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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CP No. 1007/89

864

BETWEEN

JAMES GILMOUR & CO  
LIMITED a duly  
incorporated Company  
having its registered  
office at Roma Road,  
Mt. Roskill, Grocery  
and Tobacco Merchants

Plaintiff

AND

GRAHAM TWEEDY trading  
as Dican Properties of  
Kolmar Road Service  
Station, 174 Kolmar  
Road, Papatoetoe,  
Service Station  
Proprietor

Defendant

Hearing: 20 July 1989  
Counsel: LaHatte for Plaintiff  
Milliken for Defendant  
Judgment: 20 July 1989

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(ORAL) JUDGMENT OF THORP J

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This is an application for summary judgment by a wholesaler trading in tobacco and confectionary in respect of goods supplied on credit to a garage shop attached to the Kolmar Road Service Station, Papatoetoe, between 13 December 1988 and 31 March 1989, the total amount involved being \$21,241.25.

In July last year the plaintiff was requested by a man called Canham to supply goods to it on credit at this shop and an account was opened after checking Canham's credit rating in the name "Dican Properties." In January and February last Dican Properties' account exceeded the agreed credit limit.

The plaintiff rang the service station at an unstated date, which in my view is most probably towards the end of March, and was given the number to contact the defendant, Mr Tweedie. When spoken to Mr Tweedie is said by the plaintiff's Credit Manager, Mr Hubrich, to have said that he was now the owner of the business, that it was being sold, that he would not be able to pay the amount until the business was sold and that he would not pay the account when the business was sold.

The exhibits provided by Mr Hubrich included a letter dated 3 April which refers to a conversation the previous Friday, which appears to relate to that discussion. It advised Mr Tweedie, who was addressed as "Mr Graham Tweedy, T/A Dican Properties, Colmar Road Service Station," that the account was to go on to a cash basis and that the plaintiff wanted a substantial payment of the account within 7 days. Absent any response the present proceedings were issued on 15 May.

Notice of opposition was given on 30 June together with an affidavit in support which asserted that the debt was that of the limited liability company Dican Properties Limited which Mr Tweedie said he had taken over from the Canhams on 2 February 1989.

Mr LaHatte contends that the trading was of such a nature that Mr Tweedie is not entitled to shield behind the limited liability incorporation and that he should be found liable for the whole debt.

Mr Milliken points to looseness in the records relating to this account and contends that no part of it should be the subject of personal liability.

In my view Mr Tweedie has not taken any reasonable step to avoid the Court treating the account as it appears to be, that is as a personal not a company

account, and insofar as he is in contract liable for the goods purchased on that account I believe judgment should go against him.

What I cannot see is adequate evidence of a novation, or how the contractual liability which preceded Mr Tweedie's arrival on the scene can by some double step proceed from Canham to the company to Tweedie, and at the least it is not a case in my view where the Court should find summary judgment on any such basis.

The result is that on this application judgment will be for the plaintiff in respect of the sum of \$7,423.68, being the goods sold and delivered by the plaintiff to the business in question following Mr Tweedie's "acquisition of control" of the business, to use a neutral term. The claim in respect of the remainder will be for determination in the ordinary way. Time for filing the Statement of Defence is 14 days, mutual discovery a further 7 days with a still further 10 days after inspection, following which final period both parties are to join in a praecipe unless either has filed a further interlocutory application which requires prior determination.

The costs of today's proceedings in view of the sum involved are fixed at \$1,000 plus disbursements to be fixed by the Registrar, and are to be the costs of the plaintiff in any event in respect of the judgment which it receives today.

A handwritten signature in black ink, appearing to be 'Gubb', written in a cursive style.

Solicitors:  
Gubb, Vlatkovich & Co for Defendant