IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 575/84

BETWEEN CHEMOIL FORKLIFT SERVICES LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as a machinery supplier

Plaintiff

AND LIGHTNING TRANSPORT & CARRYING COMPANY AUCKLAND LIMITED a duly incorporated company havin its registered office at 11 Floor, Norwich Union Building, Queen Street, Auckland, a general carrier

Defendant

Hearing: 13th July, 1984

Counsel: Craighead for Defendant in Support
Vickerman for Plaintiff to Oppose

Judgment: 17 JUL 1984

JUDGMENT OF SINCLAIR, J.

This is an application for leave to defend a bill writ issued in the sum of $20,000 in consequence of a cheque having been drawn by the Defendant in favour of the Plaintiff for that amount on the 15th April, 1984. Initially an application was made for leave to defend on an ex parte basis, but that application was one which was treated as being required to be on notice, with the result that the present hearing took place.

In support of the motion an affidavit was filed having been sworn by Mr Smith, a director of the Defendant company. He deposed to the fact that in May, 1984 he discussed with

representatives of the Plaintiff company the possibility of the Defendant purchasing a fork hoist from the Plaintiff. It was explained, according to Mr Smith, that the fork hoist would have to lift containers which would weigh in excess of 20 tonne and, in fact, as much as 24 tonne. In consequence he claimed that it was recommended to him that he buy a Lees 35 unit which was to be upgraded by the Plaintiff to the equivalent of a Lees 45 unit which, according to Mr Smith, would enable containers of the size and weight that his company handled to be lifted by that fork hoist.

In consequence a contract to purchase the fork hoist was entered into with a deposit of $20,000 being paid per medium of the cheque above referred to. No copy of the contract was annexed to Mr Smith's affidavit and he claimed that he was to some degree pressured by representatives of the Plaintiff company to enter into the purchasing agreement on the basis that his company was but one of several wishing to buy the fork hoist. He claims that immediately afterwards he checked with the manufacturers of the hoist, namely Lees Industries Limited, to satisfy himself whether the fork hoists, as modified, were able to lift a 24 tonne load and was apparently informed that when one had attempted so to do an hydraulic hose burst due solely to the weight it was lifting. This evidence was completely hearsay and there was no affidavit from the manufacturer. A similar statement was attributed to an officer of the Labour Department, but once again without any affidavit being forthcoming from that Department.

On behalf of the Defendant Mr Roughan filed an affidavit that he called at the Defendant company's premises and

discussed with Mr Smith the forklift operation, the stability of the yard from which the Defendant operated for a fork lift, and the price of a Lees F.35 and its capacity. On the 3rd April, 1984 according to Mr Roughan Mr Smith and his transport manager called at the Plaintiff's premises in Penrose and the purchase of a secondhand Lees F.35, which would be operated to a 45 lb capacity, was discussed and a price of $140,000 was agreed to. On the 5th April, 1984 Mr Roughan deposed to the fact that he and one of his company staff, a Mr Tregonning, called at the offices of the Defendant company and spoke to Mr Smith. As a result of the discussion, says Mr Roughan, he prepared an acknowledgement of order setting out the terms of the transaction and because he was advised that Mr Smith had recently purchased two new Nissan trucks, it was agreed that a deposit of $20,000 would be paid, which was less than that required by the Plaintiff. Mr Roughan went on to say that at no time did the Defendant company or anyone from it advise that the cheque would not be met.

Mr Tregonning also deposed to the fact that discussions took place as to the operating of a Lees F.35 to 45,000 lbs capacity and he referred to the fact that on the 5th April, 1984 he accompanied Mr Roughan to the Defendant's premises. On my reading of his affidavit it is to the effect that at those premises Mr Roughan wrote out the acknowledgement of order which was signed by both Mr ROughan and Mr Smith and that acknowledgement was annexed to Mr Roughan's affidavit as Exhibit A.

Mr Tregonning stated that normally the Plaintiff wanted

a deposit of 25%, but because of the information from Mr Smith that the Defendant had recently bought two new trucks it was agreed that $20,000 would be paid as a deposit. The cheque was handed over and Mr Tregonning stated that he did not notice at the time, nor did Mr Smith indicate to him, that the cheque had been post-dated to the 15th April, 1984. That gentleman also states that at no time was he ever advised that the cheque would not be met, nor did he receive any communication concerning the capacity of the machine. He went on to depose that no pressure was exerted at all to persuade Mr Smith to purchase a fork hoist.

To that affidavit Mr Smith replied claiming still that he had explained that the capacity of the machine had to be to lift a 24 tonne load and that he had been assured by both Mr Roughan and Mr Tregonning that such a load could be safely shifted using the fork hoist in question. He goes on to say that the acknowledgement of order had been prepared before Messrs Tregonning and Roughan went to his office and that the order form was one of a number of forms fastened in a pad and he did not have his attention drawn to the conditions on the reverse side of the form and that those terms were not discussed in any way at all. He further claims that the question of post dating of the cheque was discussed with both the above gentlemen. He further went on to say that he did contact Mr Roughan to advise that the cheque was being cancelled and complaining about the lifting capacity of the machine. However, that statement is not backed up by any correspondence at all.

A further affidavit was filed by a Mr Kinsman who was

the service manager for Lees Industries Limited. He stated that the fork hoist in question had a carrying capacity of 15 tonne and a 25% overload safety margin. Prior to it being sold to the Plaintiff it had been tested by Lees Industries Limited to ensure that it had a carrying capacity of 15 tonne and an overload capacity of up to 20 tonne and the hoist passed both tests. He went on to say that such a hoist was capable of modification to increase its normal loading capacity to 20 tonne, but he does not say whether or not such a machine, so modified, would still have the 25% overload safety margin.

When one has a look at the contract which was entered into, and there was no denying that it was signed by Mr Smith, it provides for the sale of a Lees model F.35 diesel powered fork lift truck to be painted with the original manufacturer's colours and certain additional work was to be done prior to delivery. Firstly, front and rear flashing lights were to be affixed and a reverse audible alarm was to be installed; thirdly the machine was to be upgraded to 45,000 lb maximum capacity at 48" centres; while fourthly, the machine was to be covered by a 60 day mechanical warranty excluding electronics and fork tyres. The price was stated to be $140,000 with a deposit of $20,000 and the balance payable on delivery.

There is some suggestion, on a perusal of the order form, that may be that form had been completed before the visit to the Defendant's premises because, as originally drafted, the order form provided for a deposit of $35,000 but that had been altered to $20,000. However, the plain

inference to be drawn from Mr Tregonning's affidavit is that the order form was written out at the Defendant's premises and that is reinforced by the fact that there is a statement in that affidavit that when the money matters were being discussed Mr Smith rang Dalgety Crown Finance to confirm that the balance of the finance had been arranged, but that he would still be only able to pay $20,000 by way of deposit.

Thus in this case there is a written contract between the parties which is at variance with that which Mr Smith sets forth in his affidavit. The maximum capacity stated in the order form is 45,000 lbs which is the equivalent of 20 tonne, not 24 tonne and there is merit in Mr Vickerman's argument that if 24 tonne were ever mentioned then it has been cancelled out by or merged in the contract document which was signed between the parties.

As I interpret the affidavits filed on behalf of the Plaintiff it would appear that the 24 tonne suggestion was never discussed.

For the present application I feel compelled to restrict my considerations to the form of the written contract and note with some concern that Mr Smith did not see fit to disclose its existence when he swore his first affidavit. In circumstances such as this it is incumbent upon a person asking for the indulgence of the Court to disclose all relevant information, otherwise it will run the risk of having any order made on an ex parte basis revoked on the ground that it has not made full disclosure.

The question now is whether, in all the circumstances, a good defence has been disclosed in accordance with Rule 495 of the Code of Civil Procedure. As was acknowledged by Mr Craighead, of recent date the Courts in this country have tended to take a firmer line in respect of applications of this type where a cheque forms the basis of the claim and he referred to Finch Motors Ltd v. Quin (1980)2 N.Z.L.R. 513 That decision essentially repeats the principle that where a cheque is given it has to be treated as being the equivalent of a cash transaction. On the somewhat more benevolent side of the fence is the decision in L. D. Nathan & Co. Ltd v. Vista Travel Ltd (1973)1 N.Z.L.R. 233. But here, as was submitted for the Plaintiff, there was a commercial transaction entered into between the representatives of two commercial firms who must be taken to be used to transactions of this nature and who must be taken to be well acquainted with arms length transactions. That, I accept, is a fair and proper observation. I cannot accept that in a commercial situation such as the Defendant found itself that Mr Smith was in any way pressurised as he suggested. There appear to have been three separate contacts between the parties before the order was finally signed and I simply cannot and do not accept that Mr Smith did not read the terms of the order which he was signing, which is in handwriting which is very legible and which would take but half a minute to read. At the bottom there is a reference to conditions of sale being overleaf and one of those conditions is that the buyer must satisfy himself that the goods as ordered are fit and suitable for the purpose for which they are required and that no liability should attach to the seller should

they not be so fit and suitable.

There may be situations where the provisions of the Contractual Remedies Act 1979 could be invoked in contracts of this nature where there was a pre-contractual representation which went to the very heart of the transaction and which was not complied with. But here I am of the view that I am bound by the actual terms of the contract signed by Mr Smith which plainly said that the maximum capacity of the machine was to be 45,000 lbs. Nowhere is it shown that that in fact was not the capacity of the machine.

In the circumstances I am not satisfied that there was any other principal contractual representation of which the Court should take cognisance so as to deprive the Plaintiff of its rights to sue upon the cheque.

Accordingly leave to defend is refused and the Defendant will have to take such action as it thinks fit for damages on its purported repudiation of the contract. The Plaintiff is entitled to costs which I fix at $200 and any necessary disbursements.

SOLICITORS:

Keegan Alexander Tedcastle & Friedlander, Auckland for Plaintiff

Snedden Grace Hall & Craighead, Auckland for Defendant