NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 715/92

BETWEEN MURRAY JOSEPH HOLDEN

Plaintiff

AND ARCHITECTURAL FINISHES LIMITED

Defendant

Hearing: 31 October 1996

Counsel: J R Wild QC for Plaintiff
P A McKnight for Defendant

Judgment: 14 DEC 1996

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
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This is an application to fix costs in respect of a summary judgment application heard by Master Williams, as he then was, on 19 November 1992. As a result of that hearing the Master entered summary judgment against the defendant on liability and reserved costs.

it was claimed that the defendant had converted the plaintiff's cheque (being a tax refund from the Inland Revenue Department) for $47,212 by paying it into its bank account on 16 September 1991. When the plaintiff issued its summary judgment application it also had a further claim against the defendant pursuant to s.209 of the Companies Act 1955 (Palmerston North M122/92). In the result the Master found that at the time he heard the application the accounts for the company involved were in draft form only and that it was it was difficult to ascertain exactly what the plaintiff's loss was. He found that it could vary considerably because directors fees could be fixed at anywhere between $62,939 and $12,939. If directors fees were deleted and other adjustments undertaken as the result of the s.209 proceedings then the measure of damages he found might be less than the $47,212 claimed.

An important matter as far as the present application is concerned is that the defendant appealed against the Master's decision to the Court of Appeal but the Appeal was not proceeded with. The s.209 application was subsequently heard by McGechan J who gave judgment on 1 November 1995. His judgment is also the subject of appeal but that appeal has yet to be heard. Mr Wild applied to the Judge for costs to be fixed but that application was refused. Such refusal was

appealed to the Court of Appeal. It upheld the Judge's decision that the fixing of costs should await the outcome of the Court of Appeal decision. The result of the s.209 judgment was that the Judge ordered the defendants (the Thwaites) in that case to purchase Mr Holden's 900 ordinary shares in Architectural Finishes Limited for the sum of $280,630. Mr Wild assured me that the claim for $47,212 is not included in the amount of the judgment. In fact the plaintiff recovered that amount by pursuing a claim against the bank through the Banking Ombudsman which was successful. For that reason Mr Wild says it is no longer necessary to continue with the substantive claim and/or the summary judgment application in respect of CP 715/92 and that the only issue left in respect of that proceeding is the fixing of costs. On that being done Mr Wild was happy that I could dismiss the proceeding.

It is however the defendant's strong submission that the summary judgment proceeding is so connected with the s.209 application that the overall question of costs both in respect of the s.209 application and the summary judgment application should be left for McGechan J to determine. The defendant points to the following passage of Master Williams judgment where he said:

> "Returning to the facts of this case, although Architectural Finishes clearly converted Mr Holden's cheque by paying it into its bank account on 16 September 1991, both sets of the company's draft accounts for 31 March 1992 give him a credit for the proceeds of $47,212 (the tax refund). (p15 and p16).
>
> In those circumstances the ordinary result would be to dismiss the summary judgment as regards quantum, but here, given that the parties

> are engaged in litigation one of the objects of which will resolve the question of the shareholder's loan account, it would seem that the preferable course may be to adjourn the application for summary judgment as to quantum sine die with leave to the parties to bring it on in the event of there being any necessity so to do at a future date, presumably after the conclusion of the other litigation."

It was Mr Wild's contention that the issue of the cheque only arose for determination in the context of the s.209 application in respect of whether or not the payment of the cheque into the company's account amounted to oppressive conduct. The defendant points to the decision of McGechan J at p39 where he said:

> "The realities, however, should be kept in mind. While Mr Stan Thwaite may have acted improperly, and in an authoritarian manner, in the end no more occurred than a repayment to the company of a borrowing from the company."

I must say that a possible inference from that finding is that the plaintiff might not have suffered any loss from the way the cheque was dealt with.

Ordinarily this proceeding should be treated separately and, if it is at an end, the plaintiff should be entitled to have costs fixed. However it is not clear to me from my reading of McGechan J's judgment just how the sum of $47,212 is reflected in his order fixing the price of the shares. Further the costs sought, while considerable for a summary judgment application, are small beer in the overall issue of costs. This Master has no personal knowledge of either action and the

prudent course to take is the one suggested by the defendant and that is that the costs of this proceeding as well as the s.209 application should be fixed by McGechan J when the Court of Appeal decision is made. After all a successful appeal could well have a bearing on how costs should be fixed in both proceedings. This application is refused. Costs are reserved.

Master J.C.A. Thomson