IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-001818

BETWEEN	WORLDTEL NZ LIMITED Plaintiff
AND	KI CHUL CHO First Defendant
AND	YOUNG SOOK LEE Second Defendant

Hearing: 22 July 2009

Appearances: Mr A E Liew for Plaintiff
Mr N R Campbell for Defendants

Judgment: 30 July 2009 at 4.30 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
30.07.09 at 4.30 pm*, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Counsel:

N R Campbell, Barrister, P O Box 4338, Auckland

Mr Anthony Liew, P O Box 60306, Auckland

Background

[1] The plaintiff says the first and second defendants, who are husband and wife, trade under the name ITEL. The plaintiff says that in July 2003 it appointed ITEL as a reseller of I-Phone call cards and other telephone services sold by the plaintiff.

[2] One of the products that the plaintiff marketed was phone cards. For each sale, ITEL was entitled to a commission of 30% of the fee fixed by the plaintiff company. The plaintiff company was to receive the remaining 70%, which would be invoiced on a monthly basis. The plaintiff's pleading is that the defendants would retain 30% of the sale proceeds and remit the balance to the plaintiff.

[3] In addition, the defendants were given access to the recharge facility of the plaintiff to recharge expired I-Phone call cards sold by ITEL. The plaintiff pleads that the defendants were required to collect the charges from the customers and remit them to the plaintiff.

[4] The defendants were also given authority to control and operate the bank account of the plaintiff company.

[5] The plaintiff has applied, against the first defendant alone, for an order that various accounts be taken and inquiries made, in respect of:

a) Money due and payable to the plaintiff for I-Phone call-cards and telecommunication services which the plaintiff alleges it supplied to the defendants for resale;

b) Money owing to the plaintiff from the sale by the defendants of the plaintiff's top-up facilities to recharge expired I-Phone call-cards sold by the defendants;

c) Transfer of funds undertaken by the first defendant from the plaintiff's bank account at Kookmin Bank, Auckland, to various entities in Korea.

[6] The application is made under Rule 16.2 of the High Court Rules, which provides:

> **16.2 Orders for accounts and inquiries**
>
> The court may, on the application of any party, before, at, or after the trial of a proceeding, order an account or an inquiry, whether or not it has been claimed in that party's pleading.

The call cards and top-ups

[7] Counsel for the first defendant, Mr Campbell, said that in dealing with the call cards it sold, the defendants bought and sold the call cards on their own account, rather than as agent for the plaintiff. The evidence filed by the plaintiff is consistent with the first defendant's position.

[8] Mr Campbell also said that the defendants bought the call cards from Ezytel Limited, rather than from the plaintiff. As to the top-up charges, the first defendant submits that a preliminary issue arises as to whether the defendants have any liability on this claim:

a) Although the defendants accessed the plaintiff's facility to recharge expired call cards, the defendants' say it was not their responsibility to collect top-up charges on the plaintiff's behalf.

b) While the plaintiff says that it invoiced the defendants for the top-up charges that the defendants allegedly collected, it has not produced any such invoices. However, it has produced invoices for call cards and for line rentals.

c) The first defendant has produced examples of the only other type of invoice from the plaintiff to the defendants, for termination fees. The first defendant says that the plaintiff's charge for the top-ups was included in those invoices. The plaintiff's claim for top-up charges is far in excess of the amounts that it invoiced the defendants.

[9] In relation to the telecommunication services the defendant says that, again, the plaintiff's claim is based on an allegation that the defendants sold telecommunication services as agent for the plaintiff. On the basis of the alleged agency that the plaintiff asserts, the plaintiff says that establishes an entitlement to find out, through the account that it seeks, what sales the defendants made, and what moneys the defendants collected. A preliminary issue is whether the defendants were agents for the plaintiff. The first defendant says that they were not.

[10] Moreover, the plaintiff's own evidence is inconsistent with the alleged agency. Mr Lee's first affidavit refers to and annexes invoices for line rentals. These do not reveal any agency relationship. Mr Lee's affidavit in reply refers to a pricing structure that is consistent with the defendants selling these services on their own account.

[11] For all those reasons, the first defendant says, the application for an account should be declined, because the Court cannot yet be satisfied that the defendants have any liability to account as agent to the plaintiff.

[12] I comment that Mr Campbell's purpose in raising the issues of the status of the defendants' vis-à-vis the plaintiff was to demonstrate that there was no agreement on the fundamental issue of the basis of liability. That, in turn, is said to show just how unsuited to a taking of accounts these proceedings are. The first defendant's stance, apparently, is that the application for an account and inquiry into this part of the claim should be declined, because the Court cannot yet be satisfied that the defendants have any liability to account as agent to the plaintiff.

Claims relating to transfer of funds

[13] One of the claims that the plaintiff makes against the first defendant is that he functioned as a director of the plaintiff. In that capacity, he allegedly caused funds to be transferred out of the plaintiff's bank account to third party Korean recipients.

[14] Counsel for the first defendant submits that the nature of this claim is unclear. The plaintiff does not allege that the first defendant is liable to the plaintiff in respect

of the transfers. Counsel for the defendant points out that the only specific relief sought on this claim is an order for an account and inquiries "as to the purpose of the transfer of the said funds". The interlocutory application seeks an account and inquiry in much the same terms.

[15] In fairness to the plaintiff, I think it should be noted that it pleads that the transfers of funds were unauthorised and unlawful. I consider that the form of the pleading is sufficient to disclose a claim for money had and received.

[16] Mr Campbell submitted, as well, that it would not be appropriate, and it is not necessary, to order an account of the funds transferred. An account is "regarded as carrying its usual commercial meaning in a debtor and creditor context" (*McGechan*, HR16.2.01). He submitted that the plaintiff does not allege that there is a debtor/creditor relationship between it and the first defendant in respect of the transfers. Nor is there any dispute as to the amount of the funds transferred. Therefore, he says, it would not be a proper use of Rule 16.2 to order an inquiry concerning the funds transferred.

[17] He noted, too, that the jurisdiction to order an inquiry is to be used where complex issues arise which require the application of expertise not available to the Court: *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568 at 581 (CA). On its pleadings, the issue that the plaintiff seeks to have resolved by the inquiry is the purpose of the transfer of the funds. That is a purely factual issue that the Court is sufficiently equipped to resolve. Mr Campbell pointed out that in its synopsis the plaintiff says that it has two objectives in making this application:

(a) To find out the purpose of the transfers.

(b) To obtain the production of supporting documents for the transfers.

[18] These objectives, he said, reveal the inappropriateness of the plaintiff's application. The purpose of an inquiry is to resolve an issue in a proceeding. Instead the plaintiff seeks to use an inquiry to assist it in making a case against the first defendant.

[19] The plaintiff has relied on the proposition that an agent has a duty to provide his principal with an accurate record of transactions conducted on the principal's behalf. Mr Campbell says that proposition is irrelevant to this application. In contrast to the *Yasuda v Flight Park Tandems Ltd* [2005] BCL 463 case cited by the plaintiff, the plaintiff is not seeking a declaration that the first defendant is liable to deliver up documents to the plaintiff.

The issues

[20] I intend to be guided by the following description of the power which is to be found in *McGechan on Procedure*:

> **HR16.2.01 "Account" and "inquiry"**
>
> The words "account" and "inquiry" are not defined. In practice, "account" has been regarded as carrying its usual commercial meaning in a debtor and creditor context. Orders for inquiries most commonly have been sought in relation to claims for special or liquidated damages, but on occasion have extended into the ascertainment of classes. Potential subject-matter for inquiry is not restricted by definition, but usually has been regarded as comprising matters of detail which cannot conveniently be dealt with in the context of the normal course of trial. This commentary was accepted as reflecting the correct approach by the Court of Appeal in *Rod Milner Motors Ltd v A-G* [1999] 2 NZLR 568, at p 581.
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> The Court added that the jurisdiction to order an inquiry is to be used where complex issues arise which require the application of expertise not available to the Court, emphasising that the jurisdiction was not to be used as a method of gaining separate hearings on liability and damages.
>
> The prospect of an inquiry as to damages or an account of profits permits a plaintiff to avoid particularising a claim for damages or loss of profits, or providing discovery in relation to those matters. Discovery of the plaintiff's documentation on such matters may be relevant to whether a case is made out for an inquiry or account: *Oraka Technologies Ltd v Geostel Vision Ltd* 5/2/08, Associate Judge Faire, HC Hamilton CIV-2005-419-809.
>
> A claim for loss of profits on a continuing basis was implicitly accepted by the Court of Appeal as a proper subject for an inquiry under this rule, on the basis of facts occurring or discovered after a decree of specific performance: *Neylon v Dickens* [1987] 1 NZLR 402, at p 409. In *Hodge v Applefields Ltd* (1999) 4 NZ Conv C 193,084, that case was distinguished and a belated application under the rule declined where it was sought to adduce evidence of a head of damages not addressed at trial.

[21] The Court must be satisfied that there is a liability to account before making an order for the taking of an account: *King v Library Covers (NZ) Ltd* [1951] NZLR 133; McGechan, HRPt16.01(1); Sim's Court Practice, HCR16.2.3.

[22] As the wording of the section makes clear, it is possible for the Court to make an order under Rule 16.2 before trial. The risk, though, is that the exercise will prove to be a waste of time if subsequently the Court is to conclude that the defendant was never under any liability. As I have said, liability is disputed in this case. It is not necessary, or even desirable, for the Court to embark upon an assessment of the strength of those defences and linked evaluations of how likely they are to succeed. The Court simply does not have the necessary information. Taking the argument concerning the call cards, which the defence says were brought from another entity, Ezytel Ltd, on the face of it that seems to be a straightforward defence. If the plaintiff were unable to negative that defence then it would fail to establish liability. The point that needs to be made is that this is not a case where establishing liability is a formality with the real nub of the enquiry being concerned with how much judgment should be entered for.

[23] For the plaintiff, Mr Liew proposes that the person who would be appointed under Rule 16.2 would both conduct an enquiry and take accounts. The proposed enquirer would be someone like an auditor, he told me. As I understand it, Mr Liew proposes that the auditor, having first decided whether each of the plaintiff's claims gives rise to a debt, would, if necessary, go on to compute the amount of the debt. In doing so, the auditor would presumably also take into account any re-payments that had been made and then come up with a statement of the overall state of accounts between the plaintiff and the defendant for which amount the judgment would be entered.

[24] It is the first stage of the proposed exercise that gives me difficulty. I view it as involving rather more than the usual role of an auditor. This is not the sort of case where the parties are uncertain about what the state of accounts shows and therefore wish to leave it to a competent accountant to follow up paper trails to decide whether a given item for which a claim was made is legitimate. Here, there are more fundamental differences between the parties. An example is the legal issues

involved in the first defendant's assertion that he acted with the authority of the company when transferring funds from the plaintiff's bank account to third parties. He says that he acted at the behest of, and on the instruction of, the then manager of the plaintiff in making the transfers. Then there is the defendant's contention that it bought the phone cards for re-sale from Ezibuy and not from the plaintiff – a defence I have mentioned already. Such issues are not suitable for determination by an accountant.

[25] I do not dispute that after any findings of liability have been made it may be desirable for an enquiry to be made into subsidiary aspects of the claim. It may be that at that point an auditor type person acting within the framework of clear findings of fact by the Court would be able to resolve the accounting side of the case more expeditiously and promptly and conveniently than the Court could. But that is for a later point in the proceedings.

[26] Mr Liew argued that justification for ordering the enquiry would be that it would assist the plaintiff to prove its case against the first defendant. But that begs the question of whether the proposed enquiry would do any such thing. Further, the plaintiff has other means at its disposal that will get it the information it needs to mount its case. Those measures include discovery orders, non-party discovery orders and orders directing that the first defendant answer interrogatories. All of these procedures potentially could assist the plaintiff. All of those processes will avail against recalcitrant parties if that becomes a problem in this case.

[27] Mr Liew submitted that the defendant did not have any defence to the claims. But it is clear that is not so. It is apparent that there are defences which one defendant proposes to advance in respect of each of the heads of claim. Quite what strength those defences may prove to have – if any - is not clear at this stage. But the plaintiff cannot assume that establishing liability is a foregone conclusion in this case.

[28] In all the circumstances, it is my view that the proposed enquiry does not come within the scope of the Rule as it is articulated in *McGechan* in the commentary at 16.2.1:

> Potential subject-matter for inquiry is not restricted by definition, but usually has been regarded as comprising matters of detail which cannot conveniently be dealt with in the context of the normal course of trial. This commentary was accepted as reflecting the correct approach by the Court of Appeal in *Rod Milner Motors Ltd v A-G* [1999] 2 NZLR 568, at p 581.
>
> The Court added that the jurisdiction to order an inquiry is to be used where complex issues arise which require the application of expertise not available to the Court, emphasising that the jurisdiction was not to be used as a method of gaining separate hearings on liability and damages.

[29] I consider that this is not a case where the enquiry should be carried out by some person acting in place of a Judge. It is not a case where the proposed enquirer is better equipped to make an enquiry than a Judge is.

[30] My overall assessment of the application is that this is not a case that falls within Rule 16.2 and that, even if that was wrong, it is not a case where the Court would be justified in exercising its discretion to make an order under the Rule. The plaintiff's application is therefore dismissed.

[31] I would expect the parties to resolve the question of costs between themselves and if they cannot, I will allocate time before Court at the 9 a.m. on a suitable date to hear oral argument.

J.P. Doogue
Associate Judge