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IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

A. No. 21/83

BETWEEN ENGINEERING FINANCES LIMITED a duly incorporated company having its registered office at East Street, Hamilton and carrying on business in Palmerston North and elsewhere as a financier

Plaintiff

A N D NEIL REGINALD HARRIS of Oruawhara Road, Takapau, Farmer

Defendant

Hearing: 27 October 1983 (at Wellington)

Counsel: M.E.J. MacFarlane for Defendant in support
J.H. Williams and B.D. Andrews for Plaintiff to oppose

Judgment: 2 DEC 1983

JUDGMENT OF QUILLIAM J

This is an application for leave to defend a bill writ. The bill writ claims judgment on two promissory notes given by the defendant to the plaintiff, one for $30,714 and interest due on 20 December 1982, and the other for $20,000 and interest due on 20 January 1983. These promissory notes were given by the defendant in the course of a transaction between A.M. Bisley & Co. Ltd and the defendant for the supply of an irrigator. This was a piece of equipment required by the defendant for use on his farm and to which he attached considerable importance. It is alleged that the irrigator, when supplied, did not operate properly and it is common ground that two promissory notes given originally by the defendant were cancelled by agreement because of the difficulties being experienced. They were replaced by the promissory notes which are the subject of these proceedings. There was, however, further trouble with the irrigator and, in the end, the defendant cancelled the promissory notes and directed his bank not to pay them.

The defendant has applied under R 495 of the Code of Civil Procedure for unconditional leave to defend upon the basis that he has filed affidavits which disclose a good defence or such as would make it incumbent on the plaintiff to prove consideration. I should mention that although the defendant's dealings were with A.M. Bisley & Co. Ltd, the promissory notes were given to the plaintiff. Nothing turns on this as the plaintiff is a wholly owned subsidiary of A.M. Bisley & Co. Ltd.

The general principle as to when leave may be given to defend a bill writ has been set out in a number of cases. It is not necessary for me to go through them. It is convenient for present purposes to adopt the statement of the law by Lord Wilberforce in Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH [1977] 2 All ER 463, at p 470:

> " And it is for this reason that English law ... does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. "

It was argued by Mr MacFarlane, for the defendant, that this is the strict approach which has tended to be somewhat relaxed in some recent cases. I do not need, in the present case, to depart from the more traditional approach.

In those cases where it is sought to offer one of those limited defences the further question arises as to what must be shown in order to obtain leave. This has been variously expressed in the cases but I adopt what was said by Hardie Boys J in Finch Motors Ltd v Quin [1980] 2 NZLR 513 at p 516:

> " In determining whether there is in this case such an issue, I am of course not to try the matter, but merely to determine whether, on the material put before me by the defendant, there is an arguable case .... "

Furthermore, where there is a contradiction in the affidavits and its resolution is not plain, the defendant's version should be taken as correct; (Reid Development Co. Ltd v

Rhodes [1980] 1 NZLR 704 per Somers J at p 706).

In the present case the defendant seeks to raise defences based upon invalidity and failure of consideration and I should make some reference, however brief, to each of them.

1. Invalidity

It was said that there are four defences available under this heading -

(a) Alteration of the Notes

It was argued that the notes show on their face that they have been altered and the consequence of such alteration is to discharge the notes. This was acknowledged to be a weak defence but it was claimed to be at least arguable. I do not propose to deal any further with this. I am bound to say that if it stood alone it would be difficult to regard it as a truly arguable defence, but I prefer to put it aside and consider the other defences.

(b) Credit Contracts Act

Mr MacFarlane's submission was that the Credit Contracts Act 1981 applied because, on the facts, the promissory notes come within the definition of "credit contract" in s 3 (1) of the Act. If that is so then it is common ground that the provisions of the Act have not been complied with. It was also submitted that the promissory notes were linked with a conditional purchase agreement in respect of the irrigator entered into between the defendant and A.M. Bisley & Co. Ltd and that accordingly the provisions of s 3 (4) and s 4 would also apply so as to make the Act applicable to the transaction. If that is so then there would be power under s 10 for the Court to re-open the contract.

Mr Williams' reply to this submission was, first, that a promissory note is not a "contract" and that therefore the definition of credit contract could not apply. I did not understand Mr Williams to maintain that submission and it

does not seem to me to be tenable. He then argued that the provision in the promissory notes for interest is one which would require interest to be payable as a result of default on the part of the promisor with the result that s 3 (3) (b) (ii) of the Act would operate to take the notes out of the definition of credit contract. He argued further that a common feature of the definitions of credit contract is that they contemplate payment in the future of a sum or sums exceeding in the aggregate the amount of the original debt. It was said that this feature is absent in the present case. Another submission was that the Credit Contracts Act excluded bills of exchange and so would not apply in this case.

I have summarised these arguments and it would, of course, be inappropriate for me to express any view upon the merits of them because that would be to usurp the function of the Judge who must try the substantive issues. It is sufficient for me to say that there is plainly an arguable defence based on the Credit Contracts Act and that is all that needs to be shown.

(c) Conditions Attaching to the Notes

Bills of exchange or promissory notes must be unconditional and may not be sued upon where there is any condition attaching to them which has not been satisfied; (Byles on Bills of Exchange, 24th ed, p 8). Mr MacFarlane submitted that in this case there were conditions attaching to the notes which arose out of the circumstances in which the notes were given. It was said that the notes are linked to the conditional purchase agreement and that that agreement governed the relationship between the parties so that it remains open to the defendant to contend that there are unsatisfied conditions.

Again, however successful this submission may eventually be, I think there is no doubt that it raises an arguable case as to the validity of the notes.

(d) Discharge by Agreement

There has been raised on the affidavits a clear issue of fact as to whether the plaintiff agreed that the promissory notes should be cancelled. This was not contested and so on this aspect at least it is plain that leave to defend must be given, but it was Mr Williams' argument that leave should be confined to this defence.

2. Failure of Consideration

It was submitted that a defence available to the defendant was that there had been a total failure of consideration notwithstanding that the defendant may have received some benefit under the contract. This argument was based upon the general principle as it is stated in 9 Halsbury, 4th ed, para 668, p 455, and the cases of Finch Motors Ltd (supra) and Yoeman Credit Ltd v Apps [1961] 2 All ER 281. This was disputed by Mr Williams but once again I am quite unable to say that the point does not merit argument.

Without attempting to forecast which of the suggested defences, if any, may have a prospect of success, I conclude that the defendant has established that there are defences of invalidity and failure of consideration which can reasonably be offered and which must be regarded as arguable. In these circumstances I am satisfied that leave to defend should be given. I see no reason to attach any conditions other than procedural ones. There will accordingly be leave to defend and the statement of defence is to be filed in the Palmerston North Registry and served within 14 days from the date of delivery of this judgment.

I should refer to an additional matter. I was informed that the defendant has commenced a separate action against A.M. Bisley & Co. Ltd claiming damages arising out of the transaction relating to the irrigator. This would seem to encompass some at least of the same matters as will need to be canvassed in the present action. I endeavoured to persuade counsel to agree that there was really no point in contesting the present application and that the more

practical course would be to join in agreeing to the two actions being heard together. No agreement was reached on this. At the present time I reserve the question of costs on this application but it may well be that, in due course, regard will have to be paid to the fact that the course suggested was not followed.

Solicitors: Sainsbury, Logan & Williams, NAPIER, for Defendant

Simonsen, Gregg, Andrews & Co., PALMERSTON NORTH, for Plaintiff