PHILIPP (CHRIS) v L T ENDEMANN & COMPANY LTD

Court of Appeal Apia
Morling, Ward and Muhammad JJ
10 November, 13 November 1992

CONTRACT - non-existant Company - personal liability of individual.

HELD: Allowing performance with knowledge that a company referred to in the contract does not exist, presumes personal liability. Appeal dismissed

CASES CITED:

- Hawkes Bay Milk Corporation Ltd v Watson and Others [1974] 1 NZLR 236.
- Farrell v The Secretary of State for Defence [1980] 1 A11 E.R. 166
- Shirlaw v Southern Foundries [1926] 2 KB 206
- Religate v Union Manufacturing [1918] 1 KB 592
- Black v Smallwood [1966] 117 CLR 52
- Marblestone Industries v Fairchild [1975] 1 NZLR 529
- Kelner v Baxter [1866] LR 2CP 174

Puni for Appellant
Drake for Respondent.

Cur adv vult

This is an appeal from a decision of Ryan CJ giving judgment in the sum of $62,794 to the Plaintiff/Respondent.

There is no dispute as to the facts or the sum involved. Briefly, on 26 July 1989, the Appellant signed a contract "for Samoa Handcraft Incorporated" as principal with the Respondent, a construction company, for the renovation of a building in Tauese. At the time, both parties believed there was such a body as Samoa Handcraft Incorporated but it had not been Incorporated then and has not been since. Since the signing of the contract, a company, Samoa Handcraft Ltd, has been incorporated on 15th February 1990.

The contract provided for the Respondent to submit claims for payment from time to time and progress payments were to be paid within fourteen days of the Consultant (the Appellant) issuing a certificate of payment.

The first certificate, for $26,657 was signed by the Appellant and addressed to Samoa Handcraft Incorporated Ltd. It was paid but the evidence does not disclose by whom.

Subsequently three more were issued by the Appellant on 24 October 1989 for $32,318 and addressed to Samoa Handcraft Ltd, on 28 November 1989 for $6,849 addressed to Samoa Handcraft Incorporated and on 17 January 1990 for $14,782 addressed to Samoa Handcraft Ltd. There is no dispute these were properly issued and due for payment. The latter three have not been paid and the Respondent sued for the sum outstanding together with 10% retention on all four certificates.

At the hearing and before any evidence was called, counsel for the Appellant explained his defence was that Samoa Handcraft Incorporated had not existed when he signed the contract, that he was not personally liable for the sums and that Samoa Handcraft Ltd was. He based his denial of liability on the case of Hawkes Bay Milk Corporation Ltd v Watson and Others [1974] 1 NZLR 236.

The basis of the learned judge's award was that there was an implied warranty in the contract signed by the parties that, should the company with whom the contract was made never come into existence, the Appellant would pay the Plaintiff and if he had any associates involved they would have to indemnify him.

The Appellant puts his appeal on two basic contentions; first that the judge was wrong to find an implied warranty when the Plaintiff had pleaded only breach of contract and second that he was wrong to find such an implied term.

It is correct the statement of claim was based on an action for breach of contract. The first paragraph read:

> "1. THAT on the 26th day of July 1989 the Plaintiff entered into a contract with the Defendants to perform certain restoration works to the WSTEC Historical building at Tauese, Apia."

The statement of defence admitted it partly in these terms:

> "1. THAT he admits that on the 26th July 1989 a contract agreement was signed between the Plaintiff and Samoa Handcraft Incorporated in respect of certain

restoration works to be performed to the WSTEC historical building at Tauese, Apia, but except as expressly admitted denies each and every allegation contained in paragraph 1."

Paragraphs 2, 3, 4 and 5 of the statement of claim dealt with the price of the work and the conditions of payment in the contract and were admitted by the defence.

Paragraphs 6 & 7 read:

"6. THAT the Defendants have breached clause 31 of the Conditions of Contract in that they have failed despite repeated requests to pay the sum of $53,949 being the remaining three certificates.

7. THAT in the premises the Plaintiff considers the contract is at an end and is entitled to payment of all monies owing to it for work done."

The defence to paragraph 6 is that the Defendant is not aware of the matters and therefore denies them and to paragraph 7 is a denial.

Although at the trial, the learned judge took the, one must say, generous view that the defence described by counsel "could be said to have been obliquely pointed at" in the defence, counsel for the plaintiff was taken by surprise. At the end of the evidence, she was given time to put in written submissions in answer to those of counsel for the Appellant.

Mr Puni suggests the purpose of the statement of defence is solely to answer the Plaintiff's claim and that is what he does in paragraph 1.

We disagree. The purpose of pleadings is to show exactly and unambiguously what allegations are made by one party and what the other party admits and denies in order to define the issues and thereby to inform the parties in advance of the case they have to meet; Farrell v The Secretary of State for Defence [1980] 1 All E.R. 166 at 173. In Sim's and Cain's "Practice and Procedure" it is put, on the authority of Master Williams in the unreported case of National Bank of New Zealand v National Westminster Finance, that the underlying premise in litigation is that litigation is designed to enable the parties to deal with the real matters in controversy between them and to enable the Court to adjudicate on those matters.

We do not consider paragraph 1 of the statement of defence has defined the issue. The lower Court generously allowed the defence to be pursued nonetheless. Had it been raised before, it would no doubt have resulted in an amendment to the statement of

claim. Having allowed the defence to be put, the Court was correct to consider the question of the Defendant's liability in terms of an implied warranty.

In finding there was such an implied term, the judge distinguished the present case from the Hawkes Bay case because of the conduct of the Appellant. At the time of the issue of the second certificate of payment the Appellant told the Court he discovered Samoa Handcraft did not exist as a legal entity. He must have realised such a situation was fundamental to the contract but, far from informing the Plaintiff of that discovery, he allowed it to continue to perform the contract and incur substantial further expense and he even issued and signed two further certificates of payment. In the Hawkes Bay case, when the Defendant discovered the company he believed to exist did not, he took immediate steps to have it registered without delay.

Having distinguished the cases, the learned judge, using the 'officious bystander' test in Shirlaw v Southern Foundries [1926] 2 KB 206 following Scrutton LJ in Religate v Union Manufacturing [1918] 1 KB 592, went on to find an implied term.

With respect, we feel he did not need to go that far. He accepted that the Appellant, at the time he signed the contract, believed Samoa Handcraft Incorporated existed. Whether or not he also considered it a company does not advance the matter. What is important is that his belief is relevant in determining whether he intended to make himself personally liable. The fact the parties believed such an entity existed is evidence he did not intend so to bind himself.

However, in October, the appellant discovered the company did not exist, a fact vital to the performance of the contract. He took no steps to convey this to the other party. In fact, he did not simply sit back but issued further certificates of payment and, when they were not paid, reassured the contractor payment would be made. His conduct hid from the other party a vital matter exclusively within his knowledge and caused it to act to its detriment.

It is not necessary to review the authorities but, where a person knowingly signs a contract on behalf of a company that does not exist, there is no irresistible presumption of personal liability; Black v Smallwood [1966] 117 CLR 52, but a presumption could arise that such liability was intended. If he allows performance with knowledge the company does not exist, the presumption of his personal liability, in the words of Mahon J in Marblestone Industries v Fairchild [1975] 1 NZLR 529, seems irresistible; Kelner v Baxter [1866] LR 2CP 174.

In the present case, once the Appellant discovered the company for which he had signed did not exist and by his actions represented the contract was still valid and allowed performance to continue, his conduct clearly implied that payment would be made. He must therefore be presumed to have accepted personal liability.

The appeal is dismissed with costs to the Respondent of $1,000.