

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.115/84

BETWEEN KERRY FLOYD DOWNARD

Plaintiff

A N D JOHN ROBERT COONEY

Defendant

Hearing : 13th April 1984 (In Chambers)

Counsel : Miss J.A. Bygrave for Defendant in support
S. Stokes for Plaintiff to oppose

Judgment : 13th April 1984 (In Chambers)

(ORAL) JUDGMENT OF BARKER, J.

This is an application for leave to defend a bill writ. The plaintiff sues on a stopped cheque for \$3,000 given by the defendant to the plaintiff for a consignment of hay brought from the Bay of Plenty by the plaintiff to the defendant's stables in Papatoetoe.

The hay was brought by truck from Calatea to Papatoetoe; it is claimed by the defendant and a number of deponents that the hay was mouldy and in no fit condition to be fed to horses or indeed any other stock.

This contention is disputed by the plaintiff; of course the Court is not required at this stage to resolve the dispute between the parties. The case of Finch Motors Limited v. Quin,

(1980) 2 N.Z.L.R. 513 indicates the fairly general approach of the Court, taken in situations such as the present. If the defendant can demonstrate on a prima facie basis facts as would make it incumbent on the plaintiff to prove consideration, then leave to defend is granted, usually on some terms.

In this case, it seems from a broad view of the affidavits, without any decision as to which party is correct, that the defendant is alleging that there was no consideration because the hay which he purchased was not of merchantable quality and was not according to description.

It may well be, as Mr Stokes submitted, that what the defendant is asserting is in reality a counterclaim. However, I think that, within the parameters of the Finch Motors case, there is sufficient alleged for the defendant to say that there was a failure of consideration. Whether that assertion is correct or not will depend on the Court which ultimately hears the dispute.

I therefore consider that leave to defend should be granted; following the approach of Hardie Boys, J. in Finch Motors v. Quin, I consider that the defendant should pay a tangible amount into Court which I fix at \$1,000.

Accordingly, leave to defend is granted on terms that, within 14 days, the defendant pays into Court the sum of \$1,000 or pays it into a solicitor's trust account on terms to be agreed to by counsel; that it is there to remain pending a decision on the dispute between the parties. I make this alternative stipulation because monies paid into Court do not bear interest

and it would be to the advantage of both parties if the monies were held pending resolution of the dispute, in some interest-bearing trust account.

Once the order has been sealed, I direct, by the consent of counsel given today, that the proceedings be removed to the District Court at Papakura, it being thought by counsel that a more expeditious hearing is likely in that Court than in others possibly available.

The question of costs is reserved but will no doubt be taken into account by the District Court Judge on the ultimate resolution of this matter.

R. J. Barker, J.

SOLICITORS:

Osborne, Handley, Gray & Richardson, Whakatane, for Plaintiff
Dickson & Co., Auckland, for Defendant.