1983 June 16

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

HERMES INSURANCE CO. LTD.,

Appellants-Defendants,

v.

JOULIOS THEODORIDES,

Respondent-Plaintiff.

(Civil Appeal No. 6464).

Civil Procedure—Practice—Summary judgment—Principles applicable—Order 18, *rules* 1 *and* 2 *of the Civil Procedure Rules—Burden on defendant to satisfy Court that he has a good defence - Claim on cheques which were dishonoured—Not enough for defendants to aver failure of consideration for issue of the cheques—They should "condescend upon particulars" establishing such alleged "failure of consideration" or "fraudulent representation"—Defendants' affidavit not giving sufficient facts to show that there was a good defence nor did it disclose such facts as may be deemed sufficient to entitle defendants to defend—Whether appellants could be given conditional leave to defend.*

Bills of exchange—Cheques—Principle in Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei [1977] 2 *All E.R.* 463.

By means of a specially indorsed writ of summons, under Order 2, rule 6 of the Civil Procedure Rules, the respondent-plaintiff claimed C£986.245 mils by virtue of two cheques drawn by the appellants-defendants on Chartered Bank and payable to the respondent which were subsequently dishonoured.

Upon an application by the respondent for summary judgment under Order 18, rules 1* and 2 of the Civil Procedure Rules, which was supported by an affidavit sworn by the respondent himself verifying his cause of action and the amount

* Rule 1 is quoted at p. 337 post

claimed and stating that in his belief and as advised by his counsel there was no defence to the action, the appellant Company filed an opposition accompanied by an affidavit sworn by the Secretary of the Company. At the hearing of the application for summary judgment both sides were confined to their respective affidavits and the trial Judge, after hearing argument by Counsel on both sides, refused leave to defend and signed judgment in favour of the respondent.

Upon appeal by the defendants it was contended:

(1) That the trial Judge erred both in law and in fact in reaching his decision under attack. Appellant maintained that his said affidavit "raises the defence that the consideration for the issuing of the cheques in question has failed and/or that the said cheques were issued on fraudulent representation made by the plaintiff".

(2) That "the trial Judge wrongly applied the case of *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH*, [1977] 2 All E.R. (H.L.) 463, to the facts of the present case".

Held, (1) (*after stating the principles governing the question of summary judgment - vide* pp. 337-338 *post*) that the burden is on the defendant to satisfy the Court that he has a good defence; it was not enough for the defendants to aver failure of consideration for the issue of the cheques in question; that they should "condescend upon particulars" establishing such an alleged "failure of consideration" or "fraudulent representation" as they put it in the present appeal; that that was the affidavit on which the defendants relied to show cause against such an application for summary judgment; that in fact it was the only evidence on behalf of the defendants on which the trial Judge had to exercise his discretion; that having examined the affidavit this Court holds the view that same does not give sufficient facts to show that there is a good defence, nor does it disclose such facts as may be deemed sufficient to entitle defendants to defend; accordingly contention (1) should fail.

(2) That there is no indication whatever on record to suggest that the trial Judge misconceived the principle in the *Nova Knit* case and if the insinuation is that the Judge misconceived the principle in the said case because he did not find "failure of consideration" or "fraudulent representation" on the facts

of this case, relying on the affidavit sworn by the secretary of the defendant company, the short answer to that is that the affidavit is to be blamed, for the reasons explained above, and not the Judge; accordingly contention (2) should also, fail.

Held, further, that the appellant could not be given conditional leave to defend - *M. V. York Motors (a firm) v. Edwards* [1982] 1 All E.R. (H.L.) 1024 not applicable.

Appeal dismissed.

Cases referred to:

Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH [1977] 2 All E.R. (H.L.) 463;

Stavrinides v. Ceskoslovenska Obchondi Banka A.S., (1972) 1 C.L.R. 130;

Kyprianides v. Ioannou (1966) 1 C.L.R. 265 at p. 269;

John Wallingford v. The Directors etc. of the Mutual Society [1879-80] 5 A.C. (H.L.) 685 at p. 704;

M. V. York Motors (a firm) v. Edwards [1982] 1 All E.R. (H.L.) 1024.

Appeal.

Appeal by defendants against the judgment of the District Court of Limassol (Eleftheriou, D.J.) dated the 3rd June, 1982 (Action No. 496/82) whereby on an application for summary judgment by the plaintiff they were refused leave to defend.

A. Andreou, for the appellant.

E. Serghides, for the respondent.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice A. Loris.

LORIS J.: This is an appeal by the defendant insurance company from the judgment given against it by the District Court of Limassol (P. Eleftheriou D.J.) dated the 3rd June 1982, (Limassol Action No. 496/82) on an application for summary judgment under Order 18, r. 1 of the Civil Procedure Rules, whereby the appellant-defendant was refused leave to defend.

The plaintiff's claim which appears on a specially indorsed writ of summons, under Order 2, rule 6, is based on two cheques of joint value of C£986.245 mils, drawn by the appellant company on the then Chartered Bank payable to the respondent-plaintiff, which were subsequently dishonoured.

Action No. 496/82 was filed in the District Court of Limassol on 8.2.82; service of the writ of summons was effected on 2.3.82 and the defendant company filed an appearance on 18.3.82.

On 22.3.82, before a defence was filed, the plaintiff applied for summary judgment under the provisions of Order 18, rules 1 and 2 of the Civil Procedure Rules.

The application for summary judgment was supported by an affidavit of even date sworn by the plaintiff himself, verifying his cause of action and the amount claimed and stating that in his belief and as advised by his counsel there is no defence to the action.

The defendant company filed on 27.5.82 an opposition to the aforesaid application accompanied by an affidavit sworn by the secretary of the company, namely Yiannakis Alexandrou, of Nicosia.

We shall be reverting to the facts of this affidavit later on in our present judgment.

On 31.5.82 at the hearing of the application for summary judgment both sides were confined to their respective affidavits; the defence did not apply to the Court to have anyone of its officers to be examined on oath nor did the Court order any officer of the defendant company to attend and be examine upon oath. So the learned trial judge, who had before him the two affidavits, after hearing argument by counsel on both sides, gave his decision on 3.6.82, whereby he refused leave to defend and signed judgment in favour of the plaintiff.

The appellant-defendant impugns now the aforesaid decision on two grounds:

1. That the trial judge erred both in law and in fact in reaching his decision under attack; appellant maintains that his said affidavit "raises the defence that the con-

sideration for the issuing of the cheques in question has failed and/or that the said cheques were issued on fraudulent representation made by the plaintiff."

2. That "the trial judge wrongly applied the case of *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GmbH.* [1977] 2 All E.R. (H.L.) 463, to the facts of the present case".

Our Order 18, r. 1, which corresponds to the English Order 14, r. 1 before the latter was recast by R.S.C. (Rev.) 1962, reads as follows:

"O.18, r.1 - (a) Where the defendant appears to a writ of summons specially indorsed under Order 2, rule 6, the plaintiff may on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply for judgment for the amount so indorsed, together with interest (if any), or for the recovery of the land (with or without rent), or for the delivering up of a specific chattel, as the case may be, and costs. And judgment for the plaintiff may be given thereupon, unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend."

It is thus apparent that under the Order:

(A) a plaintiff must not only satisfy the Court that there is a specially indorsed writ under Order 2, r. 6 and the defendant has entered an appearance, but he must also support the application with an affidavit made by himself, or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the action (vide *Spyros Stavrinides v. Ceskoslovenska Obchondi Banka A.S.* (1972) 1 C.L.R. 130).

(B) a defendant will have to satisfy the Court (i) that he has a good defence to the action on the merits or (ii) disclose such facts as may be deemed sufficient to entitle him to defend.

It is thus apparent from that part of r.1(a) of Order 18 which refers to the defendant "that the burden is on the defendant to

satisfy the Court that he had a good defence" (vide *Kypros Kyprianides v. Symeon Ioannou* (1966) 1 C.L.R. 265 at p. 269).

In connection with defendant showing cause against such application, Order 18, r. 3 provides as follows:

"3. - (a) The defendant may show cause against such application by affidavit, or the Court may allow the defendant to be examined upon oath.

(b) The affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff's claim.

(c) The Court may, if it thinks fit, order the defendant, or in the case of a corporation, any officer thereof, to attend and be examined upon oath, or to produce any leases, deeds, books, or documents, or copies thereof or extracts therefrom."

Now what we have to see here is: What is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment? The answer to this crucial question is to be found in the judgment of Lord Blackburn in the case of *John Wallingford v. The Directors etc. of the Mutual Society* [1879-80] 5 A.C. (H.L.) 685 at p. 704.

"... If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary (which I can hardly conceive), that the Defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.

And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the Defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when

the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I say I owe the man nothing.' Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned."

Reverting now to the affidavits sworn by the secretary of the appellant campany, the sole material on which the appellants-defendants relied in order to show cause against the present application for summary judgment:

We do not think that we should trasplant here the affidavit verbatim; we may say straight away that it is uncertain and evasive without any particulars whatever. It speaks of an express and/or implied agreement between the litigants by virtue of which the defendants delivered the two cheques in question "in full satisfaction of all the claims of the plaintiff in connection with his employment by the defendants and the termination of his employment by the defendants" (para-3(a)).

In the first place the affidavit is not a pleading where an agreement can be averred in the alternative; the affidavit is the evidence, and in this particular instance the only evidence, on which the trial Judge had to rely. If the agreement were express it should be so stated; if it were implied facts should be stated from which the implied agreement could be inferred.

Further the nature of the employment of the plaintiff with defendants should be mentioned with sufficient particularity; was he employed on a salary basis? Was he a commission agent?

No particulars are given as to the termination of his employment by the defendants, either.

We could also trace no particulars as to the amounts calculated (a) towards his salaries or commission on the one hand and (b) towards the termination of his employment.

The situation becomes more confusing when one proceeds further to para 3(b) of the affidavit where it is averred that "a considerable amount out of the aggregated amount of the two cheques represents commission not yet payable to the plaintiff" ; and immediately the question poses for an answer "what is the figure of this considerable amount?"

We need not deal with the affidavit any further. Suffice it to conclude with para 3(στ) thereof, the last paragraph, where it is stated "that the defendants have the intention of paying to the plaintiff the amounts which will be proved due to him at the end of 1982" . What are these amounts? Do the defendants mean to say that their defence comes to part only of plaintiff's claim? In such a case did their affidavit comply with Order 18, r. 3(b) of the Civil Procedure Rules referred to above?

It was not enough for the defendants to aver failure of consideration for the issue of the cheques in question. They should "condescend upon particulars" establishing such an alleged "failure of consideration" or "fraudulent representation" as they put it in the present appeal.

That was the affidavit on which the defendants relied to show cause against such an application for summary judgment. In fact it was the only evidence on behalf of the defendants on which the learned trial Judge had to exercise his discretion. Having examined the affidavit ourselves we hold the view that same does not give sufficient facts to show that there is a good defence, nor does it disclose such facts as may be deemed sufficient to entitle defendants to defend.

Turning now to the second ground of appeal notably that "the trial Judge wrongly applied the case of *Nova Knit Ltd. v. Kammgarn* (supra) to the facts of the present case", we need only point out that it is apparent from the decision of the trial Judge that he confined himself in using that part of the judgment of Lord Wilberforce which refers to bills of exchange and the limited defences available to actions thereon.

The relevant part which appears at p. 470 (letter d to e) reads as follows: "These (bills of exchange) are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments (as the Bills of Exchange Act 1882, S. 3 says 'an unconditional order in writing') which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English Law (and the German Law appears to be no different) does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made "

The principle approved in the case of *Nova Knit Ltd. v. Kammgarn* (supra) in connection with the limited defences open to actions on bills of exchange ("the cheque is a bill of exchange drawn on a banker payable on demand" vide S.73 of Cap. 262) is not a new principle but one of long standing; it was on several occasions pronounced in earlier English authorities and it finds expression in section 30 of our Bills of Exchange Law Cap. 262 as well; perhaps the "novelty" about it is that the principle was authoritatively settled by the House of Lords as late as 1977.

There is no indication whatever on record to suggest that the trial Judge misconceived this principle and if the insinuation is that the Judge misconceived the principle in the said case because he did not find "failure of consideration" or "fraudulent representation" on the facts of this case, relying on the affidavit sworn by the secretary of the defendant company, the short answer to that is that the affidavit is to be blamed, for the reasons explained above, and not the Judge.

Learned counsel for the appellant-defendant relying inter alia on the case of *M V York Motors (a firm) v. Edwards* [1982] 1 All E.R. (H.L.) 1024 strenuously argued that the defendant company should be given at least conditional leave to defend.

It must be borne in mind that the last mentioned case decided, (as Lord Diplock stated in delivering the judgment of the House of Lords) "a short point of practice and procedure" notably that "it would be a wrongful exercise of discretion to order, as a condition of granting leave to defend an application for summary judgment under R.S.C. Ord. 14, the payment of a sum which the defendant would never be able to pay, since that

would be tantamount to giving judgment for the plaintiff notwithstanding the Court's opinion that there is an issue or dispute which ought to be tried "

It is apparent from the ratio decidendi in this case that the aforesaid authority does not carry the case of the appellant any further.

Appeal dismissed with costs.