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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

C.P. No.664/88

BETWEEN JORDAN SANDMAN SMYTHE LIMITED

Plaintiff

NOT RECOMMENDED

AND ROSS SPENCER MOIR

Defendant

Hearing: 17th February, 1989

Counsel: R.A. Osborne for the Plaintiff
G.J. Venning for the Defendant

Date of Judgment: 20TH APRIL 1989

RESERVED JUDGMENT OF MASTER HANSEN

The Plaintiff is a sharebroker, and the Defendant a former client. By the Statement of Claim, the Plaintiff seeks Summary Judgment in the sum of A$13,459.67. In the interlocutory application, Summary Judgment is only sought in the sum of A$10,912.97; the Plaintiff conceding through the affidavit of Mr T.K. De Castro that the sum of A$2,546.70 is properly in dispute.

The proceedings concern the sale of 20,000 shares in Elders Resources Limited. The Statement of Claim alleges that pursuant to instructions received from the Defendant 20,000 shares were sold on the 28th October, 1986. These were apparently sold cum bonus shares. It came to pass that because of the timing of the actual sale, the bonus shares were ultimately issued to the Defendant. Naturally, the purchaser requested these shares. The Plaintiff approached the

Defendant and requested the share certificate and a signed transfer. The Defendant refused. Bound by the relevant rules of the Melbourne Stock Exchange, the Plaintiff was forced to purchase the bonus shares (in number, 5,333). I so doing they provided the purchaser with the shares he was entitled to. The cost of the replacement shares was the amount claimed in the Statement of Claim.

In the affidavit in support, there is exhibited a letter from the Defendant to the Plaintiff, dated the 25th February, 1988. The relevant portions of the letter read:-

" On 28.10.86 Ann and myself went to your Christchurch office to see a Mr David Templeton. Being unable to see him, we saw a Mr Tim De Castro, with two questions:

1. I had 20,000 Elders Resources Limited shares. Could I sell these through his firm, although I had purchased them elsewhere? He replied "Yes, if I have the certificates."

2. The shares had moved up in price. I wanted to know if there were any bonuses coming and if so I would collect these before selling my shares. I couldn't find any information in newspapers. Mr De Castro didn't know but could find out by checking with Australia. We waited in the side room for about 10 minutes. On returning he said that there were no bonuses due, so I gave my instructions to sell.

.....
The advice I got from your firm was a blantant lie. There was a bonus due on 3.11.86 and I have no intention at all of returning the above certificates."

Mr De Castro, in his affidavit in support, confirms his belief and that of the Plaintiff that there is no defence to the allegations in the Statement of Claim to the extent of A$10,912.97. He says the matters

raised by the Defendant in relation to the bonus entitlements raises an arguable issue, which goes only to the quantum of the Plaintiff's claim. Further, he goes on to allege that the damage is easily quantifiable. In paragraph 14 he states:

" .... namely by deducting from the sum which the defendant would have received on a sale conducted on 13 November 1986 the sum actually received on the 28 and 29 October 1986 sales. This calculation is as follows (all sums expressed in Australian currency and net of the commission payable to the plaintiff);-

13 November 1986	-	A$27,943.60
28 October 1986	-	A$25,396.90
		A$ 2,546.70 "

This is the difference in value of the actual selling price on the 28th October, before the bonus shares were issued, and the 13th November, 1986, which was the first day the shares went ex bonus.

Although it is not stated in the affidavit, I presume that this allegation arises from the comment in the letter I have quoted above that "I wanted to know if there were any bonuses coming and if so I would collect these before selling my shares."

However, the Defendant's affidavit in opposition puts the matter somewhat differently. He states, on oath, that having obtained assurances that there were no bonus shares about to be issued, he gave instructions to sell. He goes on to say:-

" 5. By letter dated 12th November, 1987, I was asked to return share certificates and transfer forms for 1,800 bonus shares to the Plaintiff. The letter I received is annexed hereto marked "A". By letter 16th November, 1987, which is annexed hereto marked "B", I was asked to return a transfer and share certificates for 2000 bonus shares and by a letter dated 24th December, 1987, I was asked to

return a transfer and certificates for 4000. That letter is annexed hereto marked "C". In response to that last letter I wrote to the Plaintiff the letter which is annexed to the affidavit of Mr T.K. De Castro marked "A6".

6. Following that letter I received a letter dated 23 May 1988 from Lane Neave Ronaldson, solicitors acting for the Plaintiff at that time. The letter is annexed hereto marked "D". In that letter it is stated "You were aware that when you contracted to sell the shares, they were to be sold with their issue rights." That statement was not correct. When I agreed to sell the shares because of the information I had been given I believed that there were no issue rights attached to the shares.

7. I note that in his affidavit T.K. De Castro does not accept or deny the allegations made in correspondence by me that I agreed to sell my shares only after I had been assured that there was no bonus issue due on such shares. In paragraph 14 of his affidavit Mr De Castro assumes that if I had been told that a bonus issue was due as alleged I would still have agreed to the sale of these shares on 13 November 1986. That is not a correct assumption. I considered selling the shares on 28 October 1986 because of the price which I then understood the shares to be fetching but only after being assured that as at that time there was no bonus issue of shares due on my shareholding. Had I been advised correctly of the position I would not have wanted to sell the shares at all. I never instructed the Plaintiff on 28 October 1986 that in the event of there being a bonus issue of shares on my shareholding they were to sell my shares once such issue had occurred.

6. (sic) In my dealings with the Plaintiff on 28 October 1987 (sic) I sought advice from the Plaintiff as to the value of my shares and in particular as to whether any bonus issue of shares could be expected. I would not have sold my shares if I had known that a bonus issue of shares was due on them. I would have wanted to receive the bonus shares and I would not have sold my original shares. I sold the shares only because of the advice and information I was given by Mr De Castro. If the shares had not been sold I would not have incurred any liability to the Plaintiffs as has been alleged. To the extent that I might be liable to the Plaintiff for the cost of their purchasing bonus shares I will have suffered loss as a result of the information and advice which I was given by Mr De Castro of the Plaintiff company.

> A Statement of Defence and Counter Claim in the form which is annexed hereto marked "E" is to be filed in this Court on my behalf. "

Mr Osborne submitted that there was clearly a contract to sell the shares on the 28 October. He said they were sold cum bonus. Later the Defendant refused to transfer the bonus shares and the Plaintiff was forced, under the rules of the Stock Exchange to make good that deficiency. He submitted that the Defendant had had the benefit of the contract; the sale proceeds of the shares cum bonus; and the bonus shares themselves. He submitted that the Defendant's counter claim or set-off was sufficiently associated with the claim to preclude entry of Judgment to the proper extent of that counter claim and set-off. He said, therefore, it was necessary to calculate the Defendant's damage. He said it is not right to simply say that the damage suffered was exactly what is claimed by the Plaintiff. He said the damage, if any, to be assessed is the loss flowing from the alleged negligent advice given by Mr De Castro to the Defendant. He said prima facie that was what the Defendant would have had by keeping the shares to a preferred date and what he actually had by selling when he did. He said that the letter exhibited at "A6" from the Defendant to the Plaintiff makes it clear that the sale would still have taken place after the bonus issue. Therefore, he said the relevant comparison is between realisable value, when the shares become ex bonus, and their actual realisation cum bonus. He relied heavily on the decision of Master Towle in Paine Belcher Limited v M.L. Jones a.k.a. M.L. Kriletich (unreported, Auckland C.P. 152/88, 29 June, 1988).

With all due respect to Mr Osborne's submission, it

seems to me the Paine Belcher case is significantly different from the present case. In that case, the Defendant made numerous allegations against the stockbrokers. However, in his affidavit in opposition there was apparently no reference to dates, or to the person he dealt with. It really seems to be a case where a Defendant has failed to particularise his defence, as is clearly required by the Rules and by the authorities. e.g. S.H. Lock Limited v Oremland (unreported, 19/8/86, Auckland C.P. 641/86, Wylie J.)

Quite simply, at Summary Judgment stage I am not prepared to hold that the evidence is as Mr Osborne submits. It seems to be much more in keeping with submissions made by Mr Venning on behalf of the Defendant. The Defendant's evidence in his affidavit in opposition is quite clear and precise. That evidence is that he only sold the 20,000 shares because he was told there were no bonuses expected. This is made quite clear from paragraph 7 of his affidavit that I quoted earlier. I accept that his letter to the Plaintiff, exhibited in Mr De Castro's affidavit, refers to "any bonuses coming and if so I would collect these before selling my shares". The Court is also always aware of the well known dictum of Lord Diplock in Eng Mee Yong v Letchumanan [1988] AC311 at 341:-

> " Although in the normal way it is not appropriate for a Judge to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. "

I also bear in mind the recent pronouncements of our

own Court of Appeal in Bilbie Dymock Copration Limited v Patel and Bajaj (1987) 1 PRNZ 84. However, put at its highest, the letter of the 25th February, 1988, is clearly capable of meaning that if the Defendant was aware of a bonus issue he would have collected the bonus shares, and only sold the 20,000 capital stock.

Again, it is unecessary to cite the various authorities in relation to the discharge of the onus on the Plaintiff. The state of the evidence before the Court in this case is such that I am satisfied the Plaintiff has not discharged the onus on it. The letter of the 25th February, 1988, is not clear and unequivocal evidence that the Defendant would have ultimately sold all his shares. And we have his sworn evidence that if he had been given the correct advice as to the state of the bonus issue he would not have sold the shares at all. In the event of the Defendant satisfactorily establishing either or both of those propositions at trial, it seems to me clear that the Plaintiff could not recover the full or lesser amounts claimed. If the Defendant's intention was to keep the bonus shares and to only sell 20,000, then the effect of the alleged negligent advice was to place the Plaintiff's in a position of having to buy the 5,333 shares because of their own negligence. If the Defendant can establish, after evidence has been tested in the normal way, that he would not have sold any of the shares if he had known of the bonus issue, again, the consequence of the alleged negligence led to the Plaintiff being forced to buy the additional shares.

Both counsel addressed very careful submissions to me on the nature of set off. The Defendant alleging that his claim is either a set off or counter claim. I am grateful to counsel for their careful analysis of the

law. I think it unnecessary to review it here, because it is quite clear that the allegations raised by the Defendant are so closely linked with the contract between the parties as to give rise to equitable set off if they can be established. As was said by Tipping J. in McNicol v McNicol (Timaru C.P. 43/87, unreported decision of 15.12.87): "That to be a set off the matter should go to the heart of the Plaintiff's claim so as in a sense to impeach the validity of that claim".

Accordingly, I am satisfied that the Plaintiff has failed to establish the onus on it to show that the Defendant has no defence to its claim for A$10,912.97. The application for Summary Judgment is dismissed. I am conscious that the new amendment to Rule 142(A) allows the Defendant 30 days to file a Statement of Defence from the date of the handing down of this Judgment. However, the issues between the parties in this particular case are of such a narrow compass that I consider it proper that a timetable order should be set down. I am conscious that counsel have not addressed on the question of a timetable, and for that reason there will be liberty to apply in the Chamber's list on 7 days notice if any of the timetable orders I am about to make cannot be met. Also the Statement of Defence and counter claim has already been filed:

1. Defence to counter claim to be filed within 21 days.

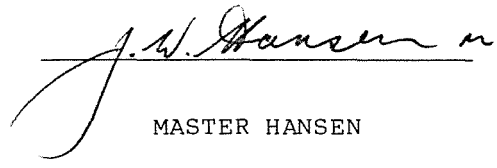
2. Lists of documents, to be verified by affidavit to be filed and served 14 days thereafter.

3. Inspection to take place 7 days thereafter.

4. Any further interlocutory applications 7 days thereafter.

5. Praecipe to be signed and filed 7 days thereafter.

This is a case where I consider it appropriate that the merits of the matter be determined before an award of costs is made. However, for the benefit of the trial Judge, they are fixed as to quantum at $1,200, plus disbursements as fixed by the Registrar.



MASTER HANSEN

Solicitors for the Plaintiff: Duncan Cotterill, Christchurch.
Solicitors for the Defendant: Wynn Williams, Christchurch.