23/12

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 1470/87

BETWEEN ENTERPRISE ADVENTURES LIMITED

Plaintiff

A N D PACIFIC SUN HOTELS LIMITED

Defendant

Hearing: November 19, 1987

Counsel: Mr. Paterson for Plaintiff
Mr. Sorrell for Defendant

Judgment: November 19, 1987

(ORAL) JUDGMENT OF MASTER TOWLE

This was an application for Summary Judgment brought by the Plaintiff seeking judgment on a dishonoured cheque dated 22nd August 1987 drawn by the Defendant in favour of the Plaintiff for the sum of $1,807,938.81¢. A number of procedural difficulties in the affidavits and the service arrangements were encountered at the outset but had been overcome by the time the matter came before me today, after fresh service on the Defendant had taken place sufficient to comply with Rule 138. In addition the Plaintiff filed an affidavit at the hearing exhibiting the cheque in question in place of the photocopies which had previously been presented, together with a further statement on behalf of the Plaintiff by its Director, Mr. Jones, verifying the allegations in the Statement of Claim.

No formal notice of opposition or affidavit was filed until this was done in Court today when the Defendant opposed the Summary

Judgment on the grounds that payment of the cheque was not due and that it had been delivered subject to a pre-condition as to its presentation. An affidavit was also filed by Mr. N.D. Iverson, a Director of the Defendant company, deposing that the company never had any contractual liability to the Plaintiff and suggesting that the cheque had been given in circumstances where settlement of a transaction was to be conditional upon a further settlement between one of the Defendant's subsidiary companies, and Arahi Properties Limited.

The background to this matter is as follows. On 6th November 1986 the Plaintiff company entered into an agreement with a company then called Pacific Adventures Limited (but later renamed Pacific Property Corporation Limited) and an Isle of Man company as covenantor, for the sale of the yacht "N.Z.I. Enterprise", together with certain ancillary equipment. A copy of that agreement was exhibited in support of the Plaintiff's application and pursuant to it, Pacific Adventures Limited was due to pay the bulk of the purchase money by 30th April 1987. The full details of that agreement are not of direct concern but it is clear from the correspondence exhibited to the Plaintiff's affidavit that there was delay in the settlement which originally should have taken place on 30th April 1987. On 8th July 1987, the Plaintiff's solicitors wrote to the Manager of the Defendant company confirming the exact purchase price as $1,648,811.50¢ which, together with an interest figure of $159,127.31 was advised as the amount due for settlement, making a total of $1.807,938.81¢. On 3rd August 1987, a further letter was sent by the Plaintiff's solicitors addressed to the Isle of Man company at an Auckland address, advising of the concern of the Plaintiff company's shareholders to the delay in settlement and threatening proceedings against both Pacific Adventures Limited and the Isle of Man company as covenantor, if settlement did not take place before the following Wednesday.

On 3rd August a letter was sent by Mr. Iverson to the Plaintiff company referring to previous telephone calls and discussions and saying, in the second paragraph:

> "....in order to save yourselves any further concern we enclose herewith our cheque in settlement as per Mr. Edmonds letter of 8th ult.
>
> The cheque is dated for August 22nd 1987 and is in the sum of NZ $1,807,938.81 the cheque being tendered on behalf of our wholly subsidiary, Pacific Property Corp Ltd. (previously Pacific Adventures Ltd)."

The cheque itself was for this sum and typed on its face were the words "Settlement: Pacific Property Corp Ltd". It was signed by Mr. Iverson and one other person on behalf of the Defendant company. The cheque was presented on 24th August and dishonoured on presentation.

Counsel for the Plaintiff has referred me to a recent Court of Appeal decision in International Ore & Fertilizer Corporation v. East Coast Fertiliser Co. Ltd. [1987] 1 N.Z.L.R., 9, in relation to the question of Summary Judgment procedure brought upon dishonoured cheques. That decision reinforces a number of earlier unreported decisions given in this area, for example, by Barker, J. in Domtrac Equipment Limited v. Lambert C.P. No. 73/86, a Rotorua case, and a case in Christchurch of Williamson, J. Halliday Racing Developments Ltd. v. Lever. The Court of Appeal has now reaffirmed the rationale for the decisions in those cases (although not specifically referred to in its judgment), that generally speaking, even between the immediate parties, bills of exchange are to be treated as the equivalent of cash. All these judgments confirm that the holder of a cheque is entitled, save in exceptional circumstances, to have the cheque treated as such. The only grounds on which this situation might not apply would be where there had been fraud, invalidity of the cheque itself, or total failure of consideration. The first two possibilities clearly do not apply in this case and it has been for my consideration whether or not there has been a total failure of consideration.

The Plaintiff claims that there was a forbearance to sue on the original agreement known to the Defendant when it gave the cheque and that this circumstance amounted to proper consideration. In

support of this proposition I have had cited to me Bonior v. Siery Ltd. [1968] N.Z.L.R., 254. In that judgment Speight, J. applied the principle enunciated in the English case of Oliver v. Davis [1949] 2 K.B., 727 that an express or implied promise by a creditor to forbear from suing a third person is good consideration.

In the light of the correspondence previously referred to, there can be no doubt in the mind of Mr. Iverson that because of the long delay in settlement, the Plaintiff was about to issue proceedings unless this took place and that it was as a direct result of this that the cheque was sent with the Defendant's letter of 3rd August. I am therefore satisfied that the defence that the cheque might have been tendered without any consideration is not tenable.

I have also given consideration to the claim by the Defendant in its notice of opposition, that the cheque was tendered conditionally and that it was not to have been presented until an ongoing sale between the purchaser and Arahi Properties Limited was confirmed. I have given careful consideration to Mr. Iverson's affidavit on this point and find that it falls short of even bringing the Defendant company to the threshold of credibility of a version that there was truly a condition under which the cheque was handed over. There was nothing in the accompanying letter of 3rd August 1987 concerning any such condition and, although there was a reference to dealings with Arahi in that letter, no stipulation was made that the cheque was only conditionally forwarded. Moreover, there is nothing precise in Mr. Iverson's affidavit to depose to him having sent the cheque on such a basis. In reaching this conclusion I have given regard to the principles relating to this question of credibility which may be extracted from the dictum of Lord Diplock in Eng Mee Yong v. Letchumanan [1980] A.C. 331, which has been cited with approval by the Court of Appeal in Pemberton v. Chappell [1987] 1 N.Z.L.R., 1 at page 4.

For all these reasons the Plaintiff has satisfied me that the

Defendant has no reasonable defence to the claim based as it is upon the dishonoured cheque and the Plaintiff is entitled to judgment. This will be in the sum of $1,807,938.81¢, plus interest on this sum as claimed from the date of issue of the proceedings on 15th September 1987 down to today. In addition I allow costs to the Plaintiff in the sum of $2000.00 plus disbursements.

MASTER R.P. TOWLE

Solicitors:

Edmonds Dodd, Te Awamutu, for Plaintiff
Nicholson Gribbin, Auckland, for Defendant