IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 572/89

737

BETWEEN F.J. HAWKES & CO. (N.Z.) LTD.

Plaintiff

A N D G.S. SMURTHWAITE

Defendant

Hearing: July 5, 1989

Counsel: Mr. Asher for Plaintiff
Mr. Black for Defendant

Judgment: July 5, 1989

(ORAL) JUDGMENT OF MASTER TOWLE

This was an application for Summary Judgment seeking an amount of $59,146 plus interest pursuant to an all-purposes guarantee given by the Defendant of the obligations to the Plaintiff of a company called Uni-Pak (N.Z.) Limited. The document relied upon was executed by the Defendant on 15th June 1987 whereby in consideration of the Plaintiff at his request advancing to Uni-Pak certain moneys and providing other financial accommodation, present or future, for the purchase of

goods on behalf of Uni-Pak he agreed to guarantee repayment of such sums by Uni-Pak. In particular the guarantee accepted a liability to pay all money advanced by the Plaintiff to Uni-Pak and interest at 15% in respect of any dishonoured bills on the amount owing under the bill from the date of dishonour. The guarantee provided that 14 days after the receipt of notice in writing by the Plaintiff of any default on the part of Uni-Pak, the Defendant would pay all sums due pursuant to the guarantee. The Defendant was the Managing Director of Uni-Pak. The company went into receivership on 28th January 1988 and has been in liquidation since earlier this year.

On 6th January 1988 the Plaintiff agreed to make finance available to Uni-Pak to a total amount of $59,146 with repayment to be arranged by a bill of exchange dated the same day drawn by the Plaintiff and accepted by the Defendant in his capacity as Director of Uni-Pak providing for repayment of that sum 30 days after its date. The bill was expressed to be payable to the order of the Plaintiff and the contract was evidenced by a credit contract dated 6th January between the Plaintiff and Uni-Pak and acknowledged and accepted by the Defendant again in his capacity as Director confirming

that disclosure had been made in conformity with the requirements of the Credit Contracts Act.

Despite a suggestion by the Defendant to the contrary, I am satisfied on the evidence of a Bank Officer that the bill was presented to Westpac Banking Corporation on the due date and that notice of dishonour was given on 8th February. The following words were noted on the bill:

"Receiver appointed 28/1/88 refer to drawer."

The Plaintiff made written demand upon the Defendant in terms of the guarantee agreement on 13th September 1988 requiring payment of the amount of the bill by 7th October and when payment was not forthcoming, issued the present proceedings.

The Defendant has filed a notice of opposition listing 9 grounds of possible defences. The first three of these related to a claim that accounts relating to Uni-Pak had been prepared at the relevant time by an Accountant named Willis and that it was on the basis of these accounts that Uni-Pak obtained financial accommodation from the Plaintiff. It was claimed that Willis has acted as agent of the Plaintiff in arranging the loan and that he might

have received some commission for his services. While the evidence in support of these contentions does show that there was a relationship of professional accountant and adviser as between Willis and Uni-Pak and that he may well have been under a duty of care to both Uni-Pak and to the Defendant, the evidence falls far short of showing that he was in any sense an agent of the Plaintiff, still less of satisfying me that he might have received some remuneration from the Plaintiff in consideration of the loan.

It was advanced on behalf of the Defendant and supported to an arguable degree by another Accountant engaged on behalf of Uni-Pak subsequently that there were inaccuracies in the preparation of the accounts by Willis and that the circumstances were such that the Defendant might have a reasonable cause of action to sustain a third party notice against Willis or his partnership. The existence of this possible claim was advanced as a reason to delay the Plaintiff's claim under the guarantee on the grounds that some indemnity might be afforded.

I can see no such link between the causes of action on the present claim and any third party proceedings and believe it would be quite inappropriate for this ground

to be used to delay the Plaintiff's claim. In dealing with this particular aspect I take the same view as did Wylie, J. in Marac Finance Services v. Hill (Auckland Registry) C.P. No. 467/87, unreported dated 13th August 1987 where he said at page 3:

> "Why should the Plaintiff be deprived of the undoubted advantage of Summary Judgment procedure merely because the Defendant in turn wants to take proceedings against a third party, when those proceedings cannot put in issue the primary liability of the Defendants? The Defendants will not lose their rights (if any) of indemnity or otherwise against the attorney. They can bring an independent action."

A further possible ground of defence advanced was a claim by the Defendant that he only gave his guarantee to the Plaintiff on condition that additional debenture security would be given by Uni-Pak. There is not a shred of documentary evidence to substantiate this contention which is denied on behalf of the Plaintiff and at best, on the evidence it could be no more than an indication given by the Plaintiff at the time the guarantee was given that at a later stage the Plaintiff might require a debenture to be given by Uni-Pak if the extent of credit had stretched out to 4 or 5 months. Certainly there is nothing to persuade me that it was a condition precedent to the giving of the guarantee and that ground also fails.

A further ground advanced was that the Plaintiff had failed to comply with the terms of the guarantee in not giving notice to the Defendant that he was to be held liable once the bill had been dishonoured. Counsel pointed out that some 7 months had elapsed between the date of dishonour and the formal notice of demand pursuant to the guarantee. Mr. Black endeavoured to persuade me that notice should have been given immediately after dishonour and sought to rely on two old cases. Philips v. Astling & Anor [1809] 2 Taunt. Reps. 206, involved the liability of a guarantor who was a party to the bill and I do not believe that can assist the Defendant who was never personally a party to the particular bill of exchange in this case. Nor have I been persuaded that there is any substance in a submission that in reliance on Corporation of Chatham v. McCrea et al (1862) 12 U.C.C.B. 352, that there was unreasonable delay in giving notice of the default and claim under the guarantee which might discharge the guarantor from liability. That case turned on very different facts from those pertaining in the present case before me where a bond given by the guarantor specifically required notice to be given and there was an express contractual duty upon the bondholder to give notice. There was in this case no obligation at all upon

the Plaintiff to have taken steps against the guarantor but merely a requirement that if it did, it had to give written notice and allow 14 days for the guarantor to discharge his obligations. It would be an absurd situation to require notice to be given to a guarantor of an all-purpose obligation of any instance of dishonour of a bill of exchange at the time of dishonour as a prerequisite to making the guarantor liable.

Two other possible defences raised related to a discussion which took place some time in September 1987 between a representative of the Plaintiff and the Defendant concerning payments of amounts due by Uni-Pak in default of which the Defendant would have been liable in terms of his guarantee. As a result of those discussions some 6 payments totalling $30,000 were made between 24th September and 1st December 1987 and the Defendant now claims that:

> ".....that agreement was to supersede and override all other obligations regarding payment of overdue bills, and bills to be presented in the future, which included the bill the subject of this proceeding."

It was claimed that this arrangement varied the basis of the original guarantee and was one which might have

required some modification disclosure to comply with the terms of the Credit Contracts Act.

I can find no merit whatsoever with this submission and the Plaintiff has denied that there was ever any such variation. There is no documentary evidence provided to back up the Defendant's claim that the arrangement to receive these payments affected the Defendant's obligations under the guarantee given on 15th June 1987. Uni-Pak was not, of course, then in receivership and I am satisfied that the accommodation given by the bill of exchange issued on 6th January 1988 was accepted by the company and by the Defendant as its Director as being covered by the original guarantee which remained unaltered.

In coming to these conclusions I have given regard to the wellknown dictum of Lord Diplock in Eng Mee Yong v. Letchumanan [1980] A.C. 331 at 341 and to the general guidance from the Court of Appeal in Bilbie Dymock Corporation Ltd. v. Patel 1 P.R.N.Z. 84. I find the material put forward by the Defendant in support of all the suggested defences imprecise and lacking in any documentation which might bring him to the threshhold of credibility that he has an arguable defence to the claim against him.

The Plaintiff accordingly has discharged its onus and there will judgment for it as claimed in the sum of $59,146 plus interest at 15% from the date of dishonour of the bill on 8th February 1988 until today. In addition, I allow costs of $1250 and disbursements to be fixed by the Registrar.

MASTER R.P. TOWLE

Solicitors:

Churton Hart Divers & Wong, Auckland, for Plaintiff
Rudd Watts & Stone, Auckland, for Defendant

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