

BE'TWEENRICHARD JAMES O'BRYEN
HOARE and GEORGE ROGER
WAYNE FRANCE

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PlaintiffsANDJAN RANDRUP JACOBSENDefendantHearing: 28 July 1986Counsel: Bogiatto for Applicant/Defendants
Quinn for Respondent/PlaintiffsJudgment: 28 July 1986

(ORAL) JUDGMENT OF THORP J

This is an application under R.497 to set aside judgment obtained on a bill writ obtained in this Court on 11 December 1985. It was common ground that the application should be dealt with under the old code in terms of which the Court has a discretion to set aside a judgment if special circumstances are shown.

Applying the criteria settled by the Court of Appeal in Orme v De Boyette (1981) 1 NZLR 576, the Court there stated that it was in general sufficient that an arguable case be shown by the defendant, that some explanation of any delay and of the failure to answer the bill writ within time should be expected before discretion is exercised in favour of the applicant, that at least the applicant must be able to show that if leave had been sought under R.495 it would have been granted, and that in the end the Court should

exercise its discretion to further the interests of justice as they appear in the circumstances of the particular case.

This action was on a cheque for \$4,000 which was delivered undated by the defendant to the plaintiffs as a deposit under an agreement to purchase a 31ft sloop from the plaintiffs. This provided for a total sale price of \$39,500, payable \$4,000 on deposit with the balance being payable upon sale of the defendant purchaser's house in Mt Eden, but in any event not later than a specified date.

The defence put forward is that the delivery of the cheque and the completion of the agreement were both subject to the precondition that the purchaser complete the sale of his Mt Eden home. That is not an easy case to make, even to the necessary standard for the purpose of an application under R.497, in view of the provision in clause 2 of the agreement for sale and purchase that the final balance of the purchase price should be payable "immediately upon sale of the Mt Eden house, but in any event not later than 30 November 1986".

However, to my mind the critical question whether or not the cheque was delivered subject to such a precondition is left in a situation only capable of determination on the merits of much closer examination of the circumstances than is feasible at this stage, and is left there not simply on the affidavit of the applicant/defendant, but also on the principal affidavit of the plaintiffs. It is clear from that affidavit that they understood there would be a delay of some sort before the cheque would be met, and that this delay related to funds being available to the credit of Mr Jacobsen in his solicitor's trust account.

It then appears from the plaintiffs' affidavit that they communicated with the solicitor concerned to ascertain whether or not the cheque could be safely presented. They assert that the original arrangement that the cheque was payable upon funds being credited to the defendant in his solicitor's trust account was replaced by an agreement made by them with the plaintiff's solicitor, as his authorised agent, that he would return a cheque which he held for the defendant to the defendant and that the plaintiffs would be entitled to present the cheque they held without further delay. That arrangement is denied by the solicitor for the defendant, which seems to me to leave the Court in the situation that there is evidence of a condition attached to the presentation of the cheque, and in a position where it is unable to resolve the nature of that condition.

A further defence raised for the applicant is the proposition that the "deposit" specified in the agreement was not a "forfeitable deposit", by reason of the absence of any provision to that effect in the contract and the absence of other circumstance which would point to its having that character. Mr Bogiatto argues that on the affidavits there is at least an arguable case that the intention of the parties was that this sum was to be a payment on account of purchase monies, and that since payment of the sum was not completed the rules about the inability of a vendor to recover a sum of that nature will apply.

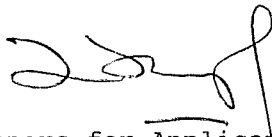
Under R.494 of the Code a defendant applying in time had the absolute right to defend a bill writ subject to payment into Court of the sum claimed and the plaintiff's costs to date. Mr Bogiatto advised that he would not oppose the inclusion of a condition on the setting aside that the applicant pay the amount claimed plus costs to date into Court at an appropriate

time.

No point was made on behalf of the respondent that there had been excessive delay in seeking a setting aside, or that the applicants' conduct was such as to disqualify it from the relief it sought. The plaintiffs' argument was addressed rather to whether or not there was a sufficient defence shown to justify setting aside. In this the plaintiffs relied principally on the proposition that the Court should look to the agreement between the parties and in terms of the parol evidence rule exercise caution before accepting parol evidence in contradiction of the apparent intention of the written agreement between the parties. I am bound to say I do not find the written agreement of such clarity and formality as to be greatly impressed by the weight of that argument.

All in all it seems to me that, provided the plaintiffs are not put at risk of losing whatever judgment they may be entitled to receive on the full hearing, it is an appropriate case for setting aside, subject to payment into Court of the amount claimed plus the plaintiffs costs of obtaining judgment on default and of the plaintiffs costs on today's hearing, the relief being a matter of grace rather than of right, and judgment is given accordingly.

The plaintiffs are allowed \$250 costs on the hearing of the present application, which sum shall be paid to them within the same period as is specified for payment into Court of the other monies. The statement of defence shall be filed and served within the same period.



Solicitors: Grove, Darlow & Partners for Applicant/Defendants
Holmden, Horrocks & Co. for Respondent/Plaintiffs