

IN THE HIGH COURT OF NEW ZEALAND

CIV 2008-404-1057

BETWEEN GENERAL DISTRIBUTORS LTD
 Plaintiff

AND VERONICA HILLIARD
 Defendant

Hearing: 20 November 2008

Hearing: 30 January 2009 (Vacated)

Memoranda: Memorandum from counsel for the plaintiff 13 February 2009
 Memorandum from counsel for the defendant 12 March 2009

Judgment: 16 March 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 16 March 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This is an application for summary judgment by the plaintiff against the defendant.

[2] When the matter was first called before me on 20 November 2008 the application was opposed by the defendant.

[3] The hearing of the application proceeded on that date but was not completed. It was adjourned part-heard as there was insufficient time to complete the hearing.

[4] The adjourned hearing date was to be 30 January 2009.

[5] In the mean-time, on 19 December 2008, the defendant was convicted in the District Court in respect of related criminal charges relating to events the subject of the present proceeding. Then, on 28 January 2009 she was adjudicated bankrupt on her own application.

[6] The adjourned hearing of this matter on 30 January 2009 did not proceed. Instead memoranda were filed in advance whereby counsel for the defendant indicated that the defendant now withdrew her opposition to the plaintiff's application for summary judgment. Thereupon, the plaintiff sought leave pursuant to s. 76(2) *Insolvency Act 2006* to continue this proceeding against the defendant as an undischarged bankrupt.

[7] In a Minute I issued in this matter on 29 January 2009, based upon the memoranda then filed by counsel, I granted that leave unopposed. I indicated my detailed reasons for this would follow. Those reasons will be set out later in this judgment.

[8] Also in that Minute of 29 January 2009 I directed that the plaintiff had a period of 10 working days to file and serve its memorandum as to the summary judgment sought and quantum. The defendant was then to have a further 10 working days to file and serve her reply memorandum regarding those issues if she wished. The plaintiff was then to have a further 10 working days to file and serve any

memorandum in reply. I indicated that I would make my decision then on the plaintiff's summary judgment application based upon all the material before the Court.

[9] Memoranda have now been filed as follows:

(a) Memorandum from counsel for the defendant dated 13 February 2009.

(b) Memorandum from counsel for the defendant dated 12 March 2009.

[10] I will now give my decision on the summary judgment application.

Application for Leave Under Section 76(2) Insolvency Act 2006

[11] But first I deal with the preliminary matter relating to the plaintiff's application for leave to continue this proceeding against the defendant as an undischarged bankrupt.

[12] Section 76(1) *Insolvency Act 2006* provides that on adjudication all proceedings to recover any debt provable in the bankruptcy of the individual concerned are halted.

[13] Section 76(2) *Insolvency Act 2006* provides however:

“(2) *However, on the application by any creditor or other person interested in the bankruptcy the Court may allow proceedings that had already begun before the date of adjudication to continue on the terms and conditions that the Court thinks appropriate.*”

[14] The principles to be applied in considering such leave applications are analogous to those that apply to prevent the continuation of legal proceedings against companies in liquidation. In *Samei v McKay* High Court, Auckland, 1 October 1998, Paterson J. CP543/96 the relevant principles were noted as:

- “(a) *There should be no prejudice to other creditors if the action were to proceed;*
- (b) *The claim should not be clearly unsustainable;*
- (c) *The claim should be of a type that is more suitably determined by action then by lodging a proof of debt in the bankruptcy;*
- (d) *Leave is more likely to be granted where there is an insurance company standing behind the defendant to pay any judgment debts the plaintiff might obtain;*
- (e) *It may be desirable to impose a condition that the plaintiff will not enforce any judgment against the defendant without the leave of the Court;*
- (f) *Mere delay in applying for leave will not prevent leave being granted;*
- (g) *Leave to continue an action within the limitation period may be granted after the expiry of the relevant limitation period without the leave of the Court; and*
- (h) *Leave should not be granted if there is no prospect of the applicant benefiting financially if leave were to be granted.”*

[15] In the present case there has been no delay in bringing this application and I am satisfied there is a point in granting leave to proceed. The plaintiff’s claim against the defendant was commenced well before the defendant chose to have herself adjudicated bankrupt. The claim, as will appear later in this judgment, is clearly sustainable and in my view there is no prejudice to other creditors if the present action proceeds.

[16] For these reasons in my Minute dated 29 January 2009 leave was granted (unopposed) to the plaintiff to continue this proceeding against the defendant, given that the defendant was adjudicated bankrupt on 28 January 2009. This is confirmed.

Background Facts

[17] I turn now to the substantive application before the Court and the background facts in this case.

[18] The plaintiff is the owner and operator of the Food Town Supermarket at Pukekohe (“the supermarket”). The defendant at the relevant time was a cashier at the supermarket. She had worked at the supermarket for some considerable time.

[19] The plaintiff alleges that the defendant in her capacity as a senior and trusted cashier used various techniques to manipulate accounting procedures, banking arrangements and the provision of fictitious refunds at the supermarket to defraud the plaintiff over a period of time of almost \$400,000.00.

[20] The plaintiff, as owner and operator of the supermarket, in February 2008 issued the present proceedings and then sought summary judgment against the defendant on the basis of conversion and monies had and received together with interest and costs. But, as I have noted above, in the mean time the defendant was committed for trial in the District Court at Manukau charged with offences of dishonesty arising out of the alleged misappropriation of these monies from the supermarket. This trial began as I understand it on 1 December 2008 and culminated in the defendant being convicted of those criminal charges which overlapped the plaintiff’s present civil summary judgment claim. In total the defendant was convicted under s. 220 *Crimes Act 1961* for failure to account for various amounts totalling \$319,622.50.

Counsel’s Arguments and My Decision

[21] In seeking summary judgment here the plaintiff relies upon r 136(1) *High Court Rules* which states:

“(1) *The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of any such claim.*”

[22] This rule requires that a plaintiff must satisfy the Court that a defendant has no defence. That was explained by the Court of Appeal in *Pemberton v Chappell* [1987] 1 NZLR 1 at p 3 as follows:

“In this context the words “no defence” have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.”

[23] The Court of Appeal went on, at p. 3, to state:

“If a defence is not evident on the plaintiff’s pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff’s right to have his case proceed to judgment without tendentious delay and a defendant’s right to have his case proceed to judgment without tendentious delay and a defendant’s right to put forward a real defence.”

[24] So far as liability here is concerned, the plaintiff essentially alleges that over a period of time the defendant systematically stole from it and thus it brings this proceeding based on causes of action in conversion and money had and received. The amount claimed is \$393,665.45 representing amongst other things misappropriated refunds, manipulation of the supermarket’s safe balance, banking fraud and theft of lotto money. As I have indicated above, counsel for the defendant has indicated that the defendant’s initial opposition to the summary judgment application is now effectively withdrawn and his instructions are to take no further steps in relation to this matter.

[25] That said and first, given that the summary judgment application is now unopposed, secondly, given what I see as extensive evidence before the Court in support of the plaintiff’s summary judgment application and thirdly, given the conviction of the defendant on 19 December 2008 on overlapping criminal charges

for thefts amounting to well over \$300,000.00, I am satisfied that the plaintiff has done enough here to satisfy the Court that the defendant has no defence to the causes of action in the plaintiff's statement of claim pursuant to r 136 *High Court Rules* (now r 12.2) and summary judgment should be granted to the plaintiff. And as to the quantum sought by the plaintiff, again that is now unopposed and I am satisfied on the basis of the extensive evidence before the Court, it is made out.

[26] The defendant has advised she no longer intends to defend the summary judgment claim brought by the plaintiff and I am satisfied on the material before the Court that the defendant in fact has no defence to the claim brought. The present application is no longer opposed by the defendant. Counsel for the plaintiff suggests that the defendant's actions in adjudicating herself bankrupt appear to have been a last minute attempt to avoid judgment against her. There is no evidence of this before me, however, and I say nothing regarding this aspect. In any event, judgment is now to be entered. I note also, that the sum claimed here by the plaintiff has been listed as a debt in the defendant's statement of affairs filed in support of her bankruptcy application. This is confirmed in para. 4 of the Memorandum from counsel for the defendant dated 28 January 2009.

Orders

[27] The plaintiff's application succeeds and orders are now made by way of summary judgment in this proceeding in favour of the plaintiff against the defendant on the basis of conversion and monies had and received in the sum of \$393,665.45.

[28] In addition interest is awarded to the plaintiff under s. 87 *Judicature Act 1908* on this judgment sum from 27 February 2008, being the date that the proceedings were issued up to the date of this judgment, at the prescribed rate under the *Judicature Act 1908*.

[29] Further, interest under r 11.27 *High Court Rules* is awarded on the judgment sum together with costs and disbursements shortly to be awarded at the prescribed rate of 8.5% per annum from the date of judgment down to the date of payment.

[30] Costs of \$11,840.00 (to include costs of \$2,560.00 awarded by Justice Heath against the defendant in respect of the defendant's earlier interlocutory application to stay the proceedings) together with disbursements of \$1,818.75 calculated in accordance with Schedule 1 of the memorandum from counsel for the plaintiff dated 13 February 2009 are awarded to the plaintiff.

'Associate Judge D.I. Gendall'