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| <u>BETWEEN</u> | <u>EOC TECHNIQUE LIMITED</u> |
| | <u>First Plaintiff</u> |
| <u>AND</u> | <u>CAD/CAM SYSTEMS LIMITED</u> |
| | <u>Second Plaintiff</u> |
| <u>AND</u> | <u>MCDONNELL DOUGLAS</u> <u>CORPORATION</u> |
| | <u>First Defendant</u> |
| <u>AND</u> | <u>MICHAEL F. BURTON</u> |
| | <u>Second Defendant</u> |
| <u>AND</u> | <u>MCDONNELL DOUGLAS</u> <u>INFORMATION SYSTEMS</u> <u>LIMITED</u> |
| | <u>Third Defendant</u> |

Hearing: 20 August 1987

Counsel: Henry for Plaintiffs
Wallis for Defendants

Judgment: 20 August 1987

(ORAL) JUDGMENT OF THORP J

In these proceedings two plaintiff companies seek injunctions to prevent the first and third defendants, which are members of the McDonnell Douglas Group of Companies, from taking action in breach of the exclusive licences which the plaintiffs say they still hold for the distribution of certain McDonnell Douglas products in this country.

The first plaintiff claims under a

licence from the first defendant. The second plaintiff claims under a licence from the third defendant. The defendants say the licence agreements were lawfully terminated, that the plaintiffs owe them approximately \$NZ500,000 and that they should not only be permitted to maintain their trade in the products in question in this country but also to proceed with winding up petitions against the plaintiffs which have been filed but not advertised.

A further prayer in the present application is for an injunction restraining further action on those petitions.

A major preliminary issue of fact which requires the Court's consideration is the allegation by the plaintiffs that either in January or February last agreements were reached between the parties for the postponement of the plaintiff's indebtedness to the defendants and for extension of the existing licences.

Mr Henry acknowledged that if the Court found there were no arguable case for such an agreement he could not contest the contention that the licence held by the first plaintiff was lawfully terminated, and that it has no right of relief against the first defendant. He submitted, however, that even if the Court was against him on the existence of an agreement of the nature described there would still be an arguable case as to the termination of the licence held by the second plaintiff from the third defendant.

I am satisfied that there is no sufficient evidentiary basis in the material before the Court for the existence of any completed agreement between the plaintiffs and the defendants of the type which they claim. It may be that Mr Fill, the principal officer of the plaintiff companies, thought he had an

agreement, but for many reasons I am satisfied that such belief was not justified.

Because of the central importance of this issue in the litigation, while I do not intend to state all the reasons which have brought me to that conclusion, I should at least state the principal reasons, and these are:

1. There are altogether too many documents emanating from the plaintiffs or their solicitors since the date of the claimed agreement which run contrary to that interpretation of the evidence:
2. A claim that the plaintiffs had reached an agreement involving monthly payments of capital and interest when no such payments have been made nor any request for extension of the dates of the payments is one which the Court must necessarily hesitate to accept: and
3. It was central to the plaintiff's argument that any payments to McDonnell Douglas were subject to the plaintiff being able to obtain a new equity shareholder: that would indeed be an unusual commercial arrangement. I do not have much difficulty in accepting this matter was the subject of much discussion between the parties, and was probably the reason for time being granted by the defendants to the plaintiff. What I do not see in the evidence is anything which would suggest an obligation on the part of McDonnell Douglas, after the failure of the endeavour to interest the Richmond Group, further to postpone their claim for monies outstanding.

The next issue of fact for consideration is whether or not there is an arguable case against the claimed determination of the licence from the third defendant to the second plaintiff.

There is a very marked difference between the language of the relevant clauses in the two licencing agreements. It is obvious on reading the two why Mr Henry should have felt compelled to accept that a finding against him on the factual issue of agreement was fatal to any claim that the first licence remained. It is equally plain that the difference in language is such that, *contra proferendum*, there must be an arguable case on this head.

Turning then to consider balance of convenience I have no doubt at all that but for the principal raised by such cases as Cayne and another v Global Natural Resources plc (1984) 1 All ER 225, the balance would favour refusal of the injunction.

There is little doubt that the licences are terminable, that what is involved in any claim by the plaintiffs is loss of profits for a limited period, and that whereas the plaintiffs are in a parlous financial state, the defendants are well able to meet any award which may be made against them. Questions of reputation must arise when a licensee is financially embarrassed as is clearly the case. Third party interests also point the same way.

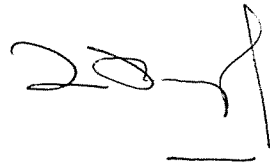
Notwithstanding that being the position I am very slow to reach a conclusion to this application which in effect would prevent a party from exercising what I have found to be an arguable claim.

I believe the situation can and should be met by refusing the injunctions save that against advertisement of the petitions to wind up, which I grant, subject to the following conditions:

1. The second plaintiff is to undertake to prosecute its substantive claims with all reasonable speed:

2. The contributories of the second plaintiff, Mr and Mrs Fill, are to give a written undertaking to the Court that the costs of such proceedings will be born by them personally and not from the funds of that company:
3. Leave is reserved to the defendants to apply for variation of the injunction on 7 days notice, the particular reason for reservation of leave being to enable the defendants to take action if in their view the plaintiffs are not proceeding expeditiously with their claims. In that regard counsel should seek to agree a programme. The fact that the first defendant is an overseas corporation and the second defendant has not yet been served makes it impracticable for the Court to formulate any detailed timetable now, but counsel advise that they are agreed it would be reasonable for an order to be made for the Statement of Defence to the Second Amended Statement of Claim to be filed and served within 7 days and for mutual discovery to be completed within 28 days.

Costs are reserved on today's proceedings.

A handwritten signature in black ink, appearing to be '20-1' followed by a stylized flourish.

Solicitors:

Hesketh Henry for Plaintiffs
Brandon Brookfield for Defendants