

MARTIN MOTOR COMPANY LTD

v.

DEO MAHARAJ

[HIGH COURT—Fatiaki J.—29 April 1988]

Civil Jurisdiction

Bill of Exchange—Summary judgment—purported payment by debtor defendant by conditionally endorsed cheque—limitation thereby on liability—effect thereof—no evidence from plaintiff of circumstances of negotiation—Court unable to say no triable issues.

D. Jamnadas for the Plaintiff
J. Singh for the Defendant

Martin Motor Company Limited (plaintiff) sued Deo Maharaj (defendant) for the purchase price of a used motor vehicle sold on the 15 August 1985. Payment was made by way of a NBF cheque which was dishonoured on presentation to the bank. Defendant had filed a defence denying any indebtedness to the plaintiff and counterclaiming \$1,000. He admitted making the purchase. The cheque was drawn by Motor Group of Fiji Limited for \$3,500. Defendant was the named payee and a co-signatory. In his defence he raised the conditional nature of his endorsement on the cheque, and the circumstance surrounding the sale to him of the motor vehicle by the Manager of the plaintiff, Mr Singh.

The plaintiff sought summary judgment. It filed an affidavit by Eric Martin Schultz. He deposed there was no defence to the action and that the defence and counterclaim are frivolous and vexatious. This fact alone did not dis-entitle the plaintiff from getting judgment providing it can satisfy the Court there has been no defence to its claim in the Statement of Defence.

The primary facts were undisputed, viz the sale of the car for \$3,500, and payment therefor by a dishonoured cheque. However s. 16(a) of the Bills of Exchange Act (Cap. 227) (the Act) clearly recognizes that an endorsee of a Bill of Exchange may negative or limit his liability to a holder by express stipulation in the endorsement (*Wakefield v. Alexander and Co. & Chaproniere and Co.* 17 L.T. 217. The endorsement on the reverse side of the cheque read—

“Pay Martin Motors Ltd.
 without recourse”.

Sgd. (D. C. Maharaj)”

The cheque therefore bore a conditional endorsement the effect of which avoids—

- A "All liability to any subsequent endorser as well as his immediate endorsee."

See *Castrique v. Buttigieg* 10 Moore PC 94 at p. 111 per Sir Williams Maule.

Counsel for plaintiff argued that the defence of "sans recourse" was not available to the defendant because applying only to an agent-principal transaction. He submitted it could not be raised as a defence by the drawer or payee of a cheque so as to render the cheque a conditional order, contrary to the definition (of Bill of Exchange) in s.3(1) of the Act.

B

Held: The plaintiff was the "holder" and the defendant the endorser with the liability which attached to the endorser by s.3(2) of the Act.

C

The defendant dealt personally with Mr Singh a Manager of the plaintiff, but there was no affidavit sworn by Mr Singh as to the course of dealing and negotiations pleaded by the defendant.

In the absence of clear authority and evidence as to the knowledge and intention of the parties and the circumstances surrounding their agreement, it could not be said there was no defence or no triable issues raised to the claim.

D

Application dismissed.

Defendant to have unconditional leave to defend.

Cases referred to:

E

Wakefield v. Alexander and Co. & Chaproniere and Co. 17 L.T. 2
Castrique v. Buttigieg 10 Moore PC 94

FATIAKI Mr Justice

Decision

The plaintiff company claims \$2,500 from the defendant being the purchase price of a used motor vehicle sold by the plaintiff to the defendant on the 15th of August 1985. Payment was made by way of a NBF cheque which was dishonoured on presentation to the said Bank.

The defendant has filed a Statement of Defence denying any indebtedness to the plaintiff and counterclaiming \$1,000. He admits purchasing the car and in payment therefor he endorsed to the plaintiff company a NBF cheque No. 566503 drawn by Motor Group of Fiji Ltd. for the sum of \$3,500 of which cheque he was the named payee and a co-signatory.

G

This is an application by the plaintiff company for summary judgment. It has filed an affidavit sworn by its governing director Eric Martin Schultz in which he deposes inter alia that there is no defence to this action and that the defence and counterclaim of the defendant are frivolous and vexatious.

H

The defendant has filed an affidavit in reply annexing his Statement of Defence which was filed on the 12th of August 1987 and which pre-dates the plaintiff company's affidavit and summons for summary judgment which is dated the 25th of September 1987.

This fact alone does not disentitle the plaintiff company from seeking summary judgment on its claim provided that it is able to satisfy this Court that there is no defence to its claim raised by the defendant in his Statement of Defence. A

The primary facts in this action are undisputed namely, that the plaintiff company sold a car to the defendant for \$2,500 and received in payment a cheque for the sum of \$3,500 endorsed to it by the defendant. The cheque was subsequently dishonoured on presentation.

The defendant in his defence raises the conditional nature of his endorsement on the cheque and the circumstances surrounding the sale to him of the motor vehicle by the Manager of the plaintiff company, Mr Vijay Singh. B

Section 16(a) of the Bills of Exchange Act Cap. 227 clearly recognizes that an endorser of a bill of exchange may negative or limit his liability to a holder by express stipulation in the endorsement. (See *Wakefield v. Alexander and Co. & Chaperoniere and Co.* 17 L.T. 217). C

The endorsement on the reverse side of the cheque above the signature of the defendant reads:

"Pay Martin Motors Ltd.
without recourse".

Sgd. (D. C. Maharaj)" D

It is clearly a conditional endorsement the effect of which has been described as avoiding "... all liability to any subsequent holder, as well as to his immediate indorsee. . . ." (per Sir William Maule in *Castrique v. Buttigieg* 10 Moore PC 94 at p. 111).

Furthermore, in that case at pp. 108 and 109 may be found the following passage: E

"The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties and the circumstances (such as the usage of the plaintiff, the course of dealing between the parties and their relative situations) under which the delivery takes place: thus a bill, . . . with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser who agrees to sell his claims against the prior parties, but stipulates not to warrant their solvency. In all these latter cases the indorser is not liable to the indorsee, and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law." F G

Clearly the circumstances surrounding the contract and the intention of the parties to it are important matters for the consideration of this Court in determining the liability of the defendant. In this regard it is to be noted that the defendant dealt personally with Mr Vijay Singh a manager of the plaintiff company and as such an affidavit sworn by him dealing with the course of dealing and negotiations pleaded by the defendant, might have been of greater assistance to the Court. H

A Counsel for the plaintiff company argues that the defence of "sans recourse" (being the French equivalent of 'without recourse') is not available to the defendant because it only applies to an agent and principal situation and cannot be pleaded by the drawer or payee of a cheque so as to render the cheque a conditional order in contravention of section 3(1) of the Bills of Exchange Act Cap. 227.

The fact that the indorser in this case is both the payee of the cheque and a co-signatory to it might require some closer examination.

B It cannot be doubted that the plaintiff company is by definition a "holder" by virtue of a special endorsement to it *or* that the defendant is the "endorser" of the cheque with liability attaching under section 55(2) of the Bills of Exchange Act if a conditional endorsement cannot be pleaded or entertained.

C But in the absence of clear authority and evidence as to the knowledge and intention of the parties to the contract and the circumstances surrounding the endorsement of the cheque, I am unable to hold that the defendant has no defence to the claim or that there are no triable issues raised in the defendant's defence.

In the circumstances, the plaintiff company's application for summary judgment is dismissed, the defendant is given unconditional leave to defend.

D *Application dismissed.*