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ROYAL COURT
(Samedi Division)

23rd August, 1995 165A.

Before: The Judicial Greffier

Between	Derek Harold Kemp, Rodney George Stubblefield, Lionel Charles Fynn, David Gurney Stedman, David Arthur Peck and others practising under the name and style of Penningtons	Plaintiffs
And	Meditco Limited	Defendant

AND

Between	Meditco Limited	Plaintiff
And	Derek Harold Kemp, Rodney George Stubblefield, Lionel Charles Fynn, David Gurney Stedman, David Arthur Peck and others practising under the name and style of Penningtons (by counterclaim)	Defendants

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Application by the Plaintiffs in the original action hereinafter referred to as "the Plaintiffs") for Summary Judgment in respect of legal fees.

Advocate R.J. Michel for the Plaintiffs;
Mr. K.R. Manning for the Defendant in the original action (hereinafter referred to as "the Defendant").

THE JUDICIAL GREFFIER: The Plaintiffs are a firm of English solicitors and the Defendant is a Jersey registered company. During May and June, 1993, the Plaintiffs were acting for a Mr. S. Azoulay and/or one of his companies in relation to negotiations with the Defendant which would lead to Pincor and/or other financial institutions providing finance to the Defendant. At a particular stage of the transaction Pincor refused to deal

any further with Mr. Azoulay as he was an Israeli and it looked as if negotiations would break down. At that point it was agreed that the Defendant would pay certain fees in relation to the negotiations and the Plaintiffs subsequently produced an account for £40,116.48. The dispute in this case is in relation to the extent to which the Defendant is liable for those fees and there is a disagreement in relation to the terms and conditions upon which these were to be paid.

In England there are procedures by which a client can challenge the quantum of an account for non-contentious business and the Defendant has not sought to invoke either of these procedures because they disputed whether they were liable at all for this work.

At the first hearing on 28th February, Advocate Michel, on behalf of the Plaintiffs, made certain submissions in relation to the effect of the failure to challenge the quantum through these procedures and the issue arose as to whether, where there was such a failure, the bill was conclusively binding upon the Defendant. I indicated to Advocate Michel that the authorities which he had shown to me did not clearly establish this and he then applied for an ajournment of the hearing, which I granted upon terms that the costs thrown away by reason of the adjournment be paid by his clients in any event. As the Plaintiffs have now sought to appeal against that decision I can only conclude that they are appealing against that order for costs.

When the hearing resumed on 23rd August, 1995, a detailed affidavit of law was produced in relation to the procedures for taxation. From this it was clear that if the Defendant now wished to challenge the quantum of the billing it would have to apply to the High Court and satisfy that Court that special circumstances existed before the Court would exercise its discretion to order a taxation. However, Advocate Michel on behalf of the Plaintiffs, accepted that the situation was only conclusive in relation to the question of whether the bill was a reasonable bill for the work done and not as to the question of the extent to which Meditco were liable therefor which was really an issue on liability.

The Plaintiffs rely very heavily upon the contents of a facsimile dated 25th June, 1993 which was sent by a Mr. Shoesmith of the Defendant to a Miss Gordon who is the partner of the Plaintiffs who dealt with the matter. That facsimile reads as follows:-

"Dear Cathy,

Re: Pincor Inc

I refer to our telephone conversation of Wednesday last in relation to Penningtons charges for your time on Pincor Inc.

As agreed, Meditco will accept responsibility for the fees in this respect, but we should appreciate a full breakdown of the hours charged to this matter. As we see it you were operational, in place of Shimon, from 26th May, 1993 until Indosuez London proved abortive on 9th June, 1993.

Many thanks for your help.

Kind regards,

Yours sincerely,

Alan P. Shoesmith"

The bill which was submitted by the Plaintiffs, in fact, dealt with work between 20th May, 1993 and 17th June, 1993, inclusive which means that it starts before and ends after the dates suggested by Mr. Shoesmith.

However, the Defendant alleges that on 22nd June, 1993, another fax was sent by Mr. Shoesmith to Miss Gordon which read as follows:-

"Cathy.

Sorry I missed you at the office today - I did call back but they couldn't find you I will call you at 10 a.m. tomorrow to discuss your Pincor bill. As agreed with Shimon we will be happy to discharge your bill from the first of the various deals we have on at the moment. The only thing to discuss is the amount of the bill - £40,000 is frighteningly high. Perhaps we can go through your time charged to Pincor tomorrow. I have your involvement on file from 26th May to 9th June when Indosuez London said No. Let's work everything out in the morning.

Kindest regards."

The Plaintiffs deny ever having received this facsimile.

In the affidavit filed by Mr. Shoesmith on behalf of the Defendant in relation to this application at paragraphs 10 & 11. Mr. Shoesmith sets out his version of the facts. His version is that the Defendant was only to be liable if financing was obtained and then payment could be made out of the proceeds of the financing and the liability of the Defendant would only be in respect of those occasions when Miss Gordon replaced Mr. Azoulay as negotiator with the financing company.

Advocate Michel, on behalf of the Plaintiffs, pointed out that none of this was referred to in the facsimile of 25th June, 1993, but the Defendant's case is that that facsimile must be understood subject to the facsimile of 22nd June, 1993 and subject to the verbal conversations between Miss Gordon on behalf of the Plaintiffs and Mr. Shoesmith on behalf of the Defendant.

At the hearing on 23rd August, 1995, Advocate Michel, whilst not conceding that this was not a proper case for Summary Judgment against the Defendant, urged me very strongly to grant conditional leave. He brought to my attention section 14/3-4/15 of the 1995 White Book which commences as follows:-

> *"Leave to defend - conditional leave - The condition of payment into Court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defence set up is a sham defence or the Master "is prepared very nearly to give judgment for the plaintiff" (Wings v. Thurlow (1893) 10 T.L.R. 53). (This statement was cited with approval by Lord Diplock in M.V. Yorke Motors (a firm) v. Edwards [1982] 1 W.L.R. 444, p. 450; [1982] 1 All E.R. 1024, p. 1028 and had been quoted with approval by Devlin L.J., in Fieldrank Ltd. v. E. Stein [1961] 1 W.L.R. 1287; [1961] 3 All E.R. 681, C.A., who restored the dictum of Bramwell B., in Lloyd's Banking Company v. Ogle (1876) 1 Ex.D. 262 that conditional leave may be granted where there is something suspicious in the defendant's mode of presenting his case, or the Court is left with a real doubt about the defendant's good faith).*
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> *Leave to defend conditional on the full amount claimed being paid into Court may be ordered where the defence is "shadowy" (per Lord Denning M.R. in Van Lynn Developments Ltd. v. Pelias Construction Co. [1969] 1 Q.B. 607: [1968] 3 All E.R. 824) or there is little or no substance in it or the case is almost one in which summary judgment should be ordered. (Ionian Bank Ltd. v. Couvreur [1969] 1 W.L.R. 781; [1969] 2 All E.R. 651, C.a.) See also Paclantic Financing Co. Inc. v. Moscow Narodny Bank Ltd. [1984] 1 W.L.R. 930, C.A. On the other hand, where the defence can be described as more than shadowy but less than probable leave to defend should be given (Rafidain Bank V. Agom Universal Sugar Trading Co., The Times, December 23, 1986, C.A.)."*

I have, in the past, on a number of occasions found the test of "where the defence can be described as more than shadowy but less than probable leave to defend should be given" a very helpful test. If this test is put alongside the test in the Van Lynn Developments Ltd case of "leave to defend conditional on the

full amount claimed being paid into Court may be ordered when the defence is "shadowy" or there is little or no substance in it or the case is almost one in which Summary Judgment should be ordered.", then it is clear that there is a category of case which lies between the case in which Summary Judgment should be ordered and the case in which unconditional leave to defend should be given in which it is appropriate to order that leave only be given on condition of the payment in of a sum of money.

In this particular case, I found that the Defendant's defence was more than shadowy and I did not find that there was sufficiently good reason for believing that the defence set up was a sham defence. Accordingly, I gave unconditional leave to defend and, as the Plaintiffs were clearly well aware of the lines of defence which would be raised by the Defendant I ordered that the Plaintiffs pay the costs of and incidental to the application for Summary Judgment, in any event.

Authorities

Royal Court Rules 1992, Rule 7/1.

The Supreme Court Practice, 1995, Order 14.

Clapham, Messervy, Renouf and Bertram -v- Pinson [1992] J.L.R. N.3; (30th April, 1992) Jersey Unreported.

Lydan Developments Ltd. -v- Medens (Jersey) Ltd. [1992] J.L.R. 135.

Hambros Bank (Jersey) Ltd. -v- Glendale Hotel Holdings Ltd. and otheres, (15th December, 1992) Jersey Unreported.

Hambros Bank (Jersey) Ltd. -v- Jasper, (27th April, 1993) Jersey Unreported.

Mercantile Credit Co. Ltd. -v- Wallis, (3rd March, 1994) Jersey Unreported.

Mercantile Credit Co. Ltd. -v- Wallis (3rd June, 1994) Jersey Unreported.

Hambros Bank (Jersey) Ltd. -v- Jasper (13th July, 1994) Jersey Unreported.

Fieldrank Ltd. -v- Stein [1961] 1 W.L.R. 1287.

Chitty on Contracts (27th Ed'n) General Principles, Vol. 1.

Smith -v- Edwardes (1988) 22 Q.B.D. 10.

Jones & Son -v- Whitehouse [1918] 2 K.B. 61.

Smith -v- Howes [1922] 1 K.B. 508.

Frere Cholmeley -v- Humphreys (20th June, 1991) Unreported Judgment of the Court of Appeal of England.

Target Holdings Ltd. -v- Redferns (1995) 3 WLR 352.