No Special Consideration

A179/72

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

NO.

BETWEEN RHONA IRENE NGATIAWA FRASER of Station Drive, Kaitoke, Upper Hutt, Pony Breeder

Plaintiff

AND RAYMOND KEITH GOUGH of 11 Awamutu Grove, Lower Hutt, dealer

Defendant

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Hearing: 21 November 1973

Oral Judgment: 21 November 1973

Counsel: K. Robinson for Plaintiff
J.R. Billington for Defendant

ORAL JUDGMENT OF COOKE J.

This is a notice of motion for an interim injunction. Broadly speaking, the plaintiff seeks to restrain the defendant pending the trial of the action from entering upon certain land at Kaitoke. On that land the plaintiff lives and carries on the business of a pony breeder. The property was purchased in or about 1960. The plaintiff and the defendant lived together there until October 1971. There was a de facto relationship between them. They then fell out. The defendant now lives in Lower Hutt. His business is described as that of a dealer. He claims an interest in the Kaitoke property under two documents, or evidenced by two documents, one dated June 1960 and the other a more informal writing dated 14 August 1964. The first of these documents records that the lender, that is the defendant, has advanced and will advance monies to the purchaser, that is the plaintiff, to enable her to complete the purchase of the property in question and that in consideration of such advance or advances the purchaser acknowledges a one half share of the lender in the said land and in the proceeds. The second is a short statement reading :

I hereby acknowledge that Raymond Keith Gough has a one half interest in all that land in Certificate of Title Number A4/88, 6 acres 3 roods 19.7 perches.
Dated 14 August 1964.

Signed Rhona Fraser

Witness
W.V. Gazley
Solicitor
Wellington

The circumstances surrounding the execution of these two documents, and in particular of the second document, have naturally not been canvassed on the hearing of this interlocutory application.

It is clear that, although the close relationship which existed between the parties for a decade has now manifestly come to an end, the defendant has sought to insist upon entering the property and exercising what he contends to be his rights thereon. It is also clear that this has occasioned vexation and distress to the plaintiff. There are quite a number of recent cases dealing with the circumstances in which it is proper to grant or refuse an interim injunction. Two of the more authoritative cases are decisions of the Court of Appeal in England. In Hubbard v. Vosper 1972 1 All E.R. 1023, 1029, Lord Denning M.R. said :

> In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead. For instance, in Fraser v. Evans 1969 1 All ER 8, 1969 1 QB 349 although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

That approach was also adopted by a Court of Appeal not including the Master of Rolls in Evans Marshall & Co. Ltd v. Bertola 1973 1 All E.R. 992. At p.1004 Sachs L.J. cited the statement by Lord Denning M.R. just quoted and referred to an earlier judgment of his own in which he had held that flexibility was an essential feature of the Court's jurisdiction. Observations to similar effect were also made by Edmund Davies and Cairns L.JJ.

While flexibility is essential, there are certain kinds of consideration to which it is customary to have regard in such cases. Those primarily relevant in the present case can be put under three broad heads. First, the prospects or otherwise of success in the action; secondly, the conduct of the parties; thirdly, the balance of convenience. They are not the only matters or heads to which I have had regard. In particular I have considered the submissions by Mr Billington for the defendant based on allegations of delay on the part of the plaintiff in seeking this interlocutory relief, but I do not think there is any substance in that particular point in the light of the whole history of this complicated litigation. All the matters appearing to be of true importance can be considered in terms of the three heads.

Turning then to the plaintiff's prospects of success in the action, it seems to me that she can be said to have reasonable prospects of obtaining the relief she seeks, being essentially some form of permanent injunction. It is difficult at this stage, and on the limited material and the limited argument heard by the Court, to reach a firm view on the effect of the two documents relied upon by the defendant or on the effect of the financial contributions towards the purchase, maintenance or development of the property which he claims to have made. But there are three matters indicating that the plaintiff's position at the

substantive hearing will be by no means without strength. In the first place, there is a suggestion in one of her affidavits that the documents were intended, by her at all events, as no more than a security for monies advanced by the defendant; that is in paragraph 19 of her affidavit sworn on 4 May 1972. To some extent that is supported by the terms of the more formal document, but whether that be the true view of either document or or of the transaction as a whole it is not practicable to determine at the present stage. I merely say that it is an issue likely to arise. In the second place, there is the fact established by the defendant's answers to interrogatories that when this property was bought he was an undischarged bankrupt. Mr Robinson contends that in consequence any interest the defendant might have acquired in this land passed to and is still vested in the Official Assignee. On this part of the case he referred to In re New Land Development Association and Gray 1892 2 Ch. 138, Ex parte Waters (1874) 18 L.R. Eq. 701, and Timmings v. Treadgold 1923 N.Z.L.R. 72. Mr Billington seeks to meet the point by saying that it is not one capable of being raised by the plaintiff. Mr Robinson suggests that there is at least tacit authority to the contrary. In the third place, there are authorities indicating that, at least as between husband and wife, although each may have a proprietary interest in the premises in question or some right of entry upon those premises, an injunction at the instance of the wife to exclude her husband may nevertheless be granted: Symonds v. Hallett (1883) 24 Ch.D.346; Phillips v. Phillips 1973 2 All E.R. 423. In the latter case the parties were joint tenants of a house. It is true that here one is not concerned with a dispute between husband and wife, but it would not be at all surprising, in my view, if the Court were to hold that parties to a former de facto union now terminated might be treated as in much the same position for the purposes of such a discretionary remedy as injunction.

For those reasons, while I do not feel able to go as far as to say that the plaintiff has established a strong probability of success at the trial, I do think that she has established a reasonable prospect of success. The mre absence of a strong probability is not decisive against the present application if due regard be given to the importance of preserving the flexibility and discretion emphasised in the cases in the Court of Appeal in England already cited.

The second head is the conduct of the parties. As to that, the evidence before the Court comprises three affidavits by the plaintiff with some support from an affidavit by Mrs Pamela Joyce Maunsell, one affidavit by the defendant sworn as recently as today, and an affidavit by a secretary employed by the defendant's solicitors exhibiting a copy of a letter sent by them to the plaintiff's solicitors and bearing mainly on the matter of delay. There are also answers by the defendant to interrogatories, sworn on 18 October 1973. Some reference has been made to these in the course of the argument. It is unnecessary to take up time by going through the affidavits in detail. The tenor of the plaintiff's affidavits, confirmed to some extent by that of Mrs Maunsell, is summed up in paragraph 2 of her second affidavit, sworn on 15 November 1973. After referring to a consent order made on 17 May 1972 that the defendant should vacate the flat at 7 Station Drive Kaitoke, she goes on to say :

> This he did after the making of the Order but he has continued to visit the property regularly and, as I believe the following events will show, has done his utmost to cause trouble and inconvenience.

She then deals with what she describes as the major incidents, many of which involved alarming or causing risk of harm to the plaintiff's ponies and horses. In her latest affidavit, bearing yesterday's date, she says :

That since the hearing before His Honour Mr Justice White on the 2nd day of November 1973 the Defendant has continued to visit the property in question. On Sunday the 4th day of November 1973 he arrived with various members of his family and spent some time gazing into a garage which I was using as a temporary stable for a mare about to foal. On Thursday the 15th day of November he entered the property leaving open a pair of gates which I had closed for the purpose of separating a dry mare from two mares with foals. On Sunday the 18th day of November he arrived during the morning again with various members of his family. My truck was parked in such a position that he could not proceed further into the property. I was loading onto it two young horses. The Defendant stopped his car a short distance from my truck and proceeded to sound the horn very loudly on a number of occasions in a manner calculated to, and which did in fact, frighten the two horses. I asked the Defendant to wait for a few moments while I finished loading the horses but he continued with this previous conduct. After I had finished loading my truck he drove onto the property where he and various members of his family proceeded to stroll around it. The Defendant entered my garage and went through the door to the clothesline and lawn and again went and stood by the garage referred to above.

That the Defendant's continual visits and harassment are having a bad effect upon my health, I have difficulty in sleeping and am obliged to take various tablets to assist me with sleeping and generally for my nervous state.

It may be understandable that no affidavit in reply to that was filed, having regard to the time factor. I did, however, give counsel for the defendant an opportunity of informing the Court of any answers the defendant might have to these allegations. Counsel mentioned a number of matters and these I shall deal with when discussing the balance of convenience. The actual incidents deposed to by the plaintiff were not specifically denied, as I understood counsel. In

the defendant's own very recent affidavit there is a striking absence of particularity. As to the question of vexatious conduct all he says is : 'I take issue with many of the questions of fact contained in the affidavits sworn and filed in support of the plaintiff's application'. His counsel argued that, this not being a case pleaded in nuisance, malice was irrelevant and in any event had not been made out. On such material as there is before the Court - and I refer specifically to the three affidavits of the plaintiff and Mrs Maunsell's affidavit - I am bound to say that there appears to me to be a prima facie case of malicious and vexatious conduct. Nor do I accept the view that malice is irrelevant when an injunction is sought in such circumstances.

Coming now to the third head, namely the balance of convenience, counsel informed me that the substantive trial could take place in the first half of February. The question therefore is essentially what should be done over a period of between two and three months, including the Christmas period. Such a question must be looked at from the point of view of both sides. From the point of view of the plaintiff there can be no doubt that freedom from being harassed and disturbed is much to be desired. As already indicated, prima facie she has good ground for complaint on that score. From the point of vidw of the defendant certain matters bearing on the balance of convenience were put to me by his counsel. One general matter mentioned was that, although the defendant now lives elsewhere, he likes in the weekends to stretch his legs and breathe the country air. That is understandable, but I do not consider that predilection for rural surroundings in one's periods of leisure can weigh a great deal on an application such as this.

The other matters mentioned were, on my analysis, seven in number. First it was said that he claims to be a part owner and has lived and worked on the property for some 11 years. Secondly it was said that he had paid £500 towards the purchase of the property and had also arranged a mortgage. Those two points may be taken together. They go to the question whether he has rights in the property, and if so the extent of them. Inasmuch as the property is not the source of his livelihood, or at least not to any significant extent, nor his home, I do not regard them of much weight on the balance of convenience. The third matter was that there is a bulldozer said to belong to him on the property and he wishes to ensure that it suffers no damage. The fourth was that there is a partly-constructed dwelling on the land, the suggestion being that if it is left in its present state it will deteriorate. The fifth was that there is outstanding maintenance in respect of other buildings on the land, and the sixth, of somewhat similar character, was that there is a garage there which the plaintiff has recently used as a stable. As regards the third, fourth, fifth and sixth matters, it seems to me that with the summer season virtually commenced and the action able to be tried in February it is unlikely that any marked deterioration will occur to any of the items of property mentioned. Another point, number seven, was there is a tenant, evidently to some extent an ally of the defendant, in premises on the land and the defendant is said to fear for what was described as this person's 'safety'. Evidently there are proceedings pending against this tenant in the Magistrate's Court. Counsel for the plaintiff indicated that, if put to her election, the plaintiff would accept as a condition of an interim injunction that she should not pursue those proceedings or seek to eject the tenant before the Supreme Court case is determined. In my view there should be such a condition. That disposes of the seventh poi

Weighing the matters raised on behalf of the defendant against those raised on behalf of the plaintiff, I think the scales come down unmistakably on the plaintiff's side. The balance of convenience as I see it is very much in favour of maintaining peaceful relations between these parties until the real issues between them can be determined; and from what appears in the affidavits and what has been said at the bar today, I am satisfied that the only way of maintaining peaceful relations and preventing irrational conduct between them is to keep them apart and to keep the defendant off the land until the trial. When that view of the balance of convenience is taken together with the considerations I have mentioned on the other two heads, a proper case for the grant of an interlocutory or interim injunction is made out and in the exercise of the Court's discretion I propose to grant it. It will be granted, however, on the usual condition that the plaintiff give an appropriate undertaking as to damages in terms of Rule 468B of the Code. As already indicated, it will also be subject to the condition regarding the position of the tenant. With regard to the precise wording of the injunction I am prepared to give counsel an opportunity to be heard further should they so wish.

In view of what counsel have now said the injunction will be in the terms sought in the notice of motion dated 1 November 1973 subject to the modification 'except as expressly authorised by the plaintiff' in respect of representatives of the defendant.

There are two matters to be mentioned in conclusion. In the first place this injunction is of course purely temporary and is granted on the footing that the action will now be brought on for trial on or about the date in February mentioned by counsel during the course of the argument. The second I mention less for the benefit of counsel, to whom it will be obvious, than for the benefit

of the parties themselves, to whom it may be less obvious. A temporary injunction of this kind does not mean that the Court has reached any opinion or anything in the nature of a final judgment on the issues in this case. Those remain to be argued and decided when the action itself comes on for trial.

RB Cooke J.

Solicitors:

McGrath, Robinson & Co., Wellington, for Plaintiff
Stacey, Smith, Gibson & Holmes, Wellington, for Defendant