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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1327/85

694

BETWEEN EMKEM INDUSTRIES (NZ) LTD

Plaintiff

A N D WACO COATINGS AND CHEMICALS LTD

Defendant

Hearing: 9 June 1986

Counsel: Alderslade for Plaintiff
Bogiatto for Defendant

Judgment: 9 June 1986

(ORAL) JUDGMENT OF SINCLAIR, J.

On 19 December 1985 the Plaintiff filed in this Court (under the procedure which was then available to it) a Bill Writ claiming the sum of $5,486.00 from the Defendant in respect of a cheque which had been issued by the Defendant in favour of the Plaintiff on 27 September 1985 and in respect of which payment was stopped. No application was filed for leave to defend and in consequence, judgment was obtained by default on 19 December 1985. Shortly thereafter, when payment of the judgment had not been made, a notice under s.218 of the Companies Act was issued on 4 December 1985 and that then prompted the present application for leave to defend the Bill Writ.

A question arises as to whether or not this matter should be dealt with under the Code of Civil Procedure or under the present High Court Rules. I accept that under the Code of Civil Procedure a Defendant quite often had some difficulty in obtaining leave to defend once a judgment had been obtained or indeed had difficulty in obtaining leave to defend even before judgment was obtained where a cheque had been handed over and the cheque was being relied upon as the bill of exchange as the basis of the action. The reason is, of course, well known in that cheques have habitually been regarded by the Courts as being the equivalent to cash and therefore the Court used to look carefully at the way in which the payment was made and the background to ascertain the true relationship between the parties and the true basis on which the cheque was given. The cases are well known and I need mention but three; Begley Industries Ltd v. Cramp (1971) 2 NZLR 207; Finch Motors v. Quinn (1980) 2 NZLR 513, and Orme v. De Boyette (1981) 1 NZLR 576. But it seems to me that even if one now were to apply the present High Court Rules to this present application, substantially the same test is to be applied. I still think that the basics are that the Defendant must show that it has an arguable case and that a miscarriage of justice would occur if it is not given an opportunity to defend the present proceedings. I do not understand Mr Bogiatto really to quarrel with that test as he acknowledged that they were applicable during the course of his argument. I think it is necessary therefore to have a look at the facts of this case and see where the justice of the matter lies.

By an affidavit made by the Director of the Plaintiff company, Mr Nice, it appears that on 25 or 26 September 1985, there was a discussion between Mr Nice and Mr Lehman of the Defendant company in relation to the account which was then running between the Plaintiff and Thurco Developments Ltd and/or the present Defendant. From the affidavit filed by Mr Lehman, it is apparent that he was putting forward to the Court the suggestion that the account in reality was that of Thurco's but there was an association between the present Defendant and Thurco Developments Ltd. According to Mr Nice, the situation was reached where there was an argument between the Plaintiff and Thurco as to the state of the account between the two. According to Mr Nice a compromise was reached whereby the Plaintiff agreed to deduct $1,000 off its account in settlement of all matters in dispute and it is claimed by Mr Nice that that situation was accepted by Mr Lehman. Mr Lehman disputes that situation and claims that he did not in fact reach any such compromise but that he gave the cheque because of the financial difficulties then being experienced by the Plaintiff. But the fact remains that the cheque was not given that day. It was given the following day at a time when the Defendant could have checked the situation and could have then repudiated, if it so desired, the alleged arrangement or could have resurrected, if that is the right term, that which it now raises against the Plaintiff. But a cheque drawn by the Defendant company was tendered, whether in settlement of Waco's account or Thurco's account does not, in my view, matter at all. It was in relation to the business dealings as between the Plaintiff and the two associated

companies - Waco and Thurco. So far as the Plaintiff is concerned it mattered little to it from whom it received payment in respect of its account. If it suited Waco to pay Thurco's account, that was a matter between Waco and Thurco and did not affect the Plaintiff at all. But it is noteworthy from the correspondence which was subsequently produced to the Court that there was, after the cheque was dishonoured a letter written by, in my view, the Defendant company dated 10 October 1985 which is headed "Waco" and which is signed "Waco Coatings and Chemicals" which is the name of the Defendant company, and when one reads the letter, particularly paragraph 2, it is obvious that whatever was the relationship between Waco and Thurco, there was a trading relationship between Waco and the Plaintiff. I quote from the second paragraph:-

> "The second point is one which this company has been making to you for some considerable time i.e. one of inaccurate and badly kept ledger accounts from your company to ours."

Despite Mr Bogiatto's submission that that can refer to Thurco, I reject that submission. To any person reading the letter the only possible interpretation is that it was Waco who was dealing on the financial matters with the Plaintiff. What then happens is the cheque is duly banked and dishonoured and following a telephone discussion between Mr Nice and Mr Lehman, the Defendant writes in reply to Mr Nice's letter and Mr Nice makes it quite plain that there had been a reduction in the account and yet that is not adverted to at all by

Mr Lehman when he files his affidavit. Whathe then attempts to suggest is that his company has been disadvantaged by reason of the fact that his company then had a stated registered office at 267 Pakuranga Highway but that instructions had been given to the accountant to change the registered office to the accountant's address. When the Plaintiff makes a search of the Companies'Office to ascertain the Defendant's registered office, it is still at Pakuranga Highway. The documents are then affixed to those premises and it is obvious that they do come to the attention of Mr Lehman. He then rings the Plaintiff's solicitors and, while there is some difference as to what actually took place, it is plain from Mr Bartlett's affidavit that he was led to believe by Mr Lehman that Mr Lehman himself had searched the Companies' Office that day when he rang - and that was about 7 November 1985 - and that the change of registered office had been completed. Mr Lehman does not refer to that allegation in his affidavit in reply but it is plainly untrue because there was no change of registered office until 4 December 1985 at which date, after judgment had been obtained on 19 November 1985, a s.218 notice had been issued. There is no affidavit from the Defendant's accountant as to the instructions which were given to him, nor when, nor any indication from him as to why he did not carry out his instructions. That is an unsatisfactory state of affairs and can only leave the Court with some feelings of disquiet that all that should have been made known to the Court has not been made known. It is noteworthy also that in a circumstance such as this,

there is not one word from the Defendant company as to its financial position and, in a case such as this, it is, in my view, incumbent upon defendants when seeking a discretion to be exercised in their favour that full disclosure should be made as to the financial situation of the person making the application. On the information which is before the Court at the moment, it appears to me that both Mr Nice and Mr Lehman are, as submitted by Mr Alderslade, pesons who have been in business for quite some considerable time and they are used to dealing in business affairs. The Bill Writ procedure is well known to businessmen and any person reading a Bill Writ when it is received - and I am satisfied that Mr Lehman did receive it and he does not in fact categorically say to the contrary - would know what was required of him if a defence was to be filed. It appears to me that there was a smoke screen put out to try and suggest that this Defendant had been disadvantaged over the failure of the accountant to notify the change of registered office. When a company is in business and it wishes to trade, then its duties are plain; it must comply with the Companies'Office requirements and the Companies' Act requirements promptly and if it fails to do so it has nobody else to blame but itself if as a result, an occurrence happens as has happened in this particular case. Here a cheque was given in a trading situation. It was, in my view, a cheque which was equivalent to cash. On the affidavits which are before me at the moment, I prefer Mr Nice's explanation as to how the cheque came to be given and it appears to me that at the moment it is

established that it was given as a result of a compromise. In those circumstances there can be no miscarriage of justice if the judgment is allowed to stand nor in those circumstances can the Defendant put forward an arguable defence. If it has a claim against the Plaintiff, then let it bring it by separate action. If the judgment is allowed to stand, it will in reality do the Plaintiff no harm if it can meet the judgment and if it can establish what it now says is its true complaint, then it still can do so but that may be a matter which would have to be decided by evidence and what the result would be cannot be guessed at or prognosticated at the present time. In my view no case has been made out to interfere with the judgment and the present application will be dismissed. The Plaintiff is entitled to costs which in the circumstances I fix at $500 plus disbursements.

P. D. Ian J.

Solicitors:

Chapman Tripp Sheffield Young, Auckland, for Plaintiff;

Grove Darlow & Partners, Auckland, for Defendant.