IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.82/82

BETWEEN CHOCOLATE BOX CONFECTIONS LIMITED

Plaintiff

A N D RONALD DEAN SIMONSON

Defendant

In Chambers: 27 February 1984

Counsel: P.M. James for Plaintiff
R. Wylie for Defendant

Judgment: 27 February 1984

ORAL JUDGMENT OF HOLLAND, J.

This action is set down for hearing next week. There are before me three notices of motion. The first is a notice of motion by the defendant for orders striking out an amended statement of claim and for a further order that the written statement of claim be struck out. The second and third motions are filed by the plaintiff, the first seeking an order that a question of law be determined prior to trial, and the second seeking leave to file an amended statement of claim.

The question of law which the plaintiff wishes to have determined before trial arises on the defendant's motion to strike out the written statement of claim. The plaintiff company is in receivership. The defendant is a shareholder who had subscribed for shares which were not fully paid. The plaintiff has sued the defendant for the balance unpaid in respect of the subscribed share capital in his name. Similar proceedings were brought against another shareholder and the plaintiff was

non-suited in August of last year. The claim was brought relying on the provisions of section 345C of the Companies Act 1955 but it was held by this Court that the receiver had not formally made a call as would have been required if no receiver had been appointed. There was further an issue in those proceedings as to whether valid notice had been given but it was unnecessary to determine that point. The receiver for the plaintiff company following this judgment has purported to make a call and give formal notice which it is submitted will comply with the Companies Act.

The writ in these proceedings was issued in April 1982. It accordingly follows that if the making of the call and the giving of notice in September 1983 is a necessary part of the cause of action of the plaintiff the cause of action arose after the issue of the writ and the unamended statement of claim reveals no cause of action. It likewise is common ground that a plaintiff is not permitted to add a new cause of action to an existing action when that cause of action arose after the date of issue of the writ. I am satisfied that there was no liability by the defendant to the plaintiff company until a valid call was made. There certainly was a contingent liability on his subscription for the shares but without a call being made the plaintiff could not have recovered against the defendant and accordingly there was no cause of action. It follows that the writ of summons in its original form does not disclose a valid cause of action and it likewise follows that the plaintiff in these proceedings is unable to file an amended statement of claim alleging a cause of action which occurred after the date of issue of the writ.

The first of the plaintiff's two motions is dismissed because the question of liability has already been dealt with by what I have said beforehand. The second motion for leave to file an amended statement of claim is likewise dismissed for the reasons set out above. Apparently an amended statement of claim was filed in Court after the action had been set down for hearing. This is clearly in breach of Rule 144 of the Code of Civil Procedure and that amended statement of claim is struck out. Although the Court is always reluctant to strike out proceedings without a hearing this is obviously a case where it is appropriate to do so. The facts are exactly the same as those which were before this Court in respect of the other shareholder. The action is accordingly struck out.

The defendant seeks an order for costs. Undoubtedly the defendant has been shown to be legally correct. But that does not indicate that he has many merits on the facts. Notwithstanding that, the plaintiff has put him to expense and been shown to be wrong and in the ordinary course of events a defendant in those circumstances would expect costs. In this case however it appears to me that there would have been a substantial risk that an order for costs against the receiver would simply have the effect of taking the money either from the secured creditor of the company of which the defendant was a shareholder and director or from its unsecured creditors. The defendant can perhaps console himself that the interest on the money which he has not paid as a result of the mistakes of law on behalf of the receiver will be of some benefit to him but in the circumstances I am not willing to make an order for costs and the action will be dismissed without costs.

A. D. Holland J