit setting out the consideration received up to and including 16 July 2010 in respect of the settlement of the Hats litigation.

[30] This aspect of the argument obviously had some resonance with the Court of Appeal because, in a Minute released after the hearing, the Court referred to the evidential gap just mentioned and went on:[12]

> We would be willing to receive fresh evidence on this point to assist us in disposing of this appeal. We will allow the respondent the opportunity to file and serve an affidavit within seven days of the date of this Minute providing details as to:
>
> (a) The terms of the 2009 settlement so far as they relate to any payments to be made to Opus Fintek Limited or to any other consideration to be provided to that company; and
>
> (b) Whether any further payments were received by Opus Fintek Ltd or the respondent under the settlement agreement between 31 March 2010 and 16 July 2010.
>
> If an affidavit is filed, then the appellants will have seven days after receipt of the affidavit to file and serve any affidavit in reply (or a memorandum if the appellants seek only to comment on the affidavit rather than provide any opposing evidence).

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12 *Symons v Wiltshire Investments Ltd* CA534/2010, 28 July 2011 at [4] and [6].

[31] This resulted in a further affidavit from Mr Wiltshire in which he said that the settlement required Hats to pay Opus a total sum of $1.4 million in six instalments, all of which had been paid, with the last payment being received on 30 March 2010 and that nothing further remained owing under the terms of the settlement. In response to the second of the issues raised by the Minute, he said:

> WIL has not received any further funds from Opus between 31 March 2010 and 16 July 2010 (or to date).

We note that this answer was not a precise response to the question posed by the Court of Appeal which, at least literally, encompassed any payments received by the respondent and not merely those which came "from Opus".

[32] Gregory Symons swore a "reply" affidavit in which, for the first time, he expressed detailed concern about the non-disclosure of the settlement agreement. In this affidavit, he said:

> ... [G]iven that the settlement agreement has again not been disclosed, it is unclear whether there has been a "side-deal" between Mr Wiltshire and the representatives of Hats which formed part of the settlement, or whether any other consideration has flowed out the settlement to Mr Wiltshire or any other entity associated with him or WIL.

[33] The Court of Appeal was not moved by Gregory Symons' affidavit and concluded its judgment in this way:[13]

> Mr Gregory Symons filed an affidavit in response in which he expresses concern that the full terms of the settlement have not yet been disclosed.
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> The information in Mr Wiltshire's latest affidavit satisfies us, however, that all of the sums that Opus received and paid to Wiltshire Investments were taken into account in calculating the amounts for which judgment was to be entered against the appellants. It follows that summary judgment cannot be denied on the basis that Wiltshire Investments failed to properly calculate the quantum of its claim in respect of the Opus debt.

[34] As we have noted already, the ground of appeal approved when leave to appeal to this Court was granted focused on non-disclosure of the settlement agreement. So a possible and cost-saving response to that grant of leave would have been the production by Wiltshire Investments of the settlement agreement. Indeed,

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[13] At [35]–[36].

in their written submissions in support of the appeal, the appellants challenged Wiltshire Investments to disclose the agreement. But this challenge was not picked up. Instead, there was this response in the written submissions filed on behalf of Wiltshire Investments:

> The 2009 settlement agreement has not been produced in the proceedings for all the reasons set out above [essentially relevance]. The confidentiality of the 2009 settlement agreement is, however, the reason that it has not been produced as a practical way to avoid the costs associated with this appeal, as the appellants suggest should have been done.

Towards the end of the hearing before us, Mr Laurenson, who appeared for Wiltshire Investments, offered to produce the settlement agreement on terms as to confidentiality, an offer which was declined by the Court given the timing.

Comments

[35] The non-disclosure of the settlement agreement strikes us as strange.

[36] From the documents we have seen and to which we have referred, it appears that by December 2009, Opus was in liquidation as well as receivership. It is not easy to see how a settlement concluded on behalf of Opus by its receiver (acting as agent) could be confidential as against the liquidator. But the details of the settlement have apparently not been made available to the liquidator.[14]

[37] Gregory Symons was the only director of OFIL. The settlement negotiations which Mr Sills was carrying on were partly (at least nominally) on behalf of OFIL. Although Mr Sills had the sanction of himself (as the receiver of Opus, which was OFIL's only shareholder) for the course of action he took, control and management of that company were still technically vested in Gregory Symons until 18 December 2009 and, up to that date, he could fairly be expected to be kept informed of developments.

[38] The correspondence of 2 and 3 December 2009, the change in the constitution of OFIL and the subsequent removal of Gregory Symons as a director of

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[14] This is what Gregory Symons said in his "reply" affidavit in the Court of Appeal.

that company demonstrate the trouble that was taken to avoid what would otherwise have been the practical requirement to disclose the proposed settlement agreement to Gregory Symons. More significantly, perhaps, given Gregory Symons' status as a director of OFIL, it is extremely difficult to see how the proposed settlement agreement (to which OFIL was obviously a party) could have been confidential in relation to Gregory Symons before his removal as a director. It is not surprising therefore that Gregory Symons seems now to be somewhat suspicious as to why the details of the agreement have not been disclosed.

[39] Gregory and Robert Symons were counterclaim defendants and the settlement agreement involved the discontinuance by Hats of the proceedings against them. If their costs had been met by Mr Wiltshire's companies (as we assume was the case), they would not be well placed to apply for costs but it still seems strange that a settlement agreement in relation to proceedings to which they were parties should be withheld from them.

[40] We recognise that, strictly speaking, the Hats settlement was collateral to the claim, which focused on the indebtedness of Opus and Fibroin to Wiltshire Investments and the appellants' related guarantee liabilities. Nonetheless, the non-production of the agreement in the affidavits filed in support of the summary judgment is not what we would have expected:

(a) The Hats settlement was fundamental to the dispute, at least as the appellants viewed the situation.

(b) When the summary judgment proceedings were commenced some, but not all, of the payments due from Hats had been received. It would have been awkward at least to explain the quantum of the claim accurately without referring to the settlement agreement and the progress made in recovering the money due under it. As it turned out, the initial particularisation of the amount claimed (and thus, it has to be said, the affidavit in support of the claim) were wrong. In this way, the withholding of the settlement agreement and the suppression of all

details about it contributed to the claim (and the supporting affidavit) being incorrect.

(c) We have already referred to what we see as the reasonable complaint made by Gregory Symons about the lack of detail about the settlement. A natural response to this complaint would have been to refer to, and produce, the agreement. Instead, Mr Wiltshire exhibited a spreadsheet leaving what the Court of Appeal later identified as an evidential lacuna.

[41] The final aspect of the non-disclosure to which we draw attention is the fact that even after leave was granted to appeal to this Court, and it was perfectly clear that there was some concern as to non-disclosure of the agreement, Wiltshire Investments declined the appellants' challenge to produce it.

Could the terms of the settlement agreement be material to the liability of the appellants to Wiltshire Investments?

[42] Mr Laurenson's primary basis for defending the non-disclosure of the settlement agreement was that it was irrelevant. His argument went like this. All that is material to the claim is the amount owed under the assigned debts. The only relevance of the Hats settlement is that it provided Opus with funds to make repayments. How Opus obtained that money is irrelevant to litigation between Wiltshire Investments and Gregory and Robert Symons. This irrelevance is all the more clear when the terms of the guarantees they executed are taken into account. They are in the usual bank form and thus contain clauses intended to preclude defences of the kind which guarantors tend to raise when sued.

[43] A concern on the part of Wiltshire Investments that the settlement agreement, if disclosed, might be relied on as a defence, is a plausible enough explanation for its non-disclosure. For present purposes we consider that it is sufficient to say that if the settlement agreement provided for entities associated with Mr Wiltshire to derive Hats-provided benefits otherwise than through Opus, this might provide Gregory and

Robert Symons with a defence. Indeed when pressed in argument before us, Mr Laurenson understandably was not disposed to challenge that proposition.

Does it matter that Gregory and Robert Symons took the point so late in the proceedings?

[44] The late particularisation of the argument (which was not until Gregory Symons' reply affidavit in the Court of Appeal) is of considerable concern. But there are a number of considerations which mean that this is of less significance than might otherwise be the case.

[45] There is the reality that Gregory Symons did ask for, and was refused, details of the then proposed settlement in early December 2009. As well, considerable lengths were taken to avoid what would otherwise have been the need to provide Gregory Symons with a copy of the settlement agreement, in particular, by changing the constitution of OFIL and then removing Gregory Symons as a director. Having gone to such lengths to keep the appellants in the dark about the settlement agreement, Wiltshire Investments is not now well placed to complain that they did not seek to make something of it earlier.

[46] There is an element of the artificial and unnatural – and really the unsatisfactory – in the absence of detailed reference to the settlement agreement in the affidavits. The simplest way for Mr Wiltshire to have told the story and to have explained the position about the instalments payable under the agreement and those that were applied in reduction of the debt was by production of the agreement. The original formulation of the claim and the affidavit in support were not complete and were thus inaccurate and undoubtedly unsatisfactory. It would also have been open to Wiltshire Investments to have disposed of the whole argument by producing the agreement once the issue was squarely raised in the Court of Appeal or, at the latest, after this Court granted leave to appeal.

[47] It is also material to note that the appellants were self-represented up until shortly before the hearing in the High Court and Mr Karam's application for an adjournment was declined.

[48] We note that most of the concerns which we have about non-disclosure of the settlement agreement are based on the material which was available to the High Court. In this regard it is important to remember that the appeals from the High Court to the Court of Appeal and from the Court of Appeal to this Court are by way of rehearing.

The indebtedness of Fibroin Initiatives

[49] The appellants' guarantee liabilities extended to the debt owed by Fibroin to the bank and thus later to Wiltshire Investments and the judgment against them included this indebtedness. When leave to appeal was granted in relation to the money owed by Opus, we were not satisfied that the approved ground of appeal, if successful, would necessarily encompass Fibroin's debt. So we withheld leave on that aspect of the case, but on the basis that the appellants could pursue the issue at the hearing of the substantive appeal. Having heard counsel briefly on the point at that hearing we see no logical reason for distinguishing between the different debts. So leave to appeal is granted in relation to the Fibroin debt.

Conclusion

[50] In this judgment we have been driven to an exercise of joining up the dots. It is possible that the rather shadowy picture which has emerged is not accurate and conceivably not entirely fair to those associated with Wiltshire Investments. If so, Wiltshire Investments has only itself to blame. It was for that company, as plaintiff, to establish that there was no defence to the entry of summary judgment and the corollary of its withholding of the settlement agreement is that it failed to do so and accordingly did not make out its case for summary judgment under r 12.2(1) of the High Court Rules.

[51] All of that said, the appellants must accept some responsibility for what has happened in that they advanced untenable defences in the High Court and did not raise the argument they have succeeded on in this Court until very late in the piece. Our judgment in their favour is a considerable indulgence. We recognise that it may well be that the settlement agreement, once disclosed, will not provide an arguable

defence. In those circumstances, we think it right to afford the respondent an opportunity to renew its application to the High Court for summary judgment once disclosure has been made.[15] As well, although we consider that the awards of costs made in the High Court and Court of Appeal should be set aside, we do not propose to award costs in relation to the appeal to this Court.

McGRATH AND CHAMBERS JJ

(Given by Chambers J)

[52] We would dismiss the appeal. We think Associate Judge Bell was correct to enter summary judgment in Wiltshire's favour and that the Court of Appeal was correct in dismissing the appeal.

[53] Associate Judge Bell found that Wiltshire had established the appellants had no defence on the basis of what was in issue before him. That he was right in that regard is demonstrated by the fact that none of the potential defences then being run is still being run. Similarly, the Court of Appeal was correct to dismiss the appeal on the basis of the issues run before it. What the appellants have now succeeded upon – the speculative side-deal – was not before the Court of Appeal.

[54] It would seem that the idea that Wiltshire or an associated company might have got a benefit from Hats or Opus under a side-deal contained in the confidential settlement agreement was first raised by a judge in the Court of Appeal during oral argument. There was no assertion to that effect either in the grounds of appeal or in the appellants' written submissions before that Court. The Court of Appeal did not investigate it further and it does not appear in their written judgment.

[55] As we understand it, what is now asserted is that Hats might have paid to Wiltshire or an associated company money which should have been paid to Opus. Had it correctly been paid to Opus, Mr Sills would have had to pay it on to Wiltshire with the consequence that the appellants' liability under the guarantee to Wiltshire would have been correspondingly reduced. The assertion, for which there is no evidence, necessarily imputes a dereliction of duty on the part of Mr Sills: he has

[15] Section 26 of the Supreme Court Act 2003 gives the Court power to remit to the High Court the application for summary judgment.

given away money which should have been Opus's. In the unlikely event he did that, he would almost certainly be liable as receiver to, among others, the appellants. Mr Sills is a practising barrister and an experienced receiver. In his affidavit, he has deposed to the obligations on him as receiver and has confirmed that he has "acted in good faith and for a proper purpose". There is no evidence to the contrary. He has had no opportunity to respond to these new allegations against him. Nor has Mr Wiltshire.

[56] The fact the guarantor wants to see a document does not of itself make the document relevant and a refusal to supply fatal. The bank's refusal to disclose its file to the guarantor in *Herron v Westpac New Zealand Ltd*[16] did not prevent the bank obtaining summary judgment. The Court of Appeal relied on a bank officer's assertion that the file contained nothing of relevance. This Court declined leave to appeal.[17] So here we see no reason to doubt the summary of the settlement agreement provided by Messrs Sills and Wiltshire.

[57] We regret the speculation as to a possible side-deal has led to the majority setting aside Wiltshire's summary judgment. The fact it is mere speculation is shown by the fact the majority are prepared to countenance Wiltshire's bringing a fresh application for summary judgment if the settlement agreement proves to be irrelevant, as Wiltshire has always contended.[18] Mr Laurenson at the hearing before us offered to let us see the settlement agreement. The majority have rejected that offer but are now content apparently for it in effect to be shown to the High Court and then for the summary judgment procedure to start all over again, if appropriate. If any court was to look at the settlement agreement, we would have thought it should have been us. It is hard to see why the appellants are granted an indulgence to raise a matter for the first time in this Court but Wiltshire is not accorded an indulgence in response.

[58] We fear this decision will encourage unsuccessful defendants on summary judgment applications to raise new grounds of defence on appeal, thereby depriving

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16 *Herron v Westpac New Zealand Ltd* [2011] NZCA 544.

17 *Herron v Westpac New Zealand Ltd* [2012] NZSC 5.

18 The conventional view has always been that a party gets only one crack at summary judgment: see, for instance, *Braid Motors Ltd v Scott* (2001) 15 PRNZ 508 (HC) at [52]–[60].

the summary judgment procedure of much of its utility. But perhaps the decision will be interpreted as a one-off solution to unusual forensic circumstances.

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