

KEMBLA AND DEFENDANT SUMMARY JUDGMENT: IS THE EMPORER WEARING ANY CLOTHES?

Introduction

1. All civil litigation, at least at its start, seems as though it will be endlessly expensive and, well, endless. Once the natural arc of a civil claim is explained to the client – pleading, discovery, interlocutories, briefs and trial – it is not surprising that most want to know if there is an easier way.
2. There have always been procedures that allow for the disposal of litigation through something less than a full trial. The original demurrer procedure was designed to allow for the early determination of cases, on the issues the parties had through pleading identified as critical to the claim. The New Zealand Courts were also aggressive in expanding their inherent jurisdiction to deal with abuse, so as to include claims where the pleading disclosed no reasonable claim or defence (a jurisdiction which in England at least was thought to require a statutory basis). However, those processes were - with the exception of the bill writ procedure - largely defendant focused, and mainly concerned with questions of law.
3. In response to the perceived limits of these procedures, the “new” High Court Rules (1986) introduced a procedure that allowed a plaintiff to obtain judgment by interlocutory application where: “the defendant [had] no defence” to the plaintiff’s claim (R 12.2(1)). The standard for judgment was soon held to be: “no reasonable grounds of defence”, as a matter of either fact or law. The procedure proved to be popular and effective.
4. Defendants, however, had nothing similar. Faced with complaints from their clients, all they could offer was the strike-out application. While in theory a claim could be so bad on the facts that it ought to be struck out, the practical reality was that a defendant’s ability to dispose of a “bad claim” was limited to those clearly bad as a matter of law.
5. In 1998, that all changed. The Rules Committee extended the summary judgment jurisdiction to include defendants. Judgment would be available if a defendant could show that: “none of the causes of action in the plaintiff’s statement of claim can succeed”. The intention was to extend to defendants the same benefits enjoyed by plaintiffs, when faced with an unreasonable and unrealistic litigant. The reality, however, proved to be far different.
6. In a series of decisions in the early 2000’s – which I refer to as the *Kembla* line of authorities - the Court of Appeal adopted a narrow and restrictive approach to

defendant summary judgment. A Court would only grant judgment where the plaintiff's case was so obviously doomed to fail that it had no prospect of success; the veritable "king hit". It was a standard intended to be significantly higher than that for plaintiff summary judgment. Its effect was to remove most of the practical benefit offered by the procedure.

7. Yet since that time, it has been difficult to discern any particular enthusiasm in the Courts for this restrictive approach. It is a line of authority that has been repeated more than developed. Indeed, the Courts have become increasingly robust in their application of the test in *Kembla*. The question emerging is; why do we have a different test for defendant and plaintiff summary judgment?
8. This issue arose in a unique way in the recent decision of *Stevens v ASB Bank* [2012] NZCA 611. The plaintiff in that case was also a counter-claim defendant. It sought plaintiff summary judgment on its action against the defendant, but also defendant summary judgment on the defendant's counter-claim. Both claims raised similar issues; the counterclaim being essentially a re-formulation of the set-off defence. The High Court gave judgment on the plaintiff summary judgment application, but refused it on the defendant application. This was on the basis that the tests for the two applications were different.
9. The Court of Appeal granted the appeal in respect of the defendant summary judgment. In the Court's view, if summary judgment could be given on the plaintiff's claim, then it ought to be given on the defendant's counter-claim, if both claim and counter-claim involved similar issues. The Court reached this result within the conventional *Kembla* framework. To that extent, the case is unremarkable.
10. However, the issue the Court did not deal with was the problem that troubled the High Court; if the tests for the two applications are different, should not similar cases be dealt with differently? That question was, essentially, ignored.
11. In this note, I do not want to debate whether *Stevens v ASB Bank* is correct. It will become apparent that I agree with the approach taken by the Court in that case. The issue I want to address is whether the Courts *should* apply the *Kembla* line of authorities, and whether there *ought* to be any distinction between plaintiff and defendant summary judgment. The argument I make is that no distinction is warranted, and that the *Kembla* line of authorities is wrong.

The approach in *Kembla*

12. The *Kembla* line of authorities consist of three cases; *Westpac Banking Corporation v M M Kembla NZ Ltd* [2001] 2 NZLR 298 (CA); *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA); and *Jones v AG* [2004] 1 NZLR 433 (PC).
13. The basic approach as set out in those authorities is that defendant summary judgment is not to be equated with plaintiff summary judgment. The Court should be significantly more reluctant to grant judgment to a defendant, and should only do so where the defendant can show that it has a “clear answer” to the plaintiff’s case, which “cannot be contradicted”. This approach was contrasted with the more permissive approach to plaintiff summary judgment.
14. The Court gave a number of reasons for this restrictive approach, ranging from an analysis of the wording of the two rules for summary judgment, to more fundamental issues of policy.
15. In terms of the rules, the Court saw it as significant that a defendant had to deal with all of the plaintiff’s causes of action before it could get judgment, while a plaintiff could get judgment on some of its causes of action only. The reason this was seen as significant was not explained.
16. What appeared to be of more importance to the Court was the availability to the defendant of the strike-out application as an alternative to summary judgment. That procedure had a long history, containing many protections for a plaintiff. The Court was not keen to see defendants potentially subvert these protections by bringing their application by way of summary judgment rather than strike-out.
17. In this regard, the main protection at risk was that an order striking out a claim did not act as a final judgment of the Court. A plaintiff could always refile an amended form of claim, if it could conceive of a way to work around the problems the defendant had identified. By contrast, summary judgment was a final judgment of the Court. The re-filing of a claim on similar issues would give rise to claims of issue estoppel.
18. The Court also saw a restrictive approach to defendant summary judgment as grounded in policy. Those reasons were explained by Thomas J in *Bernard v Space 2000 Ltd* (at p 343):

“The different approach to be adopted in relation to subcls (1) and (2) is founded on fundamental principles; a citizen’s right of access to the Courts ... [I]t is an integral element of the rule of law that everyone having a proper issue to be tried should obtain

access to the Court process. When that right of access is denied, justice is denied, and the ability of society to order its affairs and resolve its differences in a regular manner is impaired. Consequently, where a plaintiff has a proper issue to be tried it is inappropriate to apply a test or adopt an approach which would bar him or her from the judicial process. ... The Court's insistence on a clear answer which cannot be contradicted and a complete defence to the plaintiff's claim, that is, a "king hit", recognises that a plaintiff's fundamental right to his or her "day in court" is not lightly to be denied.

19. So in light of these considerations, the Court restricted the right of a defendant to use the summary judgment procedure. As well as the "king hit" standard for judgment, there were other restrictions suggested. For example, a defendant who brought an application for summary judgment, which the Court felt should have been brought by way of strike-out, was at risk not only of an award of solicitor / client costs, but also a refusal of the application on this ground alone (regardless of merit).
20. The Court also held that a plaintiff, on a defendant summary judgment application, had no obligation to produce any evidence to support its claim. In fact, the very suggestion of a need for evidence from a plaintiff may in itself be a basis for refusing the application. Again, this can be contrasted with the usual situation in a plaintiff summary judgment, where an evidential onus can easily pass to a defendant to rebut a prima facie case.
21. So the clear and intended effect of the *Kembla* line of authorities was to distinguish defendant summary judgment from plaintiff summary judgment, and to make it significantly harder to obtain.

Why *Kembla* is wrong

22. In my view, the approach in the *Kembla* line of authorities is wrong, both as a matter of law and of policy. It is perhaps easiest to start with the law.
23. The analysis of the Court in *Kembla* depended on two distinctions within the High Court Rules between plaintiff and defendant summary judgment. As discussed above, they were that a defendant must be able to dispose of all causes of action in the plaintiff's claim (whereas a plaintiff can succeed only on one of a number of claims), and the defendant has available the alternative of the strike-out application.
24. It is difficult to see why the first of these distinctions matters. A defendant facing judgment on only one of a plaintiff's claims is probably un-concerned that there are other formulations of the claim that could be made. One is enough for judgment.

Equally, it does not help a defendant much if it disposes of only one cause of action. It still faces judgment on the others.

25. More importantly, why is this asymmetry a reason to take a narrow approach to defendant summary judgment? Why incentivise a procedure (plaintiff summary judgment) that offers no certainty of resolving the entirety of the plaintiff's claim, but dis-incentivise a procedure (defendant summary judgment) that if granted will dispose of the proceeding. The only reason to incentivise plaintiff summary judgment is that, as a practical matter, judgment on one aspect of the plaintiff's claim will likely dispose of the claim entirely. But it is that very possibility – disposing of the entirety of the claim - which is the reason the Court gave for a restrictive approach to defendant summary judgment.
26. In terms of the second distinction, and the alternative available to a defendant of a strike-out application, what the Court appears to have overlooked is that a plaintiff is also entitled to bring a strike-out application in respect of a statement of defence. There is no limit on who may bring the application (see R 15.1). Indeed, prior to the introduction of the summary judgment procedure in 1986, this was one of the few tools available to a plaintiff to dispose of an unmeritorious defence. Yet the Court has never felt any concern about granting plaintiff summary judgment on questions of law, which is the usual province of a strike-out application.
27. Similar reservations can be expressed about the Court's concern with potential claims of issue estoppel. The Courts have accepted that, in both a strike-out and a summary judgment application, the plaintiff can re-plead and reformulate their case. Courts are also (invariably) lenient in assessing the merit of a claim, where facts and other material relevant to the claim are within the knowledge of an opponent. Given this, it is difficult to conceive of any realistic situation where a plaintiff, against whom summary judgment has been entered, has in some way lost an opportunity to bring its claim in a re-pleaded form. It is a concern with a technical rather than a practical dimension. It is also a concern that has not extended to defendants facing summary judgment on a matter of law, and the theoretical possibility that some other ground of defence could emerge in the future.
28. In any event, those technical issues may not have been what was driving the Court in cases such as *Kembla*. The Court saw a restrictive approach to defendant summary judgment as being the correct approach as a matter of policy. That policy, broadly speaking, was to ensure that the Courts did not overly interfere with the protections

otherwise afforded a plaintiff, and designed to ensure that the plaintiff 'has its day in Court'.

29. This is not a reason to distinguish defendant summary judgment from the plaintiff summary judgment. Presumably, a defendant is as entitled to its day in Court as the plaintiff. Indeed, the argument could be made that our adversarial system, with the burdens and other obstacles faced by a plaintiff, is biased in favour of protecting a defendant rather than a plaintiff. Yet *Kembla* endorses an approach to summary judgment that makes it easier for a plaintiff to get judgment than it is for a defendant.
30. More importantly, why would we want to have a different standard for plaintiff and defendant summary judgment? The defendant summary judgment procedure was introduced (presumably) to ensure that the benefits of the plaintiff's procedure were extended to defendants. The whole point of those processes is to impact on a party's right to proceed to trial. In the face of a reforming procedure such as defendant summary judgment, why impose such a restrictive standard?
31. So in my view, the *Kembla* line of authority is wrong. It is difficult to find support for it in the rules, or in broader policy. At the end of the day, the idea that plaintiffs and defendants should have the same right to judgment should not be controversial.

Where to from here

32. Perhaps the real difficulty here is not so much in identifying the problem with the *Kembla* line of authorities, but in doing anything about it. The cases have stood for over 10 years, and been applied on many occasions.
33. At one level, it may not matter. Cases such as *Stevens v ASB Bank Ltd* suggest that a robust application of those authorities may mean that there is little practical distinctive between the two approaches. Nevertheless, until overturned or the rules are amended, *Kembla* will remain the approach, and it is an approach that seems not only wrong, but fundamentally unfair.