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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.641/86
and
B.27/88



BETWEEN: S H LOCK (NZ) LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a confirming house

Plaintiff

A N D: CHARLES OREMLAND of Auckland, Company Director

Defendant

Hearing: 10 May 1988

Counsel: C Johnston for defendant in support
G C Everard for plaintiff to oppose

Oral Judgment: 10 May 1988

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[ORAL] JUDGMENT OF HENRY, J

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This is an application by the Defendant for an order for stay of execution in respect of a judgment entered in this Court against him on 19 August 1986 in the sum of $27,753.10. The application is made under R.565 of the High Court Rules which provides :

> "565. Stay of Execution:
>
> Any party against whom judgment has been given may apply to the Court for a stay of execution, or other relief against the judgment, upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were executed, and the Court may give relief on such terms as appear just."

The basis of the application is that the Defendant has now appealed the judgment in question and in support of that appeal has applied to the Court of Appeal for leave to adduce fresh evidence. The judgment was obtained under the summary judgment procedure following a defended hearing before Wylie J. The cause of action was based on a guarantee granted by the Defendant in respect of the operation of a bill facility granted to a company known as Quality Knitwear New Zealand Limited. The amount claimed relates to five bills of exchange due in the months of February, March, April and May of 1980 which the Plaintiff contended were dishonoured on presentation.

Mr Johnston, in support of the present application, has drawn my attention to the relevant factual material in particular to the nature of the new evidence sought to be put before the Court of Appeal. As I understood him the primary submissions intended to be made in that Court will be directed to establishing doubt as to due presentation of the bills (as required by s.45 of the Bills of Exchange Act 1908) and also to the failure to give notice of dishonour (as required by ss.48 and 49 of that Act). He addressed me in some detail as to the effect of the fresh evidence and the merits of the Defendant's case on appeal. I am doubtful as to the extent which this Court should endeavour to make an assessment of the merits of an appeal on an application for stay, if indeed it should embark on that task at all.

It may perhaps in some circumstances be relevant to ascertain whether or not an appeal is entirely without merit, but I see it as no function of this Court to make any considered assessment of the likely result of the appeal. For present purposes I am quite prepared to assume that both the application to adduce new evidence and the appeal itself have merit.

The starting point on the present application is that the Plaintiff has a judgment of this Court, properly obtained. The principle normally applied in such a situation on an application for stay is to enquire whether there is any real prospect that a defendant will be unable to recover a judgment which he pays if ultimately successful on appeal, or alternatively, if there is any real prejudice resulting to him by allowing execution prior to such a determination of the appeal. Applications for stay in these circumstances are normally brought under R.35 of the Court of Appeal Rules, which I note is in much wider terms than R.565 of the High Court Rules.

The principles upon which R.35 applications are dealt with are well known, and need no further repetition over and above what I have already stated. Rule 565, which is the only provision relied upon by Mr Johnston, requires this Court to be satisfied that a substantial miscarriage of justice would be likely to result if the judgment were executed. The miscarriage

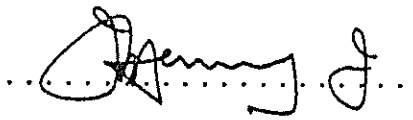
put forward by Mr Johnston is that the Plaintiff will have executed a judgment which, on evidence which was not available in the High Court at the hearing of the summary judgment application, the Plaintiff should not have had. I do not think the fact that there is an application to adduce fresh evidence is of any great significance, and the present case has no extraordinary circumstances. On appeal a plaintiff is always at risk of losing his judgment, and a defendant then placed in a position of recovering the amount of that judgment which he had paid. Importantly there is no information whatsoever before me as to the Defendant's financial position, and in particular nothing to indicate that he is unable financially to pay the amount of this judgment. Neither is there anything to indicate any prejudice which may occur to him if payment is made. There is no suggestion that Plaintiff will be unable to repay the full amount of the judgment should the Defendant be ultimately successful on appeal. Plaintiff in this case is prima facie entitled to the fruits of this judgment, obtained as it was as long ago as 19 August 1986. To be weighed also is the absence of any evidence from which it can be inferred that if the appeal is ultimately successful there will be no significant alteration meantime in Defendant's financial position which might adversely affect Plaintiff's right of recovery as an unsecured creditor.

I can see no substantial miscarriage of justice resulting if this judgment is now executed and

accordingly the application is dismissed but subject to the Plaintiff submitting in writing to the Registrar an undertaking that the full amount of any judgment paid to it by the Defendant will be repaid forthwith in the event that the present appeal is successful and the present judgment set aside - that undertaking to be in the hands of the Registrar by 5:00 p.m. on Wednesday 11 May 1988.

The application to set aside the bankruptcy notice which was argued at the same time is also dismissed as a consequence and for the same reasons.

In the circumstances, Plaintiff is entitled to an order for costs which I fix in the sum of $500.00.



10 May 1988

J S HENRY, J.

Solicitors:

Nicholson Gribbin, Auckland, for plaintiff
Grove Darlow & Partners, Auckland, for defendant