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LOW
PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

19/8

CP.647/93

1217

BETWEEN:

NEW ZEALAND MILK
CORPORATION LIMITED
a duly incorporated company
having its registered office at
Auckland, Milk Processor

Plaintiff

A N D:

SPENCER ARTHUR LAWES
of Birkdale, Auckland, Milk
Vendor

Defendant

Hearing: 17 December 1993

Judgment: ^(Suis)
~~June~~ 1994

Counsel: M A Gilbert for plaintiff
D E Smyth for defendant

JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors:
Kensington Swan, DX 57 Auckland, for plaintiff
D E Smyth, DX 2674 Auckland, for defendant

The plaintiff is seeking to recover \$26,317.73. The principles applicable to this proceeding are similar to those in CP.645/93, CP.646/93 and CP.648/93. Judgment has been delivered in respect of *New Zealand Milk Corporation v Brown* (CP.645/93).

The defendant, a milk vendor, entered into the contract with the New Zealand Milk Corporation Limited on or about 2 February 1989 to deliver milk in and around Remuera, Ellerslie and St. Johns. Mr Lawes had operated the round for the previous vendor since 1984, prior to entering into the purchase agreement with that vendor and the contract with the Corporation. The defendant applied for but did not obtain a franchise. He was offered a deed of restraint of trade together with an exit payment of \$7,200 and \$1,000 for his sales information. He did not enter into the deed of restraint of trade.

Following the injunction proceeding he sought to have milk supplied during February 1993 but as he was not a party to the injunction the Corporation refused to supply him. He obtained milk for a few days only through one of the parties who had been successful in the injunction application heard before the Court of Appeal, in which judgment was given on 5 February. The new franchisee took over his round on 1 February. He then attempted to take on selling Tararua Milk in the area and he outlines the losses. He says that he is not able to reach the monetary returns he previously had. He claims damages in the sum of \$64,064. There is a small dispute about the sum of \$123.50 for tokens allegedly returned by the new franchisee. There is

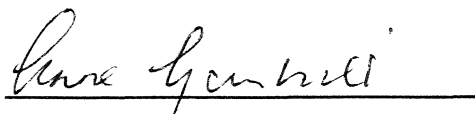
little evidence to support or refute this matter and I do not think it is suitable to be dealt with in the summary judgment context.

This case must be viewed in the light that Mr Lawes has not signed any documents restraining trade or obtaining an exit payment to which he would be entitled.

I am satisfied, however, that although he claims a loss of goodwill the matters that are relevant are (a) that he has received the goods and on-sold them. (b) he has not paid for such goods.

I have reached the view that the losses claimed amount to and arise from a separate issue and therefore give rise to a counterclaim and not an equitable set-off. If they do not give rise to an equitable set-off then the defendant does not have an arguable or tenable defence to a summary judgment and I believe that to be the case.

Accordingly there will be judgment for the plaintiff in the sum of \$26,317.73 less \$123.50 for tokens, together with interest at 11% on the net sum from 20 March 1993, and costs and disbursements of \$1000.



MASTER ANNE GAMBRILL

