20/11

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 1074/86

1733

BETWEEN FOOD-TECH INGREDIENTS LIMITED

Plaintiff

A N D APV-BELL BRYANT (NZ) LIMITED

First Defendant

A N D DEC INTERNATIONAL INC

Second Defendant

A N D NU-CON SYSTEMS LIMITED

Third Defendant

Hearing: 11 October 1989

Counsel: Mr G P Curry for Plaintiff
Mr R Harrison for First Defendant
Mr J F Timmins for Second Defendant

REASONS FOR RULING OF ROBERTSON J

There is listed for hearing, commencing on Monday 16 October, a five week hearing in this matter. In recent times there have been settlement discussions between various counsel.

It is agreed that on Wednesday, 4 October the first and second defendants advised the plaintiff that it intended to make an application for leave to make a payment into Court with a denial of liability. That application was actually received by the Court on 5 October and initially allocated time before me on the 6th.

Counsel for the first and second defendants were then ready to argue the matter. Mr Curry, counsel for the plaintiff, requested that the matter be adjourned as he considered difficult questions of law needed to be addressed and substantial enquiries had to be made as to the factual position.

The matter was accordingly adjourned until 10th October 1989 at 8.30 a.m. At that time I heard from all counsel and because of the urgency of the matter, indicated that leave would be granted to make a payment into Court. That was upon condition that the payment was made that day and the plaintiff could until 10 a.m. on Wednesday 18th of October uplift the payment. Certain other ancillary matters which I will later detail were mentioned. I now provide reasons for that decision.

The application was made pursuant to Rule 348 of the High Court Rules. That provides, in as much as it is pertinent to this application -

> "(2) In any other case a payment into Court under Rule 347 may be made at the same time as the statement of defence is filed or at any subsequent time before the proceeding is set down for trial:
> Provided that with special leave of the Court a payment may be made at any time before trial and in granting such leave the Court may make such incidental orders as it thinks proper."

The application was expressed as being on the basis -

1. That it was appropriate for the proper resolution of the proceedings; and
2. On the grounds set out in the affidavit of a solicitor which was filed in support.

Mr Harrison for the first defendant and Mr Timmins for the second defendant immediately acknowledged that the question of leave inevitably involved questions of entitlement to costs. They submitted that it was generally desirable that steps which might assist in reaching a settlement be permitted. Counsel referred to the general admonition in Rule 4 in the following terms.

> "**4. Construction** - These rules shall be so construed as to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application."

The factual position deposed to has been subject to rigorous scrutiny and analysis by Mr Curry for the plaintiff. Stripped of its preliminaries, the position of

the defendants is that since an exchange of briefs of evidence it has become possible for the defendants to make a proper assessment of the strength and validity of the plaintiff's claim. Only at that stage was it appropriate to consider what formal satisfaction of the claim should be considered. Added difficulties arose because one of the defendants is domiciled in the United States of America.

It would not be unfair to typify the submissions of both the defendants as being predicated on the premise that it was sensible to encourage the possibility of settlement which might flow from a payment into Court. Further while the Court must be vigilant to protect a plaintiff in the area of costs, it should be receptive of the possibility of a payment into Court even at this late stage.

Mr Curry for the plaintiff had a different perception of the Court's role. He drew the Court back to the strict provisions of the Rules. His starting point was the provision in Rule 348, which provides the right to make a payment into Court at the same time as a statement of defence is filed or before the proceeding is set down for trial. That he says must be the starting point for any payment because after the matter has been set down for trial it requires special leave. He points out that setting down occurred in February 1989. Consequently this application was grossly late.

In my judgment Mr Curry over-emphasises that aspect of Rule 348. The fact that leave is required at a later stage does not in and of itself create a situation in which the Court should not still view the total circumstances which have developed and make an assessment. The just, speedy and expeditious resolution of the dispute between the parties is the constant aim in every case and at any time.

From that point a strong divergence of approach emerged. Mr Curry submitted that because payment into Court as of right must occur prior to setting down, the strength and nature of the evidence was not an important factor in considering whether leave should be given. The focus of the Rules, he submitted, must be on the pleadings which is all that one would have available at the stage when payment in is anticipated as occurring. He submitted that because the affidavit in support of the application was directed to issues connected with the exchange of briefs of evidence, it was of little relevance. He said there was a general misconception of the issue by the defendants.

I concluded that was a too narrow focus to place on these Rules. In my judgment if at any stage in the process of preparation, it becomes desirable in the interests of justice to trigger this mechanism (whether that is as a result of the exchange of briefs of evidence or by a re-appraisal of the pleadings or for any other reason) then the Court should not be fettered by a doctrinaire

interpretation of the Rules.

That approach underscores the most substantial issue over which the parties were at variance.

Underlying Mr Curry's submissions was the thrust that the Court should not be concerned to enquire whether the granting of leave would cause actual prejudice to the plaintiff. He argued that it should be assumed because what was being sought was an indulgence there must be prejudice. I was not persuaded by that argument. Throughout the hearing I enquired of Mr Curry as to what matters he pointed to (apart from the need for a proper assessment of a right to costs) which would create prejudice to his client if leave were granted. No matters in that category were raised in the notice in opposition, nor in his oral argument. Instead Mr Curry moved from the base that because it was an indulgence and a falling away from the time periods in the Rules, it would be unjust by definition. I concluded that approach was mistaken. I do not overlook what was said by Somers J in McVicar Timber Industries Ltd -v- Lloyd 1978 1 NZLR 381 at 383 -

> "The rules as to payment in are technical rules. To obtain their benefit a strict adherence is necessary."

What Mr Curry appeared to overlook, is that the technical Rules within themselves acknowledge of exceptional circumstances where a late payment in could be granted. I

go further. Although experience demonstrates that when "things are done decently and in order" better justice will result, slavish adherence to the letter rather than the spirit, effect and totality of the Rules, is not a receipe for a just and equitable disposition of a matter.

Although I had no evidence on the point, Mr Curry complained that the actions of the defendants were an endeavour to manoeuvre the plaintiff into a position where it might become at risk on the question of costs. He was adamant that the proposed payment in did not take the matter into that danger zone, but that as a matter of principle, because it was moving towards it, it should be viewed with suspicion by the Court.

I consider a more robust and realistic assessment should take place. The Rules contemplate the possibility of payment in with special leave at any time prior to trial. In determining whether to grant that leave, the acid test is whether it will promote the just, speedy and expeditious resolution of the dispute. I am not persuaded that tactical advantage created by focus on compartmentalised legal strictures is conducive to a just disposition. There is no doubt that if actual prejudice of a real and meaningful kind can be pointed to, that must must weigh heavily in the exercise of the discretion. There is nothing of that sort in this case.

Mr Curry urged that if I were to grant leave then in the exercise of the power to "make such incidental orders" as the Court thought proper, I should have regard to consequential matters.

First he noted that under Rule 352, a plaintiff faced with a payment into Court, is provided with 14 days after service of the notice of such payment having been filed in Court to decide whether to accept. Mr Curry contended therefore his client must be entitled to the benefit of like period. Again the dichotomy of approach emerged. Mr Curry did not seek to suggest that there was any circumstances which necessitated that period for reflection and consideration. Simply that the period must be granted in order that his client's rights were not seen as being restricted. He further argued that as no payment into Court had yet occurred (because this proceeding for leave had not been disposed of) the 14 day period could not yet begin to run. He submitted his client was entitled to 14 days from the time that the payment was actually made, after leave was given.

A conflict with Rule 354 is created. That provides -

> "**Restriction on acceptance after commencement of trial-** After the trial has commenced, the plaintiff may accept a payment into Court only by special leave of the Court."

The defendants endeavoured to argue that whatever time period was allowed, the effect of that Rule would be that the plaintiff would have to decide before the trial commenced on Monday, 16 October, or otherwise subsequently apply for special leave. Mr Curry pointed to part of the commentary by the learned author of McGechan, 354.04 which notes -

> "The situation could arise through late payment into Court by special leave, a circumstance of indulgence to the defendant which might encourage a Court to grant a similar indulgence under Rule 354 to a plaintiff."

I concluded that in determining the inter-relationship of these two Rules, and the overall justice of the matter, it was more important that I viewed the realities in which the parties found themselves, rather than endeavouring to extrapolate from individual Rules. There was a need not to lose sight of the wood for the trees.

In the event, I concluded that as from Wednesday the 4th of October, the plaintiff was aware of the proposed payment in and the size thereof. We were dealing with the days immediately prior to the commencement of a substantial hearing. Mr Curry was at pains to inform me of the other pressing demands which there are on his time. I accept what he tells me. However in the fortnight prior to the starting of a five week trial of this complexity and involving this amount of money, Counsel must be assumed to

be predominantly available to attend to preparatory matters. I was satisfied that no injustice would arise to the plaintiff if it had a period of 14 days from the time it became aware that the application for leave was being made. At that stage it knew and could begin its "mature and unhurried consideration" of whether it should uplift the payment if leave were granted for it to be made. In my judgment it is unrealistic to suggest that there necessarily must be a period of 14 days after formal leave has been given and notice served pursuant thereto that the payment has actually been paid into Court.

Secondly, I concluded that to provide no curtailment of rights and leave the plaintiff with the full benefit of a 14 day period, it was necessary that I should make an ancillary order under Rule 354 which enables the plaintiff to accept payment after trial has commenced. That has the potential for problems. They are difficulties which in my view the defendants cannot complain about. Everybody has known of the 16th October starting date for a very long time, Whatever may be said about the timetabling on the exchange of briefs of evidence, the defendants cannot complain that such consequences are other than a direct result of their own timing of this application.

Mr Curry raised another difficulty. He contended that the form of the notice into Court did not make it clear whether the payment took into account and was intended to

satisfy the counterclaim of the first defendant pursuant to Rule 364. That has now been clarified by Mr Harrison. It has been clarified in a way which is not disadvantageous to Mr Curry's client. Consequently I do not see the possibility of injustice from a potential ambiguity justifying 10th of October (which is the date on which that was clarified), being the proper starting point. If the clarification had been detrimental to the plaintiff I may have considered the matter in a different light. As was said by Turner J in Lilley -v- Kay [1960] NZLR 292, there is an obligation on a defendant in making a payment into Court to ensure that the payment into Court is in plain terms in such a way that the plaintiff's rights are clear on the face of the document which the defendant files. However, I consider the substance rather than the technical precision is of most importance.

Despite all that was said about both facts and law, I was left with the clear impression that the overwhelming concern of the parties was the question of costs. That of course is what the payment into Court provisions are all about and one is not surprised thereby. In my judgment the plaintiff, in any event, is entitled to its costs of preparation. The quantum of those costs is a discretionary matter under Rule 46. The costs provided for in the second schedule will not necessarily be applicable.

The parties will be aware because of the timing of this

application, and the plaintiff's insistence on a 14 day period for consideration of accepting the payment in, two days of hearing of the case could occur before acceptance of the payment. I made clear to the parties that whatever decision is made on acceptance, it will be a matter specifically in the discretion of the trial Judge what costs, if any, should be allowed in respect of all or any hearing which occurs. In granting leave I have made no predetermination on the future right to costs in respect of hearing as opposed to preparation.

I hold that there is a right to costs of preparation and that must include the period from now until the trial begins. Clearly the plaintiff is entitled to continue with its preparation even although it is simultaneously considering acceptance of the money paid in Court.

The costs of the trial for its first days if acceptance occurs before 10 a.m. on the 18th of October, would no doubt be the subject of a stringent analysis and scrutiny by the Judge involved. He will be concerned as to the overall justice including the need for the plaintiff to have had the benefit of the final 48 hours before exercising its option. All I again emphasise is the need for analysis of real benefits, actual prejudice and necessary time. The determination will not be a reflex action if the plaintiff has delayed its decision simply for the sake of using the days, rather than needing it for the proper consideration of

its position.

Accordingly, for the reasons herein outlined, I made the following orders -

That the defendants may make a payment into Court in terms of the draft notice filed, subject to the clarification that the payment takes into account and is intended to satisfy the counterclaim of the first defendant pursuant to Rule 364.

This is upon condition that the plaintiff -

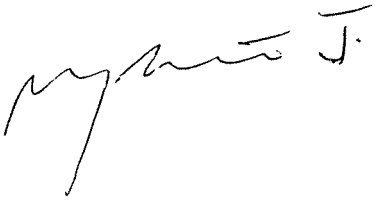
(i) May accept the payment on or before 10 a.m. on Wednesday, 18th of October and has leave accordingly under Rule 354.

(ii) Is entitled to its proper costs of preparation in accordance with the Rules up to the 16th of October 1989; and

That the question of costs (if any) in respect of the trial on the 16th and 17th of October is specifically reserved for consideration by the trial Judge.

In as much as the application was seeking an indulgence on the part of the first and second defendant, I am of the view that irrespective of what may follow the leave now given, the plaintiff is entitled to costs in respect of this

proceeding. I allow for the fact that the adjournment on Friday was at the plaintiff's request. The plaintiff is entitled to its costs in respect of this application which I fix at $210.00 from each of the first and second defendant.



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