THE ROLE OF SUMMARY JUDGMENT IN COMMERCIAL LAW

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This article considers the historical development of the summary judgment procedure, both in England and in New Zealand, for the purpose of highlighting the commercial imperatives underlying the procedure's genesis. It goes on to discuss the modern role played by summary judgment, by reference to two recent decisions that illustrate the tensions associated with expanding the procedure's scope into previously unheralded areas of the law. It concludes that commercial parties should rigorously consider whether their dispute is capable of being determined by summary judgment, but that this should not be understood as lessening the standard required to be met before judgment will be granted.

I INTRODUCTION

New Zealand is widely recognised to suffer from a "justice gap":[1] an unmet need for access to civil justice, which is attributable to a number of factors pertaining to the courts and their procedure.[2] The problem is not a new one. For as long as there have been judges charged with resolving disputes, there have been complaints that the process is too time consuming, too expensive, and bedevilled with ways in which an opponent may act to frustrate the administration of justice.[3] Given the importance

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1 Helen Winkelmann "Access to Justice – Who Needs Lawyers?" (Ethel Benjamin Address 2014, University of Otago, Dunedin, 7 November 2014) at 2–3 as cited in Rules Committee *Improving Access to Civil Justice: Further Consultation with the Legal Profession and Wider Community* (14 May 2021) at [4(a)].

2 See Lord Neuberger "Justice in an Age of Austerity" (Tom Sargant Memorial Lecture 2013, Freshfields Bruckhaus Deringer, London, 15 October 2013) at [31].

3 The tenor of these complaints is perhaps best encapsulated by Charles Dickens' scathing critique of the Court of Chancery in *Bleak House* (republished, Penguin Books, London, 2003) at 118:

> We are always appearing, and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death, about costs.

which commercial law has long placed on certainty over fairness,[4] it is perhaps unsurprising that the clamour for an effective procedure for resolving disputes summarily has been most strongly expressed by the law's cast of commercial actors. Providing commercial parties with a means of resolving their disputes with a minimum of expense and delay, while ensuring that all relevant evidence is ventilated and a court is able to come to a fair and reasoned decision on the merits, has however proved to be yet another of the law's endless roads to unattainable perfection.[5]

Talk of summary judgment has been said to "[conjure] up images of a small boat deftly picking off the minnows of unpaid accounts and liability under guarantees".[6] However, the procedure is not so limited in its scope. Stripped of the majority of limits historically placed on the procedure, summary judgment is now available in all types of proceedings, except those where it has been specifically excluded. Nevertheless, experience suggests that the courts have not yet fully grasped the mantle offered to them in this regard. In the nature of a call to action, this article therefore argues for greater recourse to the summary judgment procedure in appropriate cases. That qualifier – in appropriate cases – is important. Given the importance of cross-examination in resolving disputed issues of fact, it would be a bold advocate indeed who argued that summary judgment was apt to apply across the whole spectrum of commercial disputes. Accordingly, I will endeavour to strike a middle course: to highlight certain features that render a case ripe for summary judgment, provided the parties (and the courts) are prepared to throw off some of the shackles of history.

I do this, first, by charting the historical development of the summary judgment procedure, from its origins in the mid-19th century to its full-scale adoption in New Zealand by inclusion in the High Court Rules. In doing so, I highlight the commercial imperatives underlying the procedure's genesis and the important role it serves in providing commercial actors with a means of resolving disputes where there is no genuinely arguable claim or defence. I then provide an outline of the current summary judgment procedure contained in the High Court Rules 2016, with a focus on those aspects that are particularly relevant for commercial actors. Finally, I consider the developing role of summary judgment as it pertains to commercial law. To illustrate the competing tensions, I discuss two recent decisions of the High Court – one in which summary judgment was granted in a novel circumstance, another in which the plaintiffs' recourse to the procedure was criticised. I conclude that commercial parties should more rigorously consider whether their dispute is apt to be determined by summary

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4 Lord Mance "Should the Law be Certain?" (Oxford Shrieval Lecture, University of Oxford, 11 October 2011) at [3], quoting *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153, 98 ER 1012 (KB) at 1017 per Lord Mansfield CJ:

> In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

5 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) at 488 per Lord Goff.

6 Andrew Beck "Summary Judgment: Some Unusual Cases" [2004] NZLJ 305 at 307.

judgment, but that this should not be understood as lessening the standard required to be met before judgment will be granted.

II HISTORICAL DEVELOPMENT OF SUMMARY JUDGMENT

Summary judgment, as a concept, did not exist at common law.[7] The procedure's roots instead lie in a series of statutory interventions, beginning in the mid-19th century, which were intended as a response to a range of social and economic pressures impacting on the free flow of commerce.[8] Specifically, the impetus for a means of resolving commercial disputes summarily was the sense of dissatisfaction felt by the growing merchant class at the delays and technicalities associated with common law procedure. Owing to the increased value of disputes and a general movement from borough fairs to cities, the centuries preceding the 19th century saw English merchants become increasingly reliant on the courts to settle mercantile disputes. Unlike in Scotland and on the continent, however, where mercantile disputes were sent to specialist courts established for that purpose,[9] enforcement of the law merchant in England was beset with delays attributable to defects in the prescribed procedure.

By the 19th century, the traditional system of informal oral pleas in the common law courts had been supplanted by the more formal system of written pleadings.[10] Besides being highly technical, the most significant defect of these pleading rules was their failure to provide a method of determining the factual basis of a pleading prior to trial. Debtors were advised to exploit this weakness by a form of sham pleading. By pleading fictitious defences to an action based on a debt, a debtor could (i) discourage his creditor by the prospect of great expense, (ii) use the existing time to secure sufficient funds to pay the debt, or (iii) most unscrupulously of all, dissipate the funds available for payment

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7 For a general history of the development of the summary judgment procedure, see Charles E Clark and Charles U Samenow "The Summary Judgment" (1929) 38 Yale LJ 423; John A Bauman "The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act" (1956) 31 Ind LJ 329 at 329–342; and Arthur R Miller "The Ascent of Summary Judgment and Its Consequences for State Courts and State Law" (paper presented to Pound Civil Justice Institute 2008 Forum for State Appellate Court Judges) at 3–4.

8 At the debate in the House of Commons preceding the second reading of the Summary Procedure on Bills of Exchange Bill 1855 (UK), Sir Erskine Perry stated "this measure was not the conception of a legal mind, but had originated solely with persons connected with commerce" and that "with the exception of Birmingham, there was not a single commercial town of importance in the country which had not petitioned the House in its favour": (28 March 1855) 137 GBPD HC 1252–1253.

9 Diane P Wood "Summary Judgment and the Law of Unintended Consequences" (2011) 36 Okla City UL Rev 231 at 233; and Bauman, above n 7, at 334–337.

10 Bauman, above n 7, at 333, citing Sir William Holdsworth "The Development of Written and Oral Pleading" in Association of American Law Schools (ed) *Select Essays in Anglo-American Legal History* (Little, Brown and Company, Boston, 1908) vol 2 614 at 631.

prior to bankruptcy.[11] As one later commentator was sufficiently moved to remark, the common law courts occasioned "huge delays" that "[withheld] petitioners from their right" and imposed "an intolerable burden of expense".[12]

In an attempt to provide a solution to this intractable problem, Parliament enacted the Summary Procedure on Bills of Exchange Act 1855 – known as Keating's Act – to provide a summary procedure for judgment in cases involving liquidated claims on commercial instruments in England.[13] The procedure established by Keating's Act was "to have a very prompt and summary effect" on amenable cases.[14] A plaintiff was required to obtain a writ warning the defendant that judgment would be entered against them unless the defendant obtained leave to appear within 12 days of service.[15] Leave to appear and defend was granted on the defendant paying into court the amount demanded, or where the affidavits disclosed a defence to the action sufficient to require a trial.[16] This procedure, which is not altogether dissimilar from modern summary judgment proceedings, was favourably received, not least because it presented as "comparatively moderate and reasonable" when compared to some of the more "startling" alternative measures proposed by Keating's contemporaries.[17]

The benefits afforded by the new summary judgment procedure[18] soon saw Keating's Act extended to other types of cases. The Supreme Court of Judicature Acts of 1873 and 1875 first extended the procedure to actions for recovery of debts and other liquidated claims.[19] Subsequent

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11 Bauman, above n 7, at 333–334.

12 John Fortescue *De Laudibus Legum Angliae* (Stanley B Chrimes (translator), Cambridge University Press, Cambridge, 1942) as cited in Bauman, above n 7, at 329.

13 Summary Procedure on Bills of Exchange Act 1855 (UK) (18 & 19 Vict c 67) [Keating's Act]. The Act's name derived from its chief proponent, Sir Henry Keating, a Queen's Counsel and politician who was, at that time, the Member of Parliament for Reading. Sir Henry later served as Solicitor-General for England and Wales, before being appointed a Judge of the Court of Common Pleas and, later, a Member of the Privy Council.

14 *Walker v Hicks* (1877) 3 QBD 8 (QB) at 9 per Cockburn CJ.

15 Keating's Act, s 1.

16 Section 2.

17 Bauman, above n 7, at 338. For example, Lord Brougham had proposed the adoption of the Scottish procedure whereby, if a bill or note was dishonoured by non-payment or non-acceptance and a protest was registered within six months of that date, the holder was entitled to the ordinary methods of execution on a judgment. The defendant's recourse was to apply to stay execution pending a full hearing, but this ordinarily required payment into court of security for the sum demanded.

18 See Wood, above n 9, at 234: "The novel mechanism provided a procedural sieve for removing sham claims and reducing delay when there was no factual dispute requiring a court's attention."

19 Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66), r 7 of the Schedule; and Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77), ord 3 r 6, and ord 14.

amendments saw extension to other types of actions with the potential to involve undisputed facts – for example, actions to recover specific chattels, by landlords to recover land for non-payment of rent, and for specific performance of contracts in writing for the sale and purchase of property.[20] Unlike the process later adopted in the United States, the English procedure was defined by its focus on factual clarity and proof; summary judgment was only granted to plaintiffs in cases approaching factual certainty.[21] In the 1930s, the procedure was extended further still to include all actions in the King's Bench Division, apart from certain listed exceptions.[22] The final notable historical development occurred in 1954, with amendment to permit the special endorsement of writs in any action in the Chancery Division, which extended the procedure to all actions in that Court.[23] From its practical commercial origins, England now had a fully-fledged and generally available summary judgment procedure.

III INTRODUCTION OF SUMMARY JUDGMENT IN NEW ZEALAND

Unlike certain other jurisdictions, New Zealand did not immediately seize upon the summary judgment procedure established by Keating's Act. The effect of the English Laws Act 1858 was that it was only the laws of England existing on 14 January 1840 that were deemed to be in force, so it remained New Zealand's prerogative as to when, or if, it would adopt a similar procedure. That epoch did not arrive until 1 January 1986, when the High Court Rules came into force.[24] The raison d'être of the new summary judgment procedure was "to avoid the time and expense involved in litigation where this would be entirely wasteful", and to provide "a means of speedy resolution of meritorious claims if the plaintiff can show that there is no genuinely arguable defence".[25] The operative provision, r 136, was in the following terms:

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20 Bauman, above n 7, at 339, citing Edward S Greenbaum and Leslie I Reade *The King's Bench Masters and English Interlocutory Practice* (John Hopkins Press, Baltimore, 1932) at 76–79.

21 Ilana Haramati "Procedural History: The Development of Summary Judgment as Rule 56" (2010) 5 NYU JL & L 173 at 178–179.

22 The amendments were based on a report of the Hanworth Committee, which concluded that summary judgment was not appropriate in proceedings for, inter alia, libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage and actions in which fraud was alleged by the plaintiff: Business of Courts Committee *Interim Report* (Cmd 4265, 1933) at [15]–[17].

23 Bauman, above n 7, at 342, n 100.

24 The High Court Rules replaced the Code of Civil Procedure as the Second Schedule to the Judicature Act 1908 by virtue of s 10 of the Judicature Amendment Act (No 2) 1985.

25 Andrew Beck *Summary Judgment Procedure* (Butterworths, Wellington, 1988) at [1.05].

> Where in a proceeding to which this rule applies the plaintiff satisfies the Court that a defendant has no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant.

The authors of *McGechan on Procedure* identify two progenitors of this novel summary judgment procedure: (i) the bill writ procedure (the New Zealand predecessor to summary judgment); and (ii) the summary judgment procedures in various guises in other jurisdictions.[26] Dealing with these seriatim, in New Zealand prior to 1986, the only procedural device for preventing spurious defences and fast tracking obviously meritorious claims was the bill writ procedure.[27] The procedure was designed to operate where issues of liability could be determined from the document itself: bills of exchange were treated as the equivalent of cash, such that a breach of a background or underlying contract by the plaintiff did not afford a defence to an action on a bill.[28]

The procedure's key limitation was that its application was limited to "bills of exchange", which confined it to cases involving promissory notes, cheques and written contracts signed by the parties.[29] In cases falling outside the scope of the bill writ procedure, it was possible for a defendant who had no real defence to resort to various interlocutory steps in order to engender delay.[30] This was the same mischief that the English summary judgment procedure, embodied in ord 14 of the Supreme Court of Judicature Act 1875, was designed to remedy.[31] Given the success enjoyed by the bill writ procedure, when the Supreme Court Procedure Revision Committee produced its report to the Rules Committee in 1978, one of its key recommendations was the replacement of the bill writ procedure with a comprehensive set of summary judgment rules.[32]

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26 Andrew Beck and others (eds) *McGechan on Procedure* (online ed, Thomson Reuters) at [HRPt12.01(2)].

27 See r 495 of the Code of Civil Procedure included as the Second Schedule to the Judicature Act 1908, until its repeal by the Judicature Amendment Act (No 2) 1985. Indeed, it is arguable that notwithstanding the bill writ procedure, "New Zealand was effectively in a similar position to that occupied by English civil procedure prior to 1873": Beck, above n 25, at [1.03].

28 See *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA) at 14–15 per Cooke P; *Begley Industries Ltd v Cramp* [1978] 1 NZLR 527 (CA) at 535–536 per Cooke J; *Reid Development Co Ltd v Rhodes* [1980] 1 NZLR 704 (SC) at 711 per Somers J; and *Finch Motors Ltd v Quin* [1980] 2 NZLR 513 (SC) at 515–516 per Hardie Boys J.

29 *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"* [1998] 2 NZLR 108 (HC) at 115–116 per Potter J; and Ian Barker "Books" [1989] NZLJ 38 at 38.

30 Gordon Cain "The High Court Rules II: Some changes effected" [1985] NZLJ 152 at 152.

31 Andrew Beck "Onus of proof in summary judgment proceedings" [1987] NZLJ 143 at 143–144, citing Robert Wyness Millar *Civil Procedure of the Trial Court in Historical Perspective* (Law Center of New York University for the National Conference of Judicial Councils, New York, 1952) at 237.

32 Gordon Cain "The High Court Rules I: Some Background Comments on the New Code" [1985] NZLJ 122 at 122.

Although modelled to a large extent on ord 14, a number of first instance decisions made the point that the New Zealand procedure differed from both its English counterpart and the bill writ procedure, by placing the onus on the plaintiff to satisfy the court that the defendant had no defence.[33] In the first summary judgment case to come before the Court of Appeal, this was described as the "outstanding feature" of the provision: it "requires the plaintiff to establish a negative in circumstances in which, in general, the existence and nature of any defence is within the knowledge of the defendant".[34] Placing the overall onus on the plaintiff to set out grounds for the belief that there is no defence took New Zealand a step further than the English procedure, where reliance was placed on the plaintiff's oath alone.[35] Although it is not entirely clear why it was thought necessary to adopt a novel approach in New Zealand,[36] the courts' interpretation of what the onus practically entailed meant that, in many cases, the difference between the two systems was more apparent than real.[37]

As enacted, the new summary judgment procedure was kept on a relatively tight leash. The Rules Committee achieved this principally by extending the exceptions under the English provision (ord 14) to include, inter alia, proceedings under Parts 4 and 7 of the High Court Rules,[38] and declining to provide for defendant's summary judgment. The reasoning underlying these exceptions was, however, anomalous.[39] In the case of the perpetuation of ord 14's exclusion of defamation, malicious prosecution, false imprisonment and fraud, this appears to have been based on a misunderstanding of

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33 See *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (SC) at 14 per Greig J; *Cashel Holdings Ltd v Westpac Banking Corporation* HC Christchurch CP48/86, 9 June 1986 at 4 per Cook J; *International Ore & Fertiliser Corporation v East Coast Fertiliser Company Ltd* HC Napier A105/85, 17 June 1986 at 2 per Quilliam J; and *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2 per Eichelbaum J.

34 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3 per Somers J.

35 *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"*, above n 29, at 116, citing Beck, above n 25, at [1.05].

36 In Barker, above n 29, at 38, the Chairman of the Rules Committee, Sir Ian Barker, stated:

> Our Rules Revision Committee, in recommending the present rules, did not borrow from any other jurisdiction's summary judgment rule in any unselective way; it settled for a uniquely New Zealand form of procedure.

37 *Pemberton v Chappell*, above n 34, at 3.

38 High Court Rules, r 135.

39 See Beck, above n 25, at [2.06]:

> The way these exceptions have been created is unduly complicated and has given rise to a number of cases. For the most part proceedings of the type envisaged above would in any event not be suitable for summary judgment and the exclusion is therefore superfluous. The real problem is that the net is spread too wide and catches several situations which are straightforward and eminently suitable for summary judgment.

the rationale underlying these exceptions.[40] The context of ord 14 was that, in England, a defendant had a right to trial by jury in respect of these excluded matters.[41] Although generally unsuitable for summary judgment, New Zealand civil procedure did not single out these causes of action for special treatment in the same way, so the rationale for a blanket exclusion was lacking.

Even more anomalous was r 135's provision that summary judgment was not available in respect of proceedings under Parts 4 and 7 of the High Court Rules. This meant that the procedure was not available in respect of proceedings within the Court's equitable jurisdiction, proceedings involving mortgages and the sale of land, and all proceedings under the Companies Act 1955. Again, it is acknowledged that, for the most part, these types of proceedings are unlikely to be suitable for determination by summary judgment. However, their inclusion in the list of exclusions owes itself to the Rules Committee's misconception that it was simply extending the exclusions in ord 14 to other types of proceedings where summary judgment was generally inappropriate. As noted above, however, this was not the rationale underlying ord 14, such that an extension based on this flawed premise is difficult to justify. These issues were remedied when the High Court Amendment Rules 1998 made summary judgment available to defendants and removed virtually all of the jurisdictional restrictions on the use of the procedure.[42] The intervening 12 years, and the inability for commercial parties to access the summary judgment procedure in respect of equitable or Companies Act claims, therefore stands as an historic anomaly.

That said, these jurisdictional limits did not prevent the summary judgment procedure from immediately being pressed into action. Writing in February 1989, Sir Ian Barker, then Chairman of the Rules Committee and a Judge of the High Court, remarked that "[p]ractitioners have taken to summary judgment with enthusiasm" and "[a]ll three Masters have been extremely busy in dealing with numerous summary judgment applications".[43] The effect was not confined to courts of first instance; the early 1990s also saw a surge in appeals regarding summary judgment decisions and substantive guarantee and insolvency cases.[44] Indeed, 1990 alone saw 110 cases of this nature come before the Court of Appeal.[45] The key cause of this uptake was the need to deal with the multitude of

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40 Andrew Beck "Jurisdictional limitations on summary judgment: Is there a better way?" [1989] NZLJ 298 at 298; and Beck, above n 25, at [2.03].

41 Supreme Court Act 1981 (UK), s 69.

42 Section 3 of the High Court Amendment Rules 1998 revoked and replaced rr 135–144 of the High Court Rules with an amended summary judgment procedure.

43 Barker, above n 29, at 38–39. For a discussion of the role of the Master, see Ronald Davison "Masters of the High Court" [1987] NZLJ 324; and P L Twist "The Inherent Jurisdiction of Masters" [1996] NZLJ 351.

44 Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002) at 229.

45 Ivor Richardson "Trends in Judgment Writing in the New Zealand Court of Appeal" in Rick Bigwood (ed) *Legal Method in New Zealand: Essays and Commentaries* (Butterworths, Wellington, 2001) 261 at 279.

proceedings caused by economic conditions beginning in the late 1980s, the most notable of which was the sharemarket crash of 1987 and the subsequent collapse in property values.[46]

In its judgment concerning but one of the throng of failed companies, the Court of Appeal observed that the economic climate of the time had led to an "increase in the number of companies and individuals failing to meet their financial obligations" and a consequent "upsurge in litigation in which creditors and investors invoke their remedies".[47] The benefits afforded by the novel summary judgment procedure were recognised to be timely in this regard. Surveying the courts' workload in 1990, Casey J opined:[48]

> … without the benefit of this procedure, it is hard to see how the High Court could have dealt with the mass of litigation … following the collapse of the share and property markets.

The procedure's benefits, despite its initial shortcomings, had "undoubtedly gone a long way in restoring the confidence of the commercial community in the Courts".[49]

IV THE MODERN SUMMARY JUDGMENT REGIME

As can be seen from this historical survey of the law, there have at times been different jurisdictional limits on the availability of summary judgment in New Zealand, many of which "were historical rather than logical".[50] Under the High Court Rules 2016 these limits have effectively been circumscribed. Summary judgment is available in all types of proceedings, except those specifically excluded by r 12.1, namely, proceedings under Part 19 (originating applications), Part 20 (appeals) and Part 21 (cases stated), applications for a writ of habeas corpus, and applications for administration in common form.

As the authors of *McGechan on Procedure* note, summary judgment is not generally suitable for these matters in any event,[51] such that the exclusory rule effectively functions as a "backstop", preventing parties from wasting the courts' time with applications that, by their very nature, either cannot be determined in this manner (eg appeals) or which are already sufficiently truncated to render a summary procedure pointless (eg originating applications). In theory, then, we have reached the terminus of the 150-year journey begun by Keating's Act: summary judgment is available, as of right, in any proceeding except those where it would be functionally inapposite. However, as discussed below, case law remains replete with examples of judges chastising parties for seeking summary

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46 Spiller, above n 44, at 229; and Barker, above n 29, at 38–39.

47 *Re Registered Securities Ltd* [1991] 2 NZLR 48 (CA) at 52 per Cooke P.

48 *Cegami Investments Ltd v AMP Financial Corp (NZ) Ltd* [1990] 2 NZLR 308 (CA) at 314 per Casey J.

49 At 314.

50 Beck and others, above n 26, at [HR12.1.01].

51 At [HR12.1.01].

judgment in cases where it is plainly inappropriate. However clear-cut a summary judgment application may appear, each proceeding invariably calls for a balancing exercise between a defendant's right to have its defences explored at trial and "the appropriate robust and realistic approach called for by the particular facts of the case".[52]

In the case of a plaintiff's summary judgment application, the court is empowered to give judgment if satisfied "that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action".[53] In *Pemberton v Chappell*, the Court of Appeal stated that the phrase "no defence" requires that the plaintiff establish "the absence of any real question to be tried",[54] while, in *Towers v R & W Hellaby Ltd*, it was said that the critical question would generally be whether the Court was satisfied that the plaintiff's case was "unanswerable".[55] The phraseology adopted in the United Kingdom is whether there is "a fair and reasonable probability of the defendant having a real and bona fide defence".[56] Each of these expressions points towards the high bar required to be met, while nonetheless giving vent to the underlying purpose of the procedure: to "put an end to worthless defences being raised and pursued for the purposes of delay".[57]

It has already been noted that the outstanding feature of the provision is that the burden of satisfying the court the defendant has no defence is cast on the plaintiff. This onus does not shift;[58] however, in appropriate circumstances, an evidentiary burden will pass to the defendant to demonstrate the existence of a tenable defence.[59] This will be the case where, left unchallenged, the plaintiff's statement of claim and sworn belief that there is no defence are sufficient to convince the court there is no arguable defence.[60] A bare denial of liability in such circumstances is unacceptable.

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52 J C Corry *Laws of New Zealand* Civil Procedure: High Court (online ed) at [365], citing *Australian Guarantee Corp (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 (CA) at 59 per Greig J.

53 High Court Rules 2016, r 12.2.

54 *Pemberton v Chappell*, above n 34, at 3 per Somers J.

55 *Towers v R & W Hellaby Ltd* (1987) 3 NZCLC ¶96-155 (HC) at 100,067 per Thorp J.

56 *Gulf Azov Shipping Company Ltd v Chief Humphrey Idisi* [2001] EWCA Civ 505 at [33] per Longmore LJ, citing *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyds Rep 21 (CA) at 23 per Ackner LJ; and *National Westminster Bank v Daniel* [1993] 1 WLR 1413 (CA) at 1456–1457 per Glidewell LJ.

57 Corry, above n 52, at [365], citing *Pemberton v Chappell*, above n 34, at 2–3 per Somers J.

58 *MacLean v Stewart* (1997) 11 PRNZ 66 (CA) at 69 per Thomas J.

59 Beck and others, above n 26, at [HR12.2.05], citing *Auckett v Falvey*, above n 33, at 2 per Eichelbaum J.

60 *Pemberton v Chappell*, above n 34, at 3. Although required, under r 12.4(5)(b), to depose to the belief the defendant has no defence, a plaintiff does not have to anticipate any particular defence of which it lacks notice: *Greenback New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [19] per Tipping J.

Nor can the defendant escape liability by raising a "false, hypothetical or frivolous" defence.[61] What is required is the demonstration of the existence of a tenable defence (an issue of fact, or arguable question of law, that ought to be tried), which means that the court cannot be satisfied the plaintiff has discharged its ultimate onus to show the defendant has no defence.

The position, as regards the onus of proof, is somewhat different on a defendant's summary judgment application. As made clear by r 12.2(2), to succeed in an application for summary judgment, a defendant is required to satisfy the court that *none* of the causes of action in the plaintiff's statement of claim can succeed. If the defendant can only show that *some* causes of action cannot succeed, the proper course is an application for strike out.[62] The key difference between the two procedures is that an application for strike out is determined on the pleadings, while an application for summary judgment allows for the provision of affidavit evidence.[63] A defendant will therefore be able to succeed via an application for summary judgment on the basis of material other than that contained in the pleadings.[64] Like in the case of a plaintiff's application, summary judgment will not be granted to a defendant where there are material disputes of fact that cannot be resolved on affidavit evidence.[65] The types of application likely to succeed are those where there is a complete and incontrovertible defence on the facts – for example, where the plaintiff lacks standing,[66] or the terms of the contract provide a complete answer to the claim.[67]

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61 *MacLean v Stewart*, above n 58, at 69 per Thomas J, quoted with approval by the Court of Appeal in *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 (CA) at [93] per O'Regan J; and *Cyndicate Property Group Ltd v Jun* [2011] NZCA 502, (2011) 16 ELRNZ 581 at [51] per Ellen France J.

62 Beck and others, above n 26, at [HR12.2.07(1)].

63 *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60] per Elias CJ. Summary judgment is a judgment between the parties on the dispute so operates as an issue estoppel, such that the defendant must have an irrefutable case on the evidence before judgment will be entered. By contrast, if a pleading is struck out, the plaintiff is not precluded from bringing a further properly constituted claim.

64 See *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701 at [81] per Elias CJ, quoting her Honour's earlier statement in *Westpac Banking Corporation v M M Kembla New Zealand Ltd*, above n 63, at [60]:

> [Rule 12.2(2)] permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed.

Conversely, where there is a clear legal defence to the claim, an application for strike out, not summary judgment, is the appropriate procedure: *Body Corporate v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297 at [4] per Elias CJ.

65 *McNamara v Auckland City Council*, above n 64, at [81] per Elias CJ, citing *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433 at [5] per Lord Bingham.

66 *Coastal Tankers Ltd v Southport NZ Ltd* (1999) 13 PRNZ 638 (HC) at [11]–[26] per Master Venning.

67 See *Body Corporate v North Shore City Council [Spencer on Byron]*, above n 64, at [10] per Elias CJ.

One point on which the authorities are wholly consistent is that both plaintiff's and defendant's summary judgment applications are not the appropriate procedure for determining issues of fact. Questions of credibility can be determined only when a witness is cross-examined on oath, and the summary judgment procedure (which is normally based entirely on affidavit evidence) does not permit this method of testing allegations.[68] That said, the whole purpose of the introduction of the summary judgment procedure was to address the ignoble practice of defendants frustrating proceedings by raising spurious defences or factual conflicts. Accordingly, the courts have regularly emphasised that it will be appropriate to take a "robust approach" to summary judgment applications.[69] As was said by Lord Diplock, delivering the advice of the Privy Council in *Eng Mee Yong v Letchumanan*, a judge is not bound to accept uncritically every statement on an affidavit, "however equivocal, lacking in precision, inconsistent with undisputed contemporary documents … or inherently improbable in itself it may be".[70]

Conversely, it is well established that a court can properly determine questions of law on a summary judgment application, and that this may even extend to determining difficult questions requiring argument with reference to authority.[71] As was observed by Cooke P, giving the judgment of the Court of Appeal in *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd*:[72]

> … if the facts are adequately ascertained and the Court can be confident that the issue clearly turns on pure questions of law or interpretation, there may be no point in insisting on a trial.

To put the matter another way, what, in fact, would be gained by allowing the parties to return the next day for the purpose of giving live evidence and re-arguing the matter in open court?[73] Provided

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68 Beck and others, above n 26, at [HR12.2.03]; *Pemberton v Chappell*, above n 34, at 3–4 per Somers J; and *Attorney-General v Rakiura Holdings Ltd*, above n 33, at 14 per Greig J.

69 *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA) at 85–86 per Cooke P; *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26] per Miller J; and *Long Capital Holdings NZ Ltd v Jacks Point Village Holdings No 2 Ltd* [2020] NZCA 102, (2020) 20 NZCPR 939 at [29] per Gendall J.

70 *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC) at 341 per Lord Diplock, cited in *Pemberton v Chappell*, above n 34, at 4 per Somers J; *Krukziener v Hanover Finance Ltd*, above n 69, at [26] per Miller J; and *Avison v McFarlane* [2015] NZCA 409, (2015) 4 NZTR ¶25-019 at [38] per Williams J.

71 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [37] per Arnold J, citing *Pemberton v Chappell*, above n 34, at 4 per Somers J. See further *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28] per McGrath J.

72 *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd*, above n 28, at 16 per Cooke P; and Beck and others, above n 26, at [HR12.2.02].

73 See *Verrall v Great Yarmouth Borough Council* [1981] QB 202 (CA) at 218 per Roskill LJ:

> Merely to order a trial so that the matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent.

A similar sentiment was expressed by Lord Denning MR at 215.

the defence advanced does not require findings on disputed facts or the ascertainment of future facts, and sufficient time is afforded for argument, the court should be prepared to determine even difficult legal questions;[74] this being consistent with the approach taken on an application for strike out, which is directed solely at questions of law.

A few words should also be said about the residual discretion vested in the court. Under r 12.2, the court "may give judgment" where the plaintiff (or defendant) has established that the opposing party has no arguable defence (or claim). Although this discretion is recognised to be wide and unlimited, the approach of the courts is that it should be restrictively applied.[75] Absent any suggestion of oppression or injustice, there is little room for recourse to the discretion, such that, in the great majority of cases, it will not feature as a relevant consideration.[76] This is especially relevant in a commercial context, where the purpose of the contract and commercial imperatives will militate against delaying judgment until after a further hearing.[77]

V THE ROLE OF SUMMARY JUDGMENT

I now turn to consider the modern role of summary judgment as it pertains to commercial law. Unlike in those legal systems with a commercial code, in New Zealand, the term "commercial law" is not a term of art. There is therefore a matter of discretion in its taxonomy. For the purpose of this article, I use it to denote the law which governs commercial transactions between commercial parties, that is, parties each acting in the course of a business.[78] Much of commercial law (as I have defined it) is subject to statute and, in particular where the law of contract is concerned, is at least partially

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74 *International Ore & Fertilizer Corp v East Coast Fertiliser Co Ltd*, above n 28, at 16. See further *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 1 WLR 642 (CA) at 654 per Robert Goff LJ, citing *Cow v Casey* [1949] 1 KB 474 (CA) at 481 per Lord Greene MR: "… even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'."

75 *Pemberton v Chappell*, above n 34, at 5 per Somers J; *Sudfeldt v UDC Finance Ltd* (1987) 1 PRNZ 205 (CA) at 209 per Casey J; and *Berg v Anglo-Pacific International (1988) Ltd* (1989) 1 PRNZ 713 (CA) at 717 per Hardie Boys J.

76 Beck and others, above n 26, at [HR12.2.11].

77 See *Dominion Breweries Ltd v Countrywide Banking Corp Ltd* CA314/91, 18 August 1992 at 5 per Richardson J:

> On the facts of the case we are satisfied that there is no sufficient reason to refuse judgment. To do so would be to defeat the commercial purpose of the contractual exclusion, would be out of touch with business realities and would keep Dominion Breweries waiting for payments it was intended it should receive monthly while managing the hotel, whilst protracted proceedings on the counterclaim are litigated.

78 See generally Lord Leggatt "What is the point of commercial law?" (Fourth Jonathan Hirst QC Commercial Law Lecture, The Law Society, 2 November 2021) at [11], citing Roy Goode "The Codification of Commercial Law" (1988) 14 Monash LR 135 at 141.

codified in the Contract and Commercial Law Act 2017.[79] That Act, among other things, deals with contractual mistakes, contractual remedies, frustrated contracts, illegal contracts and the sale of goods – all areas which are well settled in terms of their amenability to summary judgment. I do not intend to dwell on them.

Nor, for differing reasons, do I intend to discuss claims under those statutes within the realm of consumer-focused legislation,[80] or pure contractual claims. The former is subject to particular policy concerns and enforcement processes operating in those areas, while the latter (in particular claims to enforce a payment obligation under a contract) are the bread and butter of summary judgment. Instead, what this section is concerned with are two statutes providing commercial actors with causes of action that, traditionally, have been seen as inappropriate for summary judgment. I am referring here to the Companies Act 1993 and the Financial Markets Conduct Act 2013 (which replaced the Securities Act 1978). In the remainder of this section, I venture some general comments about the changing nature of the New Zealand courts' attitude to summary judgment, using these statutes as a microcosm.

The High Court Amendment Rules 1998 removed the majority of jurisdictional limits on the summary judgment procedure. Theoretically, then, summary judgment is now available in respect of the breadth of proceedings contemplated by these two statutes. The reality, however, is that the courts have remained reticent, only granting summary judgment in cases that are clearly suitable for determination without the need for oral evidence. Somewhat ironically, given the Amendment Rules introduced the concept of defendant's summary judgment, the majority of successful summary judgment applications have involved companies or directors using the procedure to obtain judgment in respect of claims that have no realistic possibility of success. For example, the Court of Appeal has recently provided guidance as to when defendant's summary judgment will be appropriate because an offer has been made to purchase the plaintiff's shares for fair value, thus rendering relief unavailable under s 174 of the Companies Act.[81]

By contrast, cases in which summary judgment has been granted to a plaintiff are few and far between. A notable exception is *Hinton v Heartland Prime Meat (NZ) Ltd*, where the plaintiffs (minority shareholders who had not signed a special resolution authorising a major transaction) obtained a declaration that the defendant company was required to purchase their shares following the procedure in ss 110–112 of the Companies Act.[82] It appears to have been accepted that, if the notices

79 Originally contained in the Sale of Goods Act 1908, Frustrated Contracts Act 1944, Illegal Contracts Act 1970, Contractual Mistakes Act 1977 and Contractual Remedies Act 1979.

80 See the Fair Trading Act 1986 (insofar as it applies to consumers), the Consumer Guarantees Act 1993, the Credit Contracts and Consumer Finance Act 2003, the Unsolicited Electronic Messages Act 2007 and the Privacy Act 2020.

81 *Birchfield v Birchfield Holdings Ltd* [2021] NZCA 428, [2022] 2 NZLR 123 at [29]–[40] per Goddard J, discussed by Associate Judge Lester in *Hiscock v Panmure Orchards Ltd* [2021] NZHC 3020 at [16]–[22].

82 *Hinton v Heartland Prime Meat (NZ) Ltd* (1999) 8 NZCLC ¶96-792 (HC).

sent to the company initiating the process were valid, the plaintiffs were entitled to relief. The only issue was whether a memorandum subsequently provided to the directors affected the status of those notices – this being a question of law, which was capable of being determined on a summary judgment basis.[83] The decision, which was analogous to an application under the Declaratory Judgments Act 1908, does not materially advance the case for the general availability of plaintiff's summary judgment for proceedings under the Companies Act, or indeed under any other commercial-focused statute.

A Feldman v Dexibit Ltd

This being the accepted state of the law, a recent decision of the High Court, *Feldman v Dexibit Ltd*, represents a significant development in this regard.[84] Specifically, it appears to be the first case in which summary judgment has been granted to a plaintiff under ss 118 and 174 of the Companies Act. Dexibit was a technology company focused on the provision of data and analytics software services. Its founding shareholders, including the first plaintiff (Mr Feldman), were all involved in the business to differing extents. Following a deterioration in the parties' relationship, Dexibit undertook a round of further capital raising (known as the Series A Round), which resulted in the dilution of the plaintiffs' shares, and amendments to both the constitution and the shareholders' agreement, in apparent breach of the process required by those documents. The plaintiffs sought summary judgment for their claim requiring compliance with the minority buy-out provisions in ss 111 and 118, or alternatively invocation of the unfair prejudice remedy in s 174.

The key issue was whether the actions taken during the Series A Round affected rights attached to the plaintiffs' shares. Associate Judge Sussock found that they did, such that Dexibit was not entitled to act as it had, unless this was approved by a special resolution of each interest group.[85] On the information available, it was unclear whether Dexibit's resolution was valid (because it had obtained the necessary approvals), or whether it had failed to comply with this requirement.[86] What was clear was that no copy of the signed resolution (whether valid or invalid) had been sent to the plaintiffs, as required by the Companies Act.[87]

The failure to comply with this mandatory obligation was fatal to the defendants' opposition. If the resolution was valid, the plaintiffs were within time when they issued their notice requiring the company to purchase their shares under s 111.[88] Alternatively, if the resolution was invalid, summary judgment would likely be available under s 174. As her Honour noted, ordinarily a claim for breach

83 At 261,887 per Master Venning.

84 *Feldman v Dexibit Ltd* [2021] NZHC 2488.

85 At [127]–[128].

86 At [139]–[142].

87 At [153].

88 At [159]–[160].

of s 174 is unlikely to be amenable to summary judgment.[89] However, the conduct complained about (a breach of s 117) was a deemed breach by virtue of s 175, so the evidential difficulties associated with proving unfairly prejudicial conduct were essentially obviated. The particular breach committed by Dexibit (whether of s 118 or s 174) was left to be determined at the next stage of the proceeding, which was directed at determining appropriate relief and quantum.[90] In either case, however, summary judgment was appropriate because the plaintiffs' case was based solely on the documentary record, which would not change at trial.

The plaintiffs' decision to focus their case on an objective interpretation of the documents is perhaps the most striking aspect of the proceedings and what sets *Dexibit* apart from other superficially similar cases. In a recent English case, for example, a minority shareholder was refused summary judgment because the question whether the respondents were entitled to act as they did turned on representations made at the time of the original investment rather than the documents.[91] By contrast, the factual narrative was not disputed in *Dexibit*; what was in issue were the legal consequences of the actions taken by the company.

One point not required to be addressed in *Dexibit* was whether it may be possible to establish (on a summary judgment basis) a breach of s 174 in circumstances not amounting to a deemed breach of that section. Had, for example, the share issue not constituted a breach of s 117, could the Court have concluded that the actions of the company in breach of the terms of the constitution and the shareholders' agreement amounted to unfairly prejudicial conduct? Given that, as I have attempted to labour, the propriety of the conduct in question turned solely on the interpretation of the documents, it is arguable that a finding of breach would still have been available. The Court would have been in exactly the same position had it reconvened in 12 months' time to receive viva voce evidence following the exchange of discovery. By that same token, it should be possible for a court to find a breach of, for example, s 9 of the Fair Trading Act 1986, if the claim is similarly predicated on the documentary record. Case law from the United Kingdom is generally supportive of this approach.[92]

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89 At [162].

90 At [163]–[165]. The proceedings settled before this second-stage hearing as to relief and quantum, with the company buying out the plaintiffs' shares for an undisclosed price: see Fiona Rotherham "Coming out the other side of a Covid-decimated industry" NBR (10 February 2022) <www.nbr.co.nz>.

91 *Faulkner v Vollin Holdings Ltd* [2020] EWHC 3176 (Ch), [2021] BCC 249 at [20]–[28] per Johnson J.

92 See *Re Bankside Hotels Ltd (No 2)* [2018] EWHC 1035 (Ch), [2018] BCC 617 at [127] per Sir Nicholas Warren:

> I see no reason why a particular issue in [an unfair prejudice] petition could not, in appropriate circumstances, be decided including whether the Court is satisfied certain conduct amounts to unfairly prejudicial conduct …

Appeal allowed but not on this point: *Re G&G Properties Ltd* [2019] EWCA Civ 2046, [2020] BCC 236.

Following this decision, it appears that some shareholders may have an easier path to obtaining relief from unfairly prejudicial conduct than was previously thought to be the case. Shareholders must be aware of the strict time limits required by the procedure established by ss 111–118. However, provided they meet these requirements, there is no reason why a summary judgment claim should not succeed. Shareholders wishing to bring a claim for unfairly prejudicial conduct (under s 174) have a more difficult task. However, provided their claims are based solely on the documents, there appears to be no reason why a court should not be willing to decide the matter on a summary judgment basis. A greater readiness on the part of the courts to order summary judgment in respect of commercial disputes may provide the impetus for parties to negotiate commercial outcomes at an earlier stage of proceedings, given the greater risk of successful summary judgment proceedings, or (where a plaintiff may not have the funds to support a full hearing) proceedings being instituted at all.

B Fullarton v Arowana International Ltd

A salutary reminder that the permissive approach taken by Associate Judge Sussock in *Dexibit* will not have the effect of opening the floodgates is provided by the equally recent decision of the High Court in *Fullarton v Arowana International Ltd*.[93] The proceedings concerned various claims, under ss 55G and 56 of the Securities Act and s 9 of the Fair Trading Act, arising out of an initial public offering (IPO) by Intueri Education Group Ltd (Intueri). Like Associate Judge Sussock in *Dexibit*, Fitzgerald J remarked upon the novelty of the application and the fact it appeared that summary judgment had never previously been granted in New Zealand or Australia on a securities claim.[94] The result in *Fullarton*, however, was markedly different to the groundbreaking outcome in *Dexibit*. Although not as excoriating as judges in certain earlier cases,[95] her Honour's judgment makes clear that this was plainly an inappropriate case in which to invoke the summary judgment procedure.

The IPO in question involved Intueri raising $174.7 million, a portion of which was used to acquire a company that owned and operated three New Zealand-based private training establishments. In these proceedings, brought by various investors, it was alleged that the IPO documents (comprised of an investment statement and prospectus) contained "untrue statements" for the purpose of s 55 of the Securities Act, and were misleading and deceptive for the purpose of s 9 of the Fair Trading Act. The plaintiffs initially sought summary judgment as to liability in respect of both causes of action;

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93 *Fullarton v Arowana International Ltd* [2021] NZHC 931.

94 At [13].

95 See for example *MacLean v Stewart*, above n 58, at 67 per Thomas J:

> The present appeal relates to litigation which provides a prime example of the misuse of the summary judgment procedure. The litigation … is strongly contested by the parties. As tempting as the summary judgment procedure may have appeared to the plaintiffs, … the procedure should have been resisted, or discontinued when it became plain that it was inappropriate.

however, owing no doubt to how the argument developed, an amended claim was filed on the final day of hearing that limited the application to solely the Securities Act claims.[96]

As to the claim itself, the initial hurdle to be surmounted was the factual question whether any of the IPO documents contained untrue statements. The significance of this point was not lost on the Court. Indeed, Fitzgerald J observed that the fact almost three hearing days were devoted to factual issues arising on the application did not make for an auspicious start.[97] More importantly, however, key parts of the plaintiffs' case[98] relied on what her Honour accepted was inadmissible hearsay evidence.[99] Without these key documents, there was inevitable uncertainty about a number of the factual propositions underpinning the plaintiffs' claim.[100] Moreover, other factual matters (such as the state of knowledge of certain enrolment figures, and the scope and nature of audit systems and business practices) clearly needed to be the subject of further evidence before it would be appropriate for the Court to reach a conclusion.[101]

Plainly, then, the plaintiffs had failed to satisfy the Court that the defendants had no arguable defence to the allegation the IPO documents contained untrue statements. It was therefore unnecessary (and would have been artificial) for the Court to go on and determine whether the defendants had no arguable defence on the issues of reliance, causation, the due diligence defence and whether they ought to be excused from liability pursuant to s 63 of the Securities Act.[102] Nevertheless, Fitzgerald J observed that a number of these issues also appeared generally unsuitable for determination by way of summary judgment, because they were "fact driven, and some of those facts [were] in dispute",[103] issues arising on the liability inquiry were "also likely to overlap with the issues arising in relation to quantum",[104] and the question of relief would need to be determined at a subsequent quantum hearing (which could not be right).[105] The application was therefore dismissed.

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96 *Fullarton v Arowana International Ltd*, above n 93, at [11].

97 At [100].

98 In particular, an overview of an investigation commissioned by the Tertiary Education Commission, and a report prepared by Deloitte. Both concerned Quantum Education Group Ltd, the company to be acquired with part of the proceeds of the IPO.

99 At [101].

100 At [101].

101 At [118]–[134].

102 At [135]–[136].

103 At [138].

104 At [143].

105 At [146].

Looked at in the context of the overarching test for summary judgment, the myriad factual issues that fell for determination in *Fullarton* mean it is unsurprising that the Court comprehensively rejected the plaintiffs' application. When viewed alongside a case like *Dexibit*, the contrasts (particularly the nature of the evidence adduced and the ability to bifurcate liability and remedy) are stark. That the claim in *Fullarton* was inapposite for summary judgment does not, however, mean that it was weak. Indeed, Fitzgerald J stressed that her judgment should not be taken to imply anything about the strengths or weaknesses of the parties' respective cases.[106] In doing so, however, her Honour's judgment underlines the crucial point (often overlooked by parties to litigation) that the question to be asked before commencing summary judgment proceedings is not "how confident am I in my claim?" but rather "are the questions required to be answered to resolve this matter capable of determination on a summary judgment basis, and am I confident of winning on those issues?" The summary judgment process is a powerful tool, but like any tool, it has a specific function from which users are ill-advised to stray.

VI CONCLUSION

The issues facing commercial parties today are not altogether dissimilar from those experienced by the English merchants whose complaints regarding the shortcomings of 19th century court procedure spurred the introduction of summary judgment over 150 years ago. Having observed the development and success of that system in England, New Zealand finally sought to adopt summary judgment for itself in the 1980s. However, because it was infused with several novel features, the procedure suffered from some particular foibles, which prevented it from achieving all of its desired objectives. The procedure nonetheless proved useful in dealing with the fallout from the financial and property market crash in the late-1980s and, with the amendments brought about by the High Court Amendment Rules in 1998, summary judgment was cemented as a key part of the New Zealand legal landscape. The ensuing years have seen summary judgment gradually extend its scope beyond its well-recognised purview of debt recovery and guarantee enforcement, to encompass proceedings across the entire commercial spectrum.

As the decision in *Dexibit* illustrates, in an appropriate case, there is no reason why summary judgment cannot be granted on a traditionally fact-heavy cause of action, even where this has never previously been countenanced. A focused approach to the question of whether strict reliance on the documentary record, and the absence of a factual issue to be tried, may permit an application for summary judgment should result in greater recourse to this efficacious and expeditious procedure. Against this, however, the spectre of judicial reprobation for inappropriately pursuing summary judgment looms large. To guard against this, parties should bear in mind the need to obtain independent and objective advice as to both the merits of their substantive case *and* the appropriateness of pursuing summary judgment. Taking a rigorous approach to this second issue will assist in giving effect to the underlying purpose of summary judgment, while also providing commercial parties with the certainty which they and commercial law crave.

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106 At [99].