NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No. 71/97

BETWEEN EDGE COMPUTER LIMITED

Appellant

A N D COLONIAL ENTERPRISES LIMITED
(trading as P C HELP)

Respondent

Hearing: 18 June 1997

Counsel: M J Fisher for Appellant
J C Corry for Respondent

Judgment: 25th July 1997

JUDGMENT OF GREIG J

Solicitors:
Brookfields, AUCKLAND, for Appellant
Grigg & le Page, LOWER HUTT, for Respondent

This is an appeal against the refusal of an application by the appellant for summary judgment against the first defendant. The appellant is a wholesale trader in computer componentry and equipment. The respondent, trading as P C Help, is an assembler and retail supplier of computers and computer equipment. During 1995 the appellant supplied the respondent with a variety of computer componentry, including a number of items described as motherboards. A dispute has arisen between the parties about the motherboards which were all sold to the respondent's customers as part of computer equipment. It is alleged that these motherboards are totally defective and do not and can not perform the functions for which such a component is designed.

In January 1996 the appellant supplied a variety of other components and equipment to the respondent. None of that equipment included any of the allegedly defective motherboards. At the end of January the respondent sent to the appellant a number of cheques in payment of the invoices for the supplies furnished and delivered in January 1996. The total amount of those cheques was $58,828.62. All of the cheques were dishonoured because the respondent had stopped payment on them. The reason for stopping the payment was the dispute about the earlier motherboards and the appellant's prospective understanding that it would be involved in expense and possibly damages at the suit or claim of its customers.

The appellant began proceedings. These included an application for a Mareva injunction and proceedings to put the respondent into liquidation. These proceedings were unsuccessful. An application for summary judgment was also sought and in the end, at the hearing, the application for summary judgment was limited to the amount of the cheques and the dishonour of them. It was accepted that other items claimed by the appellant and the claim against a second defendant as a guarantor/surety were not amenable to summary judgment.

The respondent has issued a counterclaim against the appellant in respect of the defective motherboards. The claim includes the amount paid for the motherboards to the appellant, namely, $37,150.80 on the grounds of total failure of consideration. In addition claims are made for damages for the costs or prospective

costs of replacing the motherboards and other expenses involved in that, together with claims for general and exemplary damages.

The appellant has throughout founded its claim and application for summary judgment on the basis of the liquidated amount of the dishonoured cheques. It claims that because of the special rules about claims on dishonoured cheques the respondent is not entitled to any right to set-off or counterclaim, whether of a liquidated or unliquidated nature. The judge concluded that that was not a firm foundation for the appellant's claim in this case. He took the view that the principles which have been cited and followed in New Zealand were not so clear in their application as the appellant submitted. The learned judge was also concerned that there was insufficient evidence before him as to whether there was a continuing contract between the parties. He was also concerned that in this case there were suggestions of fraud on the part of the appellant in the supply of the motherboards with suggestions of improper modification to the hardware and software incorporated in them. He concluded that there was some doubt in his mind as to whether or no a proper defence was raised and concluded that it was not appropriate to deal with either the claim by the appellant or the respondent's cross-claim on the basis of summary judgment.

The rules about bills of exchange and cheques, and claims for their dishonour, while they may appear to be anomalous, are certainly clear. The way in which it is put, correctly I believe and succinctly, in 42 *Halsbury's Laws of England* (3rd ed) para 414 is as follows:

> " An unliquidated cross-claim cannot be relied upon as an extinguishing set-off against a claim on a bill of exchange. However, as between the immediate parties, a partial failure of consideration may be relied on as a pro tanto defence provided that the amount involved is ascertained and liquidated. "

For New Zealand the matter has been expressed by the Court of Appeal in a judgment delivered b Cooke P in *International Ore & Fertilizer v East Coast Fertilizer* [1987] 1 NZLR 9 at p 14 as follows:

> " Generally speaking, even between the immediate parties bills of exchange are to be treated as the equivalent of cash. Except for a total or liquidated partial failure of consideration, a breach of a background or underlying contract by the plaintiff does not afford the defendant a defence to an action on a bill, even when the action is between immediate parties. A counterclaim for unliquidated damages cannot be put forward as a set-off in either an action on a bill writ under the old procedure or an application for summary judgment under the new procedure. For the purposes of the present case it is not necessary to explore the further consequences of that principle under the new High Court Rules or the position of a third party who has given value for a bill in good faith, although if anything the latter will obviously be stronger than that of an immediate party. "

The learned President then referred to the opinions of Lord Wilberforce and Lord Russell of Killowen in *Nova Knit Ltd v Kammgarn* [1977] 2 All ER 463 and continued at p 15:

> " This is basically a matter of the substantive law defining the rights and obligations of parties under bills of exchange. It is more than a matter of procedure. The judgment under appeal includes passages apparently suggesting that New Zealand procedure may let in, at the discretion of the Court, a wider range of defences to actions on bills, or that a counterclaim for unliquidated damages may be allowed to frustrate the plaintiff's right to recover on a bill. To that extent the judgment cannot be supported. "

Nothing can be clearer and whether anomalous or not that rule and those principles must be followed and applied until the law is changed by statute. Expressions in the High Court Rules about summary judgment cannot, by implication, change that clear principle which is universally applied and which have international as well as national trading implications.

It was suggested by the respondent that this was a case where the exception of total or partial failure of consideration would apply. It was submitted that the motherboards supplied earlier were unfit and useless and that therefore there had

been a total failure of consideration. The immediate answer is that the exception on this head applies only where the failure is in the underlying contract upon which the bill of exchange or cheque is founded. That is not the case here. There is no suggestion that there was any total or partial failure in the contracts and the terms upon which the cheques were paid.

As to the concern about the form of the contract between the parties there is, with respect, nothing which on the evidence before the Court at this stage could give rise to any possible defence. There is no evidence at all as to the terms of any contract. The clear implication is that this was a continuing arrangement under which the respondent from time to time made purchases from the appellant. Payments were made on invoices and monthly accounts. There is nothing to suggest that there was any contract or any term of a contract which might have affected the rights of the appellant to claim the amount on the dishonoured cheques.

It was submitted by Mr Corry that in this case the claim by the respondent, at least in respect of the motherboards which were said to be defective, was a liquidated one thus giving a basis for a legal set-off of the kind exemplified in the judgment of Cockburn CJ in *Stooke v Taylor* (1879-1880) 5 QBD 569. That submission fails on the facts. As I have noted all of these motherboards were incorporated into other equipment and componentry and sold on to the respondent's customers. In spite of some publicity about the defective motherboards only a relatively small proportion of the respondent's customers have sought a replacement. Whether that is because the motherboards are not as defective as thought or that the customers are unaware of the defect, cannot yet be decided. The result is, however, that the respondent can not justify a claim for replacement of the motherboards in total as has been made. Moreover, the respondent has received a payment for these motherboards as part of the price it charged to its customers. It is no longer possible for there to be a full restoration of the equipment. The contract has been accepted and affirmed. The title in the goods had passed. All that can be now claimed is a breach of warranty and the damages that flow from that. There is no longer scope for a claim for liquidated damages in the sense required.

It was submitted that there remained some overall discretion under R 163 (2) of the District Court Rules which would allow the Court, notwithstanding the clear rule as to the unavailability of defences and counterclaims or cross-claims in actions on cheques. To exercise a discretion in favour of the respondent on this ground reference was made to the principles and, in particular, the last one set out by McGechan J in *Roberts' Family Investments Ltd v Total Fitness Centre (Wellington) Ltd* [1989] 1 NZLR 15 at p 20. Mr Corry sought support in this from the observations of Staughton LJ in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 2 All ER 163 at p 169. That was not a case of a claim on a bill of exchange or cheque but was a case about set-off. His Lordship suggested that the law as to set-off or the historical development of the law as to set-off had "led to results which appear to lack logic and sense". He went on to say, "it can be said that there is a case for reform of the law, which has to be discovered in a number of diverse rules based on no coherent line of reasoning" but concluded, perhaps tentatively, that the law could continue to be tolerated because a broad interpretation of the doctrine of equitable estoppel or the grant of a stay of execution had ensured that justice prevailed. As His Lordship noted, reform may be required but until that reform takes place the law, I think, has to be applied. These discretions do not alter the principles nor do they permit a Court to depart from or ignore them.

As has been noted, however, there can be room for the imposition of terms, even in a summary judgment, to ensure justice in any particular case. In my judgment there is and was never any doubt that the appellant was entitled and is entitled to summary judgment in the amount it was claimed on these dishonoured cheques. It is equally clear that the respondent has a counterclaim which it ought to be entitled to pursue and have disposed of in court. The likelihood is that execution of a summary judgment in the amount at stake would prevent that disposal of the counterclaim because the respondent would almost inevitably be wound up and its creditors and others might be unwilling to continue the matter. Although R 163 (2) does not change the law it does give scope for the grant of stay to enable the respondent's counterclaim to be dealt with and, in the end, justice to be done.

In the result the appeal is allowed. The appellant is entitled to summary judgment in the sum of $58,828.62 but there will be a stay of execution of that judgment until the further order of the Court in which the counterclaim proceeds. The appellant is entitled to costs and other disbursements on the summary judgment. I fix costs, including the costs on this appeal, in the total amount of $2,000 disbursements to be fixed by the Registrar of the District Court.