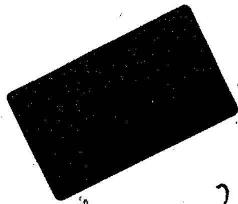
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1449/85

J



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BETWEEN A.W. EASTON

Plaintiff

AND KAYTRAC HORTICULTURE SERVICES LTD

Defendant

Hearing: 14 March 1986

Counsel: Mr Johnson for plaintiff
Mr Yolland for defendant

Judgment: 14 March 1986

JUDGMENT OF HILLYER J

This is an action which started as a claim on a bill writ, pursuant to rule 490 of the former Code of Civil Procedure. That Code has now been superseded. There is no corresponding provision in the new High Court Rules which came into force on 1 January 1986.

Counsel have agreed to follow a decision of Prichard J. Spencer v Crowther (unreported) High Court Auckland, 21.2.86. There His Honour, at the invitation of counsel, agreed to treat the matter as an opposed application by the plaintiff for summary judgment under rule 136 of the High Court Rules. Prichard J commented that this would accord with the comparative table at p.200, paragraph 89, Sim & Cain Practice and Procedure 12th Ed. I am content to follow the course counsel have suggested.

Rule 136 provides:

> "Judgment where no defence:
> Where in a proceeding to which this rule applies, the plaintiff satisfies the Court a defendant has no defence to a claim in the statement of claim or to a particular part of any such claim, the Court may give judgment against that defendant."

Mr Johnson for the plaintiff therefore submits that I should give judgment for the plaintiff in this action, for the amount of the bill of exchange, $10,000.

The plaintiff and the defendant in July and August, 1984, entered into a complicated series of transactions for development of a company called Geyserland Orchids, and the set up of a tourist display, now called Fleur International Orchid Gardens Ltd. There were fundamentally two contracts entered into between the parties. One was a set up contract whereby the plaintiff was to arrange finance and/or financial parties for the development, the other a management contract in which the parties agreed that an amount totalling $55,000 per annum, would be paid by monthly instalments.

The bill of exchange in this case is a cheque for $10,000 which was part, it is said, of the set up charge. Obviously the set up was to have been done before the management.

Matters apparently did not go well between parties, and the management contract was cancelled, as a result of which the defendant alleges that a sum of $18,915 is due by the plaintiff to the defendant, or one of its associated companies. It appears that there was some confusion about the payment of $10,000 said to have been arranged by one of the directors of the defendant company without the knowledge of the other directors.

Be that as it may, on 24 May 1985, the General Manager of the defendant forwarded to the plaintiff a letter which reads on its surface as being quite friendly. It starts "Hullo Andy", and goes on to note that the $10,000 fee was claimed by the plaintiff. After saying that no Auckland director was aware of the arrangement, the General Manager said :

> "Please accept our apology together with our cheque for $10,000. We have a minor problem though, as we had not budgeted for this figure."

The General Manager then went on to set out the way in which it was alleged by the defendant company that the sum of $18,915 was due by the plaintiff to the defendant, and said :

> "I have reconstructed the contract from 1 November 1984 to 1 June 1985, with the suggestion being you forward us a cheque for $18,915 with a direct credit system taking over from 1 July 1985."

The letter concludes:

> "Would you kindly complete the direct credit form and lodge same at your bank, also would you sit on our cheque for a few days to allow your cheque to make its way through the banking system."

The plaintiff apparently did not sit on the cheque for a few days or any length of time, and did not forward the cheque for $18,915. The plaintiff denies that the $18,915 is owing, and says he has a good defence to the action. The cheque for $10,000 was dishonoured on presentation.

On behalf of the plaintiff Mr Johnson has submitted that the ordinary rule is that cheques are to be treated as cash; Begley Industries v Cramp [1977] 2 NZLR 207, and that having received the cheque, he is entitled to the moneys represented by it forthwith.

The ordinary meaning, however, in my view, of the letters written by the defendant to the plaintiff, which I have quoted at length, is that the defendant did not have the money to pay the $10,000 because they had not budgeted for it, and that they would not have the money until the $18,915 alleged to be owing by the plaintiff "made its way through the banking system". In my view that is a clear indication that the $10,000 cheque was conditional on payment by the plaintiff of the $18,915.

Businessmen writing to each other do not adopt the precise language of the Chancery Bar, and presumably for business

reasons, do not appear to make their letters as blunt as a lawyer may. Nevertheless, the clear meaning of the letter is that the $10,000 was to be met from the $18,915 to be paid by the plaintiff.

The principles are dealt with in Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd [1981] 2NZLR 322 at 333. In that case a cheque was forwarded by the plaintiff for a lesser amount than the amount claimed by the defendant "in full settlement of our account". The plaintiff received no reply to the communication, but the defendant banked the cheque and then claimed the balance. The learned Judge held that the payment was a conditional one. He said:

> "The respondent in this case had no legal right to bank the cheque without accepting the condition upon which it was sent. The terms of the delivery of the appellant's cheque fall within S.21(2)(b) of the Bills of Exchange Act 1908 as being 'conditional or for a special purpose only and not for the purpose of transferring the property in the bill.' It therefore follows that the property in this cheque could not pass to the respondent until it complied with the condition. By banking the cheque and then repudiating the condition, the respondent in my opinion converted the cheque."

Having regard to the finding I have made as to the meaning of the letter of 24 May, I am unable to say that there is no defence to a claim for immediate payment of the cheque, and I refuse to order judgment against the defendant.

It follows that the plaintiff will have to pursue his claim for the $10,000 by means of an ordinary action. It may well be that he will do so now by way of counterclaim in the action for $18,915 already commenced.

I am of the view that even though this decision does not finally dispose of the claim between the parties, it does bring an end to this particular claim, that is the claim on what used to be the bill writ procedure, and in those circumstances in my view, the defendant is entitled to costs.

In all the circumstances, I allow costs to the defendant in the sum of $350 and disbursements.

P.G. Hillyer J

Solicitors:

Davys Burton & Henderson, Rotorua for plaintiff
Yolland and Romaniuk for defendant