

FNT (3)

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

NO. A.83/84

1156

BETWEEN            RESOURCES DEVELOPMENT LIMITED  
Plaintiff

A N D                TRIUNE RESOURCES CORPORATION  
Defendant

IN CHAMBERS:

Hearing:            21 September 1984

Counsel:            J.F. Burn for Plaintiff  
                          A.A.P. Willy for Defendant

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(ORAL) JUDGMENT OF COOK J.

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This is an application for leave to defend a bill writ. The writ in question sets out what is referred to as a bill of exchange and this makes reference to a contract, a copy of which is annexed to the statement of claim.

The application is on two grounds, first, that the document set out in the statement of claim is not a bill of exchange within the meaning of Rule 501. Alternatively, leave to defend should be granted upon the merits. Rule 501 extends the ordinary meaning of the term "bill of exchange" so that it includes not only a true bill of exchange, including a promissory note or a cheque, but also any written contract signed by the party sought to be charged. What must be known is the sum certain which is owing by the person who has signed the contract and the day certain upon which it became due or the certain time within which it has become due.

In the present case the bill of exchange, which is in the form of a promise to pay, sets out a sum certain (together with interest) and then provides that the amount shall be payable by the borrower to the lender one year from the date due for the payment of the deposit pursuant to clauses 2(a) and 2(b) of a certain agreement made between the parties of 24th February 1982; that is, the agreement a copy of which is attached to the writ. Consequently, it is necessary to look from the promissory note to this agreement. That in turn provides in clause 2(a) that a deposit will be paid upon the confirmation of all the special conditions of the agreement and the balance of the purchase price, i.e. the amount mentioned in the promissory note, is to be paid one year from the date upon which the deposit became due for payment. The special conditions are set out in clause 14 and they are conditions to which the agreement is subject. The result is that it cannot be ascertained by reading the agreement upon what day the deposit becomes, or became, due.

For the applicant, Mr Burn argues that reference may not be made to the agreement; that the promissory note must be read alone and that it is not possible to regard both as a written contract within the meaning of Rule 501. No doubt a bill of exchange, including a promissory note and cheque, must be in one paper writing; I am less sure that it is essential that such a written contract need be, but I do not find it necessary to decide that. Whether the written contract may be contained in one document or in more than one, it is still necessary to be able to determine from the document or documents the day certain or the time certain upon or within which the sum of money becomes due for payment.

As I have indicated, in the present case this is not possible from the promissory note and the agreement despite the fact that the two are read together. Mr Willy submitted that the date may be ascertained elsewhere, in this case from a statement of claim (so far uncontested) in a separate action between the parties in relation to the same subject-matter.

Apparently this statement of claim states the date of payment of the deposit. He points to the definition of a promissory note in the Bills of Exchange Act 1908, Section 84, and the fact that the maker of the note must engage to pay on demand or at a fixed or determinable future time, with the suggestion that the time may be determined from some other source.

I am satisfied, however, that the time must be capable of determination from the promissory note itself; otherwise it would run counter to the whole concept of negotiability.

To my mind the law is clear. The bill writ procedure is available when the essential facts, i.e. that a sum certain in money became due by the defendant to the plaintiff on a certain day or within a certain time, are known virtue of the bill of exchange, cheque, promissory note or written contract; it must be clear on the face of the document upon what day the money became due. With respect, I agree with the following extract from the judgment of Wilson J. in United Dominion Corporation v. Walker [1975] 2 N.Z.L.R. 182 at page 184:-

" These considerations, in my opinion, individually and collectively show that the rules under consideration should be construed strictly against those who seek to invoke them. In particular (and this was the matter in issue on this application) the words in R 501 referring to a written contract should be restricted to their literal meaning, and the maxim certum est qui certum reddere should be sparingly used. That means that the 'sum certain' must itself be stated in the contract or must be the balance of a sum so stated, and the 'day certain' or 'certain time' must be specified therein. Just as the bill of exchange, promissory note or cheque shows these details on its face, so must the written contract that for the purposes of RR 490 to 500 is deemed by R 501 to be included in the term 'bill of exchange'."

Mr Willy did raise the point that the application was made out of time, but I am satisfied, and I understand him

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to accept, that his instructing solicitors had agreed to an extension of time and the applicant was not in breach of that.

Leave to defend is granted, a statement of defence to be filed within 14 days from today's date. Costs reserved.

A handwritten signature in black ink, appearing to read 'H. Cook', is written in a cursive style to the right of the text.

Solicitors:

Oldham, Cullens & Co., Christchurch, for Plaintiff  
Parry, Field & Co, Christchurch, for Defendant