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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No.1625/89

NOT RECOMMENDED

1579

BETWEEN JONES ODELL MOTORBODIES LIMITED a duly incorporated company having its registered office at 12 Fairfax Avenue, Penrose, Auckland and carrying on business inter alia as Panelbeaters

Plaintiff

A N D ANDREW LOGAN t/a KWIKSNAX FOR LUNCH 4/448 Rosebank Road, Avondale, Auckland, Caterer

Defendant

Hearing: 5 October 1989

Counsel: Mr Powell for Plaintiff
Mr Christie for Defendant

Judgment: 5 October 1989

ORAL JUDGMENT OF GAULT J.

This is an application for summary judgment in a proceeding in which the plaintiff sues the defendant, claiming the sum of $36,416.35 for the supply of six food retailing units for use in mobile food dispensing vans. The claim also includes the fitting and finishing of a new rear door to a motor vehicle.

From the affidavit evidence it appears that the defendant had discussions with officers of the plaintiff company with a view to the contractual arrangement. On behalf of the defendant it is said that a contract was entered into orally

some time prior to 22 August 1988. That is not inconsistent with the plaintiff's pleading that a contract was made "in or about August 1988", and with the affidavit of the secretary of the plaintiff company who says that a letter dated 22 August 1988 confirmed the arrangement. Whether the letter actually confirmed an earlier oral contract or itself sets out the final details of the agreement, is not altogether clear. The first paragraph of the letter dated 22 August reads -

> "Following our conversations and agreements of last week I considered it better for all parties if the final details were clarified on paper, so there can be no misunderstanding."

That letter was written by the defendant on a letterhead bearing the name "Kwiksnax for Lunch". Also exhibited is another letter dated 13 October 1988, also signed by the defendant under a slightly different but similar letterhead, also bearing the name "Kwiksnax for Lunch".

The work was done and invoices were posted to "Kwiksnax". In the notice of opposition to the present application, one defence is raised. It is that the defendant contracted with the plaintiff as agent for a company Swan Holdings (No.39) Limited, which company traded under the name "Kwiksnax for Lunch". The evidence directed to that defence is, in essence, summed by in paragraph 10 of the defendant's affidavit which reads -

> "As stated above I was more than surprised to be served with proceedings wherein I have been sued personally. There is no doubt in my mind that Messrs Barry Jones and

> Roger Odell, the major shareholders in the plaintiff and the individuals with whom all dealings with the plaintiff were conducted, were both fully aware that I was a director and agent of a limited liability company and was not trading as an individual. Further, that company was Swan Holdings (No 39) Limited."

The plaintiff claims it dealt with Mr Logan as an individual, contracted with him, had no knowledge that he was acting as agent and, therefore, is entitled to judgment againt the defendant personally.

For the defendant it is said that officers of the plaintiff company well knew at the time the contract was made that they were dealing with a company and not an individual.

There is a clear conflict of evidence as to the knowledge of officers of the plaintiff company at the material time. That can be resolved only by the Court hearing evidence, with cross-examination, and making a finding as to the knowledge of the plaintiff company at the relevant time. On that basis the matter is not appropriate for summary judgment because the defendant must have the opportunity to establish the defence outlined, if he can.

In the course of argument I made reference to the provision in the Companies Act 1955 which requires companies, in their official documents, to disclose the correct name. At the end of he hearing I located, and invited counsel to consider, the note in Capital Letter (II TCL 8) of the judgment in Hutt Valley Energy Board v Hayman (unreported) High Court Wellington, CP 675/87 Ellis J., 23 February 1988.

After a short adjournment I heard further submissions from counsel in relation to the issue raised in that case. There the Court applied s.116(5) of the Companies Act to hold the director and principal shareholder of the company personally liable for an order for the supply of gas because the order had been made under a name which did not disclose the limited liability of the company. Section 116(5) provides that, if an officer of a company issues any business letter of the company, or signs any order for goods, wherein its name is not mentioned in the manner required, he shall be personally liable to the holder of the order for goods for the amount thereof, unless it is duly paid by the company.

Mr Powell, for the plaintiff, sought to rely upon that provision in support of the present application for judgment against Mr Logan, who is an officer of Swan Holdings (No.39) Limited. He said that the letter of 22 August 1988, to which I have already referred, even if it was written on behalf of that company, constituted an order for goods signed by the defendant personally, so rendering him personally liable.

Mr Christie was at pains to distinguish the judgment in Hayman and advanced grounds why s.116(5) should not be applied in this case.

Of the matters he advanced the only one I find has any real strength is that the letter dated 22 August in fact is not an order for goods. If the contract in this case was made orally at an earlier stage, then the order was made in the context of

the oral agreement. The letter of 22 August is thus merely a confirmation and not an order. I am of the view that it will be necessary to investigate the evidence to determine whether that is so. The fact that the secretary of the plaintiff company, in his affidavit, referred to the letter as confirming the arrangement, indicates the matter is far from clear.

While, for the reasons I have given, I have reached the view that summary judgment must be refused in this case, I record that I have done so by a fine margin. The evidence on behalf of the defendant tends to be somewhat vague and generalised and does not go as far as one would expect in circumstances such as this clearly to pinpoint the time when the contract was made, and to address representations made and grounds for attributed knowledge at that time. However, I am not in a position to say, that when all the evidence is heard, it may not be shown that the plaintiff well knew it was dealing with a company at the time the contract was made. Accordingly the matter must be dealt with in the ordinary way.

The defendants should file a statement of defence within 14 days. The defendant is entitled to costs which I fix at $750.00, together with disbursements to be certified by the Registrar.

Solicitors: Trotter McKechnie Quirke & Morrison, Auckland
for Plaintiff
Russell McVeagh McKenzie Bartleet & Co, Auckland
for Defendant