IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A.90/69

No Special Consideration

BETWEEN L.A.ELLMERS CONSTRUCTION LIMITED (in Liquidation) a duly incorporated company pursuant to the Companies Act 1955 having its registered office at Auckland Builder

PLAINTIFF

AND JOHN THOMAS MONTAGUE of 28 Sanders Avenue, Takapuna, Company Director, BARRY ROBERT TAYLOR of 22 Corunna Road, Milford, Company Director, and LOUIS ALLAN ELLMERS of 45 Richards Road, Forrest Hill, Company Director

DEFENDANTS

Hearing: September 13, 1971

Counsel: Jenkins for Plaintiff
Lawson for Defendant L.A.Ellmers
Keene for Defendant J.T.Montague
Fookes for Defendant B.R.Taylor

Judgment: September 17, 1971.

JUDGMENT OF McMULLIN, J.

This is an action in which the liquidator of L.A.Ellmers Construction Ltd. seeks to recover from the defendants the sum of $4357.45, being advances to defendants or payments made by plaintiff company on behalf of defendants, who at all material times were partners in an enterprise called Montayr Exports. Montayr Exports was in fact a partnership between defendants formed to export building materials overseas. Plaintiff company was a building company but it is now in the process of being wound up. Defendants were shareholders in and directors of the plaintiff company. It would appear that its memorandum of association was too restrictive in its terms to permit of the operation of an export business by plaintiff company and for this reason defendants formed a partnership to operate under the wing of and yet outside of the plaintiff's structure. At one stage at least it was intended that Montayr

Exports would become an incorporated company but its incorporation was never brought about.

Before the plaintiff company went into liquidation Montayr Exports commenced business and had business dealings, the funds for which appear to have been largely provided by plaintiff company. It is in order to effect a recovery of funds which plaintiff company expended on account of Montayr Exports that the present action is brought. Plaintiff does not expressly sue on an acknowledgment of indebtedness given by the three defendants but invokes a document dated 28th February, 1968, in proof of the fact that moneys were advanced to the defendants for the purposes of the business of Montayr Exports. Defendants acknowledge their indebtedness to plaintiff but deny that as at 28th February, 1968, it was $3,000 and that it is now $4,357.45. They say that it was something to the order of $3,000 as at 28th February, 1968, but deny that their indebtedness was to be quantified at that date in any exact amount. They say that the acknowledgment was prepared by the company's solicitors at a time when the fortunes of Montayr Exports appeared to be wavering and it was thought desirable to record the somewhat loose terms of the arrangement made between the company and what was in effect a partnership. Since the acknowledgment was signed further advances have been made and that it why the present claim is one for $4,357.45.

The cases in which the Courts can go behind an acknowledgment must be infrequent, but I think that the present case is one where the acknowledgment can be said to record the substance of the position between the company and the partnership although there is some room for argument as to the exact amount of the advances.

The claim arises in respect of four items which are (a) Zephyr car, (b) cash advance, (c) payment of air fares and (d) payment of salary. I deal with these as follows:

Zephyr Car. The liquidator claims that, although the Zephyr car, which was purchased for $850, was originally shown in the company accounts as a company asset, it proved on investigation to be in fact a car purchased on behalf of Montayr Exports to be used for the benefit of that partnership. It was for this reason that in the accounts prepared by the liquidator the position was reversed and the present claim arises. The accounts were prepared originally by Mr. Morse, a chartered accountant, from primary records which consisted in the main of cheque butts, although, where information on these butts was not clear or was ambiguous, Mr. Morse sought clarification from one of the defendants as directors.

At the hearing Mr. Griffiths, on behalf of the liquidator, gave evidence of the preparation of the accounts following upon the commencement of the winding-up and the basis for the claim. Mr. Montague in evidence said that Ellmers and Taylor had decided with him that the partnership would buy the car off him and that it was to be used by Taylor for the time that he was associated with the company. He said that it was to be used for the business of L.A.Ellmers Construction Ltd. Mr. Ellmers agreed with him. However, there was produced in evidence a letter which Mr.Ellmers had written to the company's solicitors on the 21st June, 1968, in which he said that Mr. Morse had indicated that a debt was owing to the company by the Montayr Exports partnership and this debt included a Zephyr car valued at $850. The letter asked that that debt be recorded in the form of acknowledgment in the same way as the earlier acknowledgment of the 28th February, 1968, had recorded Montayr's indebtedness. This letter indicates that Mr. Morse had had some second thoughts about the ownership of the car, and it seems to me to be significant that Mr. Ellmers did not, when writing to the

solicitors, protest at debiting the partnership with the value of the car and that he was prepared to write to the company's solicitors recording that a debt was owing to the company by Montayr in respect of the car. I believe that the car was bought for use by the partnership and I accept that the liquidator has shown that the car was in fact bought on behalf of the partnership with moneys advanced by the company. Plaintiff is therefore entitled to succeed on the claim in respect of the car for $850 reduced by $250 being the amount received on its sale. In the same way plaintiff is entitled to succeed on the claim for $92.20 being the amount of repairs done to the car which would have been a partnership asset.

Cash loan. It is conceded by the defendants that a cash advance made on the 22nd September, 1967, of $610.55 and a further advance on the 17th November, 1967, of $200 are both recoverable by the plaintiff.

Air fares. The claim for air fares arises from the fact that a number of trips were made overseas by Mr.Taylor who was the partner mainly engaged in the running of Montayr Exports. It seems that on one of these trips at least he took Mrs. Taylor. A considerable amount of money was incurred in air fares as is evidenced by the fact that Air New Zealand Ltd., with whom some of the flights were made, is a creditor in the liquidation of the plaintiff company in the sum of $1,496.60. Air New Zealand Ltd. charged the air fares for Mr. Taylor's flights to the plaintiff company. It is difficult to determine what was the partnership's business and what was the company's, but, in my view, the plaintiff company, which was a company engaged in the building of houses in New Zealand, would have had little or no occasion to send one of its directors overseas. On the other hand, Montayr Exports would by the very nature of its business have had to send one or more of the partners overseas and it is conceded that on occasions it

did. I think that quite clearly the air fares claimed were air fares for which an indebtedness was incurred by plaintiff company on behalf of the partnership and plaintiff is entitled to succeed for the amount claimed, viz. $814.70.

Salary. This brings me to the final item which is one for repayment of the salary of $2,040 paid to Mr. Taylor. I think that there is room for argument as to the apportionment of this salary. Mr. Jenkins concedes that nowhere in the accounts is there a statement as to how the amount is made up. It appears quite clearly to have been paid. Mr. Montague in evidence says that Mr. Taylor spent only part of his time on the business of Montayr Exports and that some of the salary would have been paid in respect of his services to the plaintiff company. He says that no more than one half of Mr. Taylor's time would have been spent on the affairs of Montayr Exports, and Mr. Ellmers has given evidence to the same effect. I think, however, that, as Mr. Taylor was not apparently a great success in the plaintiff's business and Montayr Exports was to some extent a niche found for him, he would have spent more than one half of his time on the affairs of Montayr Exports. I think that 60% of the sum of $2,040 should be treated as being salary paid to Mr. Taylor in respect of his services to Montayr Exports. This would entitle plaintiff to a recovery of $1,224.

In evidence both Mr.Montague and Mr. Ellmers said that there had been an agreement reached between the three defendants that the liability incurred by them in respect of Montayr Exports to the plaintiff company should be borne as to 75% by Mr. Taylor, 15% by Mr. Montague and 10% by Mr.Ellmers. The acknowledgment of debt already referred to certainly contemplates some apportionment between the defendants of the liability. But I am not called upon in the present case to determine that liability because clearly defendants are jointly and severally liable to plaintiff. If, however, defendants

cannot agree on the proportions in respect of which the moneys to be paid under this judgment are to be made, then some separate proceedings will have to be instituted.

There will therefore be judgment for the plaintiff for $3,541.45 with costs to scale and disbursements to be fixed by the Registrar. There will also be an order for payment out to plaintiff of the amount paid into Court for security for costs on the present motion.

Solicitors: Turner, Hopkins & Partners, Auckland, for Plaintiff

Allan B. Lawson, Auckland, for Defendant L.A. Ellmers

Morpeth, Gould & Co., Auckland, for Defendant J.T.Montague

H.D.Kidd & Short, Takapuna, for Defendant B.R.Taylor