NZLR 19/12

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A.No.230/79

1300

BETWEEN ERNEST ADAMS LIMITED a duly incorporated company having its registered office at Christchurch and carrying on business as manufacturers of food

Plaintiff

AND DAVID ELWYN OWEN DAVIES of Hamilton, Wholesaler

First Defendant

AND THE LIQUIDATOR OF Q DEL LIMITED

Second Defendant

Hearing: 14 November, 1985

Counsel: C.J.Walshaw for Plaintiff
J. Milne for Defendant

Judgment: 17 December, 1985

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JUDGMENT OF PRICHARD, J.

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The first defendant moves for an order under R.276(e) granting a new trial of this action on the ground that material evidence has been discovered since the trial which could not have been known or foreseen before the trial. There is also before me an

application under R.594 for an order enlarging the time limited by R:284.

The plaintiff's claim against the first defendant is for moneys received and not accounted for under a distributorship agreement. The defence is that the agreement was not between the plaintiff and the first defendant but between the plaintiff and the second defendant Q'Del Limited (now in liquidation).

The action was heard in Hamilton on 20 July, 1982. My judgment was delivered on 29 October, 1982. I concluded, on the balance of probabilities, that the agreement was between the plaintiff and the first defendant. Judgment was entered against the first defendant for the amount of the claim, $28,232.68 with interest and costs. The first defendant appealed unsuccessfully to the Court of Appeal, the judgment on appeal being delivered on 9 February, 1984.

The first defendant deposes that over six months later, in October, 1984, he had reason to inspect the files held by the Official Assignee in connection with the liquidation of Q.Del Limited. There he came upon a letter typed on the plaintiff's letterhead as follows:

"

11 September, 1979

Q.Del Limited,
P.O. Box 5248,
Frankton,
HAMILTON

Attention; Mr D.E. Davies

Dear David,

Please find attached your authorisation and selected lines from Woolworth s.

David - an early start to selling Christmas Lines would be most appreciated.

Thank you.

Kind regards

Yours faithfully,
ERNEST ADAMS LIMITED

(sgd) R.J.D. Henderson
Manager "

The letter was not referred to in the plaintiff's affidavit of documents - nor, for that matter, in the defendant's.

The evidence at the trial was that the distributorship agreement was entered into on 13 March, 1978 between the plaintiff company and either Mr Davies or Q Del Limited. It was an oral agreement, concluded (over the telephone) between Mr Henderson, North Island Manager of the plaintiff company and Mr Davies. There was total conflict between Mr Henderson and Mr Davies as to whether the agreement was with Mr Davies in his personal capacity

or as the agent of his company. I was unable to resolve the conflicting accounts except by having regard to the correspondence which passed between the parties after the contract was made. Apart from regular weekly statements, invoices and dockets there was surprisingly little written correspondence - over the period of about 18 months while the contract was in force there were only three letters from the plaintiff company, all addressed to "Mr D.E. Davies". Similarly, the weekly statements of account furnished by the plaintiff company were all addressed to "Mr D.E. Davies, P.O. Nox 5248, Frankton." On the other hand, the majority of the plaintiff's invoices and dockets were made out to "Q.Del, Frankton" (but not Q.Del Limited) and payments to the plaintiff company were by cheques drawn on the account of Q.Del Limited. The letter of 11 September, 1979 is, therefore, of some significance

The present application was filed on 7 March, 1985 - over two years after the date of judgment - and some five months after the first defendant discovered the letter of 11 September, 1979. By way of explanation for the delay the first defendant says that following his discovery of the letter he sought and obtained the opinion of Auckland counsel, that thereafter (in December, 1984) his solicitors corresponded with the plaintiff's solicitors, enquiring as to the reason why the letter had not been included in the plaintiff's affidavit of documents. And, finally, he says, he had to raise money

to cover his legal expenses and to obtain a supporting affidavit from another witness.

It need scarcely be said that whenever there is a distinct likelihood that there has been a miscarriage of justice the Court will not be slow to exercise the jurisdiction under R.594 to enlarge the time for applying for a new trial. For this reason, as Callan J. observed in Stone v. Scaife [1944] NZLR 698, it is often convenient to consider the merits of the substantive application at the same time as the application for enlargement. Even so, the delay in the present case - between the discovery of the letter and the filing of the application - seems to call for a more cogent explanation than has been offered in the present case. Not without hesitation I have decided that if there is a good case on the merits I should exercise the discretion under R.594

The tests to be applied in relation to applications of the present kind are formulated in Dragicevich v. Martinovich [1969] NZLR 306:

> (1) - It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial:
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> (2) - The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive:

(3) - The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

As to whether the letter in question could not have been discovered with reasonable diligence, Q.Del Limited was a one man company -this letter must have been seen by Mr Davies in September, 1979; but, on 7 February, 1980 a winding-up order was made and the letter, along with other company records, came into the possession of the Official Assignee in Hamilton as liquidator. This was after the issue of the writ (in October, 1979) but before the defendant's case was prepared for trial.

Mr Davies said in evidence that in the course of preparing for trial he went to the Official Assignee's office with his solicitor. A large number of documents was obtained for the purposes of the trial - but the letter of 11 September, 1979 went unnoticed. Mr Davies said in evidence (at the trial) that he and his counsel had made "a pretty thorough" search of the many hundreds of documents held by the Official Liquidator and had found only two addressed by the Plaintiff to Q.Del Limited. The solicitor deposes that he made a thorough search of the files and expresses the opinion that if the letter had been there he would have found it. Mr Henderson says that when he made an affidavit of documents on behalf of the plaintiff he had no recollection of the letter of 11 September, 1979: that it was probably

addressed to Q.Del Limited by a staff member who was not aware of the true position.

Bearing in mind the large quantity of documents which had to be searched at the Official Assignee's office I think it is fair to say that the fact that the letter was overlooked is not inconsistent with Mr Davies and his solicitor having exercised reasonable diligence in their search for documentary evidence. I think, therefore, that the first of the requirements stated in Dragicevich v. Martinovich is satisfied.

Having regard to the fine balance of the evidence in this case I am bound to find that production of the letter at the trial, although certainly not decisive, would probably have had an important influence on the result.

Mr Henderson agrees that the letter bears his signature, so the third requirement of Dragicevich v. Martinovich is inapplicable.

Accordingly, I conclude that there should be an order for a new trial. However, in view of all that has transpired since the date of judgment, the order should be on terms which will protect the plaintiff's position in the event of the result of the new trial being no different from that of the first. The plaintiff now

has the benefit of a charging order affecting a property in Cambridge owned by the first defendant. I think I am justified in making it a condition that the first defendant give security over that property for the amount of the charging order. Subject to that and the payment of the costs of this application, which I fix in the sum of $150 plus witnesses expenses and disbursements as fixed by the Registrar, there will be an order for a new trial.

SOLICITORS: Tompkins, Wake & Co. Hamilton for First Defendant

Rowe, McBride & Partners, Palmerston North for Plaintiff.