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NOT RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 3/89

BETWEEN ROBERT ARTHUR PLAYLE, DAVID LAKIN and PAKIETO FALE all of Auckland, Shareholders

First Appellants

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AND VEN-LU-REE LIMITED, a duly incorporated company having its registered office at Auckland

Second Appellant

A N D RICHARD JOHN MONEY of Auckland, Company Director

First Respondent

AND STUART CRAIG ENNOR of Auckland, Barrister

Second Respondent

Coram: Cooke P.
Bisson J.
Ellis J.

Hearing: 20 March 1989

Counsel: W.G.C. Templeton for Appellants
B.P. Henry and Kathy M. Riddell for Respondents

Judgment: 20 March 1989

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JUDGMENT OF THE COURT DELIVERED BY COOKE P.

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The facts leading to this appeal are both complicated and unusual. No good purpose would be served by reciting them in full. They have been fully traversed in argument. Counsel have been unable to find any authority truly in point despite considerable searches. In the circumstances

we will state the main facts and our conclusions and the reasons for it briefly.

We consider that Chilwell J. had jurisdiction under Rule 35 of the Court of Appeal Rules to impose, as he did on 30 May 1988, on the granting of a stay of execution of his judgment of 11 March 1988 a condition that the appellants make an interim payment to the respondent of a sum to be fixed by the arbitrators in the existing arbitration under s.15 of the Arbitration Act 1908. On 29 September 1988 the parties confirmed in signed writing an agreement reached at their conference on 22 September 1988 specifying the basis of the intended determination and interim award, including a timetable contemplating that this would not be given until after the fixture for the hearing in this Court, namely 7 October 1988. In the event this Court determined and allowed the appeal on that day. The arbitrators' interim award fixing the amount of the interim payment as $300,000 with interest was delivered on 4 November 1988.

On 5 December 1988 without any objection being taken to jurisdiction by the appellants Chilwell J. made an order adopting the amount in the interim award, subject to a variation as to interest. As to payment he ordered:

> That the second defendants pay to the plaintiff $300,000, as fixed by the arbitrators in terms of para (c) of the order plus interest thereon at 11% per annum from 26 November 1987 to the date of payment.

We hold that he had jurisdiction to make that order by virtue of Rule 35, his prior order of 30 May 1988 and the agreement of the parties dated 29 September 1988 whereby they accepted by necessary implication that liability to make the interim payment was to survive the appeal. If necessary we treat the order for payment of 5 December 1988 as made under s.16 of the Arbitration Act. Such an arbitration is incidental to Court proceedings and the Court has wide powers in relation to it: compare Davidson v. Wayman [1984] 2 N.Z.L.R. 115. For these reasons the order is an enforceable order of the High Court.

We think, however, that the present appellants should not have to make such a considerable interim payment without obtaining control of the company. Accordingly condition (c) in the order of 5 December 1988 (p.34 of the Case) will be amended to read:

> (c) That at the time of such payment the Plaintiff sign and deliver registerable transfers of his shares in the Defendant Company to the Second Defendants and an effective and irrevocable notice of his resignation as a director of the Company.

The appellants, i.e. the second defendants referred to in the order, should have approximately three weeks from today to make the payment, so in condition (b) the date 24 December 1988 will be replaced by 14 April 1989.

Condition (d) as to the Plaintiff's undertaking will stand with the addition after 'the sums' of 'or part thereof'.

Condition (e) will stand with the addition at the end of 'before his resignation as a director'.

Condition (f), reservation of costs, will also stand.

We do not regard it as appropriate to add a condition as to disclosure of information bearing on another dispute between some of the parties, as suggested by Mr Henry.

The stay granted by Chilwell J. on 7 March 1989 will stand. Leave is reserved to apply to the High Court in that regard.

Subject to the amendments that we have specified, the appeal is dismissed. There will be no order for costs of the appeal.

R B Cooke P.

Solicitors:
Sellar Bone & Partners, Auckland, for Appellants
Dyer Whitechurch & Bhanabhai, Auckland, for First Respondent