IN THE HIGH COURT OF NEW ZEALAND 22/5 CP 867/91
WELLINGTON REGISTRY

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	BETWEEN	THE EXPORT GUARANTEE GENERAL MANAGER a body corporate under the Export Guarantee Act 1964 Plaintiff
	A N D	AKARANA EXPORTS LIMITED a duly incorporated company having its registered office at 9 Dora Street, Henderson, Auckland, and carrying on business as an exporter Defendant

Date of Hearing: 6 April 1992

Counsel: A J Knowsley for Plaintiff to oppose
G J Kohler for Defendant in support

Date of Judgment: 12 May 1992.

JUDGMENT OF MASTER WILLIAMS QC

On 14 November 1991 the plaintiff ("Exgo") commenced this proceeding against the defendant, Akarana Exports Limited, seeking judgment for $90,707.01. The Statement of Claim recited Exgo's corporate status under the Export Guarantee Act 1964 and said that the parties to the proceeding entered into an export insurance arrangement concerning contracts between Akarana Exports and a M.Lequerre of Tahiti; that M.Lequerre defaulted in payment; and that Akarana Exports made a claim under the insurance agreement and were paid $127,500.00 in March 1984. The Statement of Claim then continued by

alleging that Akarana Exports received $90,707.01 from M.Lequerre; that Akarana Exports was obliged to pay that sum to Exgo pursuant to the insurance agreement; and that Akarana Exports defaulted in that regard.

The Statement of Claim was served on Akarana Exports' registered office on 29 November 1991 and, no Statement of Defence having been filed, Exgo sealed judgment by default on 31 January 1992 for the sum claimed, $90,707.01, and costs of $685.00.

This judgment is concerned with Akarana Exports' application, filed on 10 March 1992, to set aside that judgment. The application was based on allegations that Akarana Exports has defences to this proceeding including defences that the claim is statute barred; that Akarana Exports is under no obligation to pay Exgo the sum received from M.Lequerre; and that Exgo is estopped from requiring payment because of the actions of a Mr Rowland.

The principles which govern applications such as these are now well settled. They are, principally, to be found in the decisions of the Court of Appeal in *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 975 and *Russell v Cox* [1983] NZLR 654. As explained by McMullin J in the latter case (at 659), the Court is required to consider whether:

1. The defendant has a substantial ground of defence.

2. The delay in bringing the application is reasonably explained.

3. The plaintiff will suffer irreparable injury if the judgment is set aside.

4. Overlying all these considerations are the interests of justice.

In relation to this application, counsel for Exgo acknowledged, properly in this Court's view, that no questions arose as to Akarana Export's delay in bringing the application to set aside the default judgment nor that Exgo would suffer irreparable injury if the judgment were set aside. The argument therefore centred around whether or not Akarana Exports had a substantial ground of defence and the overall justice of the claim.

A Mr Cameron, Akarana Exports' Manager at all material times up to its ceasing active trading in late 1988, says that Akarana Exports commenced supplying chilled meat and frozen foods to M.Lequerre in December 1982. Initial shipments were financed by Letter of Credit but the defendant later traded with M.Lequerre on 30 day terms with credit insurance cover of up to $150,000.00 arranged with Exgo on 20 April 1983 (although there is in evidence a form withdrawing that credit limit from 25 July 1983).

On 23 May 1978 the parties to this proceeding entered into an "Open Declaration (Shipments) Policy" pursuant to which Exgo agreed to pay Akarana Exports "a percentage of the amount of any loss ... which he may sustain in connection with the export of goods from New Zealand", such losses arising from, inter alia, the "failure of the buyer to pay to the exporter within six months after due date of payment the gross invoice value of goods delivered to and accepted by the buyer". Exgo was obligated to pay Akarana Exports its loss "immediately after the expiry of ... six months". In the circumstances which apply to this case, Exgo's obligation was to meet 85% of the loss (Clauses 3(i)(a) and 24(a)(i)). Clause 24(b) continued:

> "The Exporter shall pay all sums so recovered to the General Manager forthwith upon their being received by him or any person on his behalf, the Exporter hereby acknowledging and declaring that until such payment is made to the General Manager he receives and holds such sums in trust for the General Manager."

The amount of the loss was to be calculated in accordance with Clause 27 which relevantly read:

> "The amount of loss shall -
>
> (i) As regards goods delivered to and accepted by the Buyer be the gross invoice value of those goods less -
> (a) The amount which at the date at which the loss is ascertained the Buyer would have been entitled to take into account by way of payment, credit, set-off or counterclaim or which the Exporter is entitled to appropriate in whole, or in part payment of the price of the goods; and
> (b) Any expenses saved by the Exporter by the non payment of agent's commission or otherwise; and

> (c) Any part of the gross invoice value of the goods which represents interest payable by the Buyer for credit facilities in respect of any period subsequent to payment by the General Manager."

Mr Cameron's evidence is to the effect that Akarana Exports' trading with M.Lequerre continued satisfactorily until mid 1983 when he suddenly defaulted in paying for goods which he had received. He says that Akarana Exports immediately advised Exgo of the default. The claims form is dated 8 February 1984; lists a number of invoices totalling $170,881.28 and dated May and June 1983 which M.Lequerre had failed to pay; set out the defendant's credit limit of $150,000.00; and claimed 85% of that sum, $127,500.00. Akarana Exports answered the box for "Name and address of your local agent" by saying:

> "None. Debt handled since July 1983 by Mr Brian Rowland who holds our power of attorney + has legal counsel in Tahiti."

Akarana Exports says that although it only listed invoices totalling $170,881.28 in that claim, in fact M.Lequerre at that point owed the defendant approximately $232,000.00 plus interest. Mr Cameron said, understandably enough, that "even when the plaintiff paid us pursuant to the policy we were looking to recover the balance from Lequerre".

After Akarana Exports reported the loss to Exgo, the plaintiff replied by telex dated 20 July 1983 expressing its concern at the manner in which the claim had arisen and saying that "in the first instance you may wish to contact Mr B A Rowland Debt Collector" and giving Mr Rowland's telephone number.

Mr Cameron said that:

> "Brian Rowland acted on many files for the plaintiff and travelled particularly throughout the Pacific region pursuing debtors. ... From discussions with the people at Exgo ... it was made clear that they expected us to use their nominated debt collector Brian Rowland. Rowland requested us not to go to Tahiti or to have any contact with Lequerre but to leave all such matters in his hands. At his request we signed documents appointing him our agent and signed various pages he produced authorising him to act with Tahiti solicitors on our behalf.
>
> Rowland at various times told us that he had arranged security in Tahiti for the full debt and/or that the amount was about to be

> settled. He was a somewhat larger than life character and whilst a good raconteur was always short on specifics."

Mr Cameron puts in evidence a diary note of a series of some eight discussions which he had with Mr Rowland between 21 July 1983 - 8 March 1985 plus a final discussion on 2 May 1989. The first series records optimistic promises concerning payment by Lequerre. The last includes the notation:

> "Amount to come should be around (from memory) $104,000 or $114,000.. less payout due to EXGO. Brian seems to remember the figure of $87,000 .. and then $10,000 legal fees for Brian and maybe 15%. Brian says we might end up with $10,000 or $15,000 for ourselves."

Mr Cameron says that he has not heard from Mr Rowland since March 1989 (although the date of his last diary note is 2 May 1989) despite efforts to contact Mr Rowland in Australia, Mexico and Fiji. Mr Cameron says of Mr Rowland that:

> "I suspect that Rowland may have obtained further recovery of funds from Lequerre and has decamped with such. Lequerre is apparently psychiatrically unwell and incapable of advising us of what happened."

Mr Cameron continued:

> "I am aware that Rowland reported to the Plaintiff personally over the years in respect of our file and the other recoveries he was working on for the Plaintiff. At one stage he advised me that he had negotiated with the Plaintiff for us to retain the funds received in early 1985 in return for us the (sic) signing over our rights to EXGO for the remaining debt and that EXGO 'would take care of the last $150,000'. This was important to us as, under Rowland's direction, we had resumed trading with Lequerre beyond the original debt in an endeavour to assist him to trade out of his problems and to assist with debt recovery. We extended further credit in the sum of approximately $18,000 which has also been lost by us."

Mr Cameron concluded, in his second affidavit, that:

> "It was my understanding that he was acting both for EXGO and for the Defendant. ... Certainly in his dealings with me Rowland presented himself as acting both for EXGO in respect of

> the sum (to be/paid by EXGO) and in respect of the balance owing by the Defendant."

Mr Redwood, Exgo,s Manager, said that "Mr Rowland did not act for the Plaintiff on this or other files" and went on to state:

> "Mr Rowland was a debt collector whom we knew to operate around the Pacific. It has not been our method of operation (and was not in this case) to employ Mr Rowland. Rather, we suggested to the exporter that Mr Rowland might be contacted if they wished to pursue recovery in that fashion."

and he puts in evidence a telex from Akarana Exports to Exgo of 21 July 1983 that said that the debt had been "discussed with Brian Rowland who is now working on this debt for us".

Exgo paid Akarana Exports $127,500.00 on 2 March 1984.

On 25 March 1985 Akarana Exports received $90,707.01, that sum having been collected by Mr Rowland from M.Lequerre. Akarana Exports paid Mr Rowland commission of 15% of the sum which it received, $13,606.05, on 3 April 1985. It has retained the balance of $77,100.96 ever since. Mr Cameron says that Akarana Exports advised Exgo of that payment by letter dated 29 March 1985. Mr Redwood says that the plaintiff's files do not contain any such letter and that Exgo first became aware of the payment on 15 November 1985 via Mr Rowland. There is in evidence a telex from Exgo to Akarana Exports of 18 November 1985 supporting that statement - although the figures which it quotes are slightly in error in saying that the payment to the defendant was $91,000.00 so that the sum claimed by Exgo was $67,898.02. The letter asked for "yr cheque for [that sum] this week please". Akarana Exports replied by telex on 21 November saying that it was "looking at our figures. Will reply soonest".

A course of correspondence then ensued between the parties over the period December 1985 - August 1986. It is not necessary to recount the details of that correspondence save to note that, in it, Exgo made claims on Akarana Exports for the whole or varying parts of the gross sum paid to it. In one of the letters, Mr Cameron's attention was expressly drawn to paragraph 24(b) of the policy. The replies include letters from Akarana Exports on 7 and 13 March, 30 June

and 29 August 1986. The letter of 7 March said that the defendant was "expecting further funds soon from Lequerre" and continued:

> "We had ... until recently firmly believed that Exgo would receive final proportion of any recovery, and had not planned our budget otherwise. We have read para.24(B) on the policy but seek yr indulgence for a little more time."

On 13 March Mr Cameron said that he was waiting for Mr Rowland to return and that "we are working towards a prompt solution to this problem". On 30 June Akarana Exports wrote saying:

> "We have found ourselves in a predicament where we had not anticipated an obligation to EXGO until the settlement reaches the last 85% of the $127,500 received from Lequerre. This had been our firm understanding until the overtures from your people. Our interpretation was outlined to Mr Campbell in our telex of 7/3/86.
>
> You will realise that for a small enterprise like ours, we had to make arrangements to fund Lequerre's debt, and it is now a situation of embarrassement for us where you have quoted to us paragraphs in the policy which appear to challenge our interpretation of our obligations.
>
> ... I realise that your interpretation of the position does not rely on receipt of further funds from Tahiti, but you will nevertheless see that we have been hoping for such further funds to provide a solution.
>
> I can only assure you of hour honest intent to see this matter through to a mutually satisfactory conclusion. Although it is not the answer you are seeking, we can undertake to contact you again as soon as I have spoken to Brian Rowland, and to keep you posted with developments."

On 13 August Exgo sent Mr Rowland a form of assignment for execution by Akarana Exports. That document, had it been signed, would have assigned to Exgo all the defendant's rights in the contract of sale to M.Lequerre and all interest in any securities later obtained in relation to those goods and confirmed that Akarana Exports would "hold the monies so far recovered under those contracts in trust" for the plaintiff. On 29 August Akarana Exports replied saying that "I have had the assignment of our rights signed under seal and have given them to Brian Rowland" and concluded that the defendants wished:

> "... to reassure you of our desire to facilitate a speedy recovery of the balance."

Mr Cameron says that the defendant has no copy of the draft assignment in its records and he puts in evidence the only document which he says Akarana Exports signed. Though in French, undated and unaccompanied by a translation, it appears to be akin to a power of attorney in favour of a Papeete solicitor to recover $NZ189,068 plus interest from another Papeete solicitor acting for M.Lequerre. It does not appear to contain any acknowledgment that Akarana Exports held the moneys which it had obtained from M.Lequerre in trust for the plaintiff.

Exgo's files for this period also include a number a number of file notes by Exgo officials other than Mr Redwood purporting to detailed conversations with Mr Campbell in which repeated promises of payment were made. Mr Campbell objected to the admissibility of some of these statements in an affidavit sworn by him on 2 April and filed the following day. The plaintiff had little opportunity to respond. The Court takes the view that, in those circumstances, the documents are admissible as business records where the author was unavailable to give direct evidence but that, in the circumstances, the weight to be accorded to those documents is below that to which they would otherwise have been entitled (Evidence Amendment (No 2) Act 1980 s.17).

In the documents before the Court a lengthy gap then occurred between August 1986 - July 1990 . Mr Redwood says that during this period Exgo was trying to discover whether there was any progress in recovery of the balance of the debt from M.Lequerre and Akarana Exports' lack of payment to Exgo was overlooked.

The correspondence narrative recommences in July 1990 and continues until July 1991 with the plaintiff making a number of demands of Akarana Exports for payment of $67,679.41. The only reply from Akarana Exports is dated 5 September 1990. It speaks of unsuccessful attempts to obtain security over M.Lequerre's land and continued:

> "On the question of the amounts so far recovered and your request for $67,974.41, we are still of the same opinion on the matter as before. When this debt first went sour, with Brian's

> guidance and supervision, and with your knowledge and approval, we continued trading with Lequerre at the outset in an endeavour to keep him trading, and indeed in an endeavour to get all our debt paid. A lot of the funds received were in respect of this. As you know, we had traded with Lequerre beyond the limit of the EXGO cover based on our best considered commercial judgment at that time, and we still find it hard to accept that recoveries should be apportioned with an insurer under such circumstances.
>
> ...
>
> From our point of view, we would rather work with you in seeking further recoveries from Lequerre to have the matter properly resolved."

Exgo rejected that approach in a number of subsequent letters.

The only other factual matters which require to be noted are:

1. That on 3 February 1992 Akarana Exports contacted the plaintiff to suggest that they made joint efforts to endeavour to recover the balance of the debt from M.Lequerre.

2. That Mr Cameron suggests that if it is still open to the defendant so to do, it wishes to credit the funds which it received from M.Lequerre to a number of particularised invoices, none of which were included in their claim on Exgo and which total $79,963.90. He says that that sum, plus interest, would exceed the gross payment received by the defendant, $90,707.01.

Dealing with that last matter first, this Court is of the view that it is not open to Akarana Exports, in the context of this application, to seek to apportion the payment which they have received in a manner plainly devised to limit Exgo's right of recovery. Throughout the years that the parties have dealt with this matter, although Akarana Exports has on occasions mentioned losses which it claims to have suffered for the non-payment for goods on invoices outside the ambit of this claim, it has never previously suggested that the payment which it received on 25 March 1985 was other than in partial payment of the invoices against which it had lodged its claim with the plaintiff.

The next matter which requires to be considered is Akarana Exports' claim that it has a defence to this proceeding based on the Limitation Act 1950.

It is clear that Akarana Exports received payment of the $90,707.01 on 25 March 1985. Mr Cameron says that the defendant wrote to Exgo on 29 March advising it of that payment but Mr Redwood says that the plaintiff has never received such a letter. Any obligation on the part of Akarana Exports to transmit the sum received by it to Exgo arose on that date. On that basis, the limitation period for Exgo's recovery of that sum would have expired on 25 March 1991. On that view of the matter, the claim would be out of time.

Exgo only discovered the payment on 15 November 1985. The proceeding was commenced on 14 November 1991, that is to say one day inside the six year limitation period if the cause of action arose on the plaintiff's discovery of the payment to the defendant. Exgo submitted that the accrual of its cause of action was either concealed by Akarana Exports' fraud until 15 November 1985 or that the cause of action was based on the defendant's fraud in that it had received the money from M.Lequerre in trust and that accordingly the commencement of the limitation period was postponed until 15 November 1985 pursuant to the Limitation Act 1950 s.28(a)(b).

In the view which this Court takes of the matter, it is not necessary to endeavour to resolve whether or not Akarana Exports did send the letter of 29 March 1985 to Exgo since there are documents in evidence written by Akarana Exports since 15 November 1985 which arguably might amount to an acknowledgment of the claim and thus to a fresh accrual of the cause of action pursuant to the Limitation Act 1950 s.25(4) which relevantly reads:

> "Where any right of action has accrued to recover any debt or other liquidated pecuniary claim ... and the person liable or accountable therefor acknowledges the claim ... the right shall be deemed to have accrued on and not before the date of the acknowledgment of the last payment"

and s.26(1) which reads:

> "Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment."

On 7 March 1986 Akarana Exports' letter earlier discussed clearly accepted an obligation to pay Exgo even though the defendant's interpretation was that Exgo was not entitled to payment until the whole sum due was received from M.Lequerre. The defendant's letter of 30 June 1986 repeated the defendant's interpretation of the policy and spoke of the defendant's intention "to see the matter through to a mutually satisfactory conclusion". The defendant's letter of 29 August 1986 said that it had sealed an assignment of its rights in Exgo's favour, thus acknowledging an obligation to pay Exgo, and concluded by assuring the plaintiff of "our desire to facilitate a speedy recovery of the balance". The defendant's letter of 5 September 1990 again returned to its interpretation of the policy and said that Akarana Export found it "hard to accept that recovery should be apportioned with an insurer under such circumstances" and suggested that the parties worked together in "seeking further recoveries from Lequerre".

Finally, although Mr Cameron's summary of his conversations with Mr Rowland is not signed by him, it is exhibited to his sworn affidavit and thus, in this Court's view, arguably complies with s.26(1). It includes the note "less payout due to Exgo" in the two May 1989 entries.

In this Court's view, those documents taken together do amount to an acknowledgment that Exgo has a claim against Akarana Exports (*Culling v Duncan* (1906) 8 GLR 668, 677) such as to give rise to a fresh accrual of the plaintiff's cause of action.

However, despite that conclusion, the Court acknowledges that whether or not the defendant's letter of 29 March 1985 was ever sent and, more particularly, whether or not the passages in the defendant's letters and statements just referred to do amount to acknowledgments of the claim may be arguable and that those matters, if ultimately determined in Akarana Export's favour, may give it a defence to this claim.

The second defence to which Akarana Exports claimed arguably to be entitled was that the plaintiff was estopped from requiring repayment to it of the sum paid in March 1985 because Mr Rowland was the plaintiff's agent and the plaintiff was identified with his actions. Even though Exgo may initially have given Akarana Exports Mr Rowland's name, it is sufficient to deal with that submission to recall to mind the defendant's telex to the plaintiff of 21 July

1983 saying that Mr Rowland is "now working on this debt for us". The fact that Mr Rowland acted for the defendant is borne out by the defendant paying his commission on 3 April 1985. In view of the fact that there is nothing in the evidence to suggest that the plaintiff ever took over the recovery of the debt due by M.Lequerre to Akarana Exports or instructed Mr Rowland to act on its behalf in any way, the Court reaches the view that that ground of defence is not made out.

The third defence to which Akarana Exports claimed arguably to be entitled was that pursuant to the contract Akarana Exports was under no legal obligation to pay Exgo the funds which it received. In essence, that was a repeat of Akarana Exports' interpretation of the policy as reflected in the various letters which it wrote Exgo on that topic over the years.

Counsel for Akarana Exports based his submissions in that respect on Kelly and Ball Principles of Insurance Law in Australia and New Zealand paras 11.95, 11.100, 11.109, p508, 509, 512. The first of those passages recites the basic principle of insurance law that:

> "If the insured takes action to recover his loss without obtaining the authority of the insurer, he must bear the costs if his action fails."

The learned authors, in the second passage to which reference was made, observe:

> "The obligation does not prevent whoever is in control of the proceedings from settling a claim, although the contract itself may well contain a provision under which the insured is bound not to do so. All that is required is that whoever is in control act in the best interests of himself and the other party in settling a claim. The duty is not an absolute one. In *Arthur Barnett Ltd v National Insurance Co of New Zealand* [1965] NZLR 874, for example, the High Court of New Zealand recognised that the insured was not bound to claim against a negligent third party any more than the amount of loss reasonably attributable to that party's conduct. The insured was not bound to claim for the full loss merely because that might appear to be in the insurer's interests.

The third passage reads:

> "If an insured is under-insured, he may still suffer a loss after being indemnified by the insurer. The question arises whether the insurer has, by way of subrogation, an immediate call on the moneys recovered from the third party, or whether priority must be given to recouping the insured's loss."

Whilst those passages encapsulate well-known provisions of insurance law, it is clear that they yield place to the terms of the policy itself. The relevant provisions of the policy have earlier been recounted. Pursuant to the combined effect of clause 1(ii) and 24(a)(i)(b), it was plainly Akarana Exports' contractual obligation to pay Exgo at least 85% of the $90,707.01 forthwith on receiving the same on 25 march 1985 and, pending that payment, that Akarana Exports held that sum in trust for the plaintiff. It has failed to make any payment and accordingly is plainly in breach of the contract.

However, those last two findings do not avail the plaintiff since, in the view which this Court takes of the matter, the defendant arguably has available to it the substantial ground of defence under the Limitation Act 1950. It accordingly follows that the default judgment must be set aside.

The Court's formal orders are:

1. That the application by the defendant for the setting aside of the default judgment entered against it and in favour of the plaintiff on 31 January 1992 is granted.

2. In the circumstances, it is appropriate that the costs of the application be reserved (hearing time 3.50 - 4.40pm).

3. That unless requested by both counsel not to do so, the Registrar is directed to set this matter down in the first available Master's Chambers List after the expiration of 14 days from the date of delivery of this judgment for the making of such timetable or other consequential orders as may then be required.

Master Williams QC

Solicitors: Rainey Collins Wright & Co, Wellington for Plaintiff
Knight and Friedlander, Auckland for Defendant

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