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IN THE SUPREME COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.103/80

BETWEEN FASHION DISCOUNTERS LIMITED (formerly called and known as CARLAWS FASHION DISCOUNTERS LIMITED)
Plaintiff

A N D DAVID NATHAN PROPERTIES LIMITED
Defendant

Hearing : 10th March 1980

Counsel : W.M. Bryan for defendant in support
G.P. Monteith for plaintiff to oppose

Judgment : 11th March 1980

(ORAL) JUDGMENT OF BARKER, J.

This is an application to set aside an ex parte interim injunction made by me on 8th February 1980.

The facts are relatively simple. The defendant is the lessee of a building of shops and offices in Customs Street, Auckland, known as Achilles House. It leases the land on a Glasgow lease from the Auckland Harbour Board. The defendant originally granted a lease of shop premises on the corner of Commerce and Customs Streets to a menswear retailer called John Bolton Limited for a period of three years and two months, which period expired on 31st January 1980. In or about June 1978, John Bolton Limited entered into a written agreement for sale and purchase with the plaintiff, to transfer and assign its interest in the lease to the plaintiff and also to sell to the plaintiff the fittings and other chattels on the premises. The purchase price for the assets was $20,325 including the sum of $7,000 good will for the lease.

The defendant gave its consent to this assignment by way of deed dated 12th September 1978. It was a term of th

lease that the lessor would sell only menswear and accessories from the premises. The managing director of the plaintiff company, Mr Carlaw, states in his affidavit, that he obtained the consent of the defendant through its secretary, Mr Browne, to the sale by him of ladies' clothing. Also, there seems to be some support for this contention from an affidavit made by Mr Bolton in proceedings between John Bolton Limited and the present plaintiff (under its former name) in A. No. 206/79. This affidavit, sworn in May 1979, states inter alia that Mr Bolton approached the secretary of the defendant, Mr Browne, who agreed that the landlord would assign the lease of the premises to the present plaintiff, and would allow it to sell from the premises menswear, womenswear and childrenswear.

The defendant denies that it agreed to the sale of women's and children's wear from the premises and commenced proceedings in respect of this matter for termination of the lease in A.1888/79. A defence to this action was filed, alleging that Mr Browne had permitted the defendant to sell mixed clothing on the premises. This is denied by Mr Browne. I note that the defence to that action was the affirmative one that the landlord had consented to the particular use of the premises; there was no alternative application for relief against forfeiture.

The contention of the plaintiff is that it had agreed with the defendant that it would receive from the defendant a new lease of the premises upon the expiry of the existing lease, on the same terms and conditions as given to other tenants in the building on the basis that the head lease between the defendant and the Auckland Harbour Board was due for renewal and was in fact renewed. This contention to Mr Carlaw is denied by Mr Browne.

Mr Browne deposed that he sent to all tenants, including, he believes, the plaintiff, a circular letter to tenants pointing out that the lease expires in January 1980 to coincide with the

expiry of the head lease from the Auckland Harhour Board; in that letter, he said:

> "Because some tenants have requested an assurance as to future tenure, the Directors have requested me to advise tenants that it is the present intention of the Company to renew its lease with the Auckland Harbour Board in January 1980; The Company would then be prepared to offer new leases to existing tenants for a further period of four years to January 1984.
>
> The rental payable would be adjusted in January 1980 after the Company has been informed of the ground rent payable to the Auckland Harbour Board, and a further review of rental would be made in January 1982."

Mr Carlaw denies that such a letter was ever received by him; I cannot, in interim injunction proceedings, resolve the conflict of evidence between the parties as to whether there was any agreement. It does seem that a case could be made out, on the evidence of Mr Carlaw, if accepted, that there was an agreement that there would be a renewal of the lease and that the term, as is customary in commercial leases, be for the same period as that offered to other tenants, and at a rental to be fixed by agreement, or, failing agreement, by arbitration; this is the normal way of fixing rents on commercial properties in Auckland City. Mr Monteith has filed an amended statement of claim seeking specific performance or damages in lieu; the question as to the exact arrangements between the parties will be one to be litigated at the substantive hearing of that action.

The question before the Court at the present time is whether the interim injunction should be continued. Argument was addressed to me as to the proper test, it being said that whilst there might be a serious question to be argued, namely, the test laid down in American Cyanamid Co. v. Ethicon Limited (1975) A.C. 396, there was not a "strong prima facie case" as required by the earlier House of Lords decision in Stratford & Son Ltd. v. Lindley (1965) A.C. 269, which was followed by the New Zealand Court of Appeal in Northern Drivers Union v. Kauwau Island Ferries (1974) 2 N.Z.L.R. 617.

In an unreported decision of Greenwich v. Murray & Ors (A.507/77, Wellington Registry, Judgment December 1977) I looked forward to a statement from the New Zealand Court of Appeal as to the proper test to be followed by Courts in New Zealand in the light of the Cyanamid case. I pointed out there that the Australian decisions still followed Stratford v. Lindley and that there was some division of opinion amongst New Zealand Supreme Court Judges. Most of the cases have recently been collated in a comprehensive article by Mr B.V. Harris in (1979) N.Z.L.J. 525.

Since that article was written, there has been some limited assistance provided by the Court of Appeal in an unreported decision called Congoleum Corporation v. Polyflor Products (N.Z.) Limited (Judgment 18th July 1979). Cooke, J. there considered that the case under consideration had unusual facts; whilst it had been suggested that the practice under the Cyanamid decision was somewhat different from previous New Zealand practice, His Honour considered that there was no need to travel into that question. He did rely on the statement of Lord Diplock at p.409 of the Cyanamid judgment:

> "I would reiterate that in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

Cooke, J. considered that, in the special circumstances of the case before him, justice required an interlocutory injunction.

Richardson, J. proceeded on the basis that it was common ground that there was a serious question to be tried and he was of the opinion that the balance of convenience was clearly in favour of granting an interim injunction. Richardson, J. did not traverse the Cyanamid and Stratford v. Lindley approaches; it seems clear that he accepted the Cyanamid approach.

The third member of the Court of Appeal, Somers, J., said of the Cyanamid decision:

> "I do not understand the case to suggest any rigid or mechanical rules by which the Court must abide in deciding whether the flexible and discretionary remedy of injunction should go in interlocutory manners. Browne L.J. referred to that point in Fellowes and Son v. Fisher (1976) 1 Q.B. 122, 138-139. I agree with what he says."

One therefore looks to Fellowes v. Fisher which, I suggested in the Greenwich case, provided a key to the apparent discrepancy between the two House of Lords decisions. One can see that Browne, L.J. considered that the House of Lords did not intend to lay down rigid rules for the exercise of the discretionary remedy.

The same proposition has been stated in the Canadian case of Lambair Limited v. Aerotrades (Western) Limited, where Matas, J.A., in the Manitoba Court of Appeal, said at p.508:

> "In my respectful opinion, it is not necessary, in an application for interlocutory injunction, in Manitoba, to follow the consecutive steps set out in the American Cyanamid judgment in an inflexible way; nor is it necessary to treat the relative strength of each party's case only as a last step in the process."

It seems too there is some differentiation to be made between the cases where there is no argument as to the facts and cases where there are facts which must eventually be determined at the substantive hearing. In the Greenwich case, for example, the prime question for determination was whether a clause in a contract of employment was too wide as imposing a restraint on trade. On occasions where there is no dispute as to the facts, and the question is one of interpretation of a statute or of previous authority, the Court must, of necessity, make greater inquiry into the legal merits of the case. This approach is shown by a recent decision in the public law field of the English Court of Appeal in Smith and Others v. The Inner London Education Authority (1978) 1 All E.R. 411, 426 where, referring to the Cyanamid decision, Lord Justice Geoffrey Lane said:

> "Indeed the whole purpose of the decision in that case was to avoid the necessity of the court

> trying the case in advance on inadequate facts and argument and to provide rules designed to ensure that a fair balance was maintained between the parties until trial. The present case is dissimilar from American Cyanamid Co v. Ethicon Ltd in almost every particular. There is no material dispute about the facts. The authority have contended that the principles in that case are not appropriate to cases where the issue is the propriety or otherwise of the exercise by a public authority of its statutory powers and they pray in aid the decision of their Lordships in Hoffmann-La Roche & Co AG v. Secretary of State for Trade and Industry, and particularly the speech of Lord Reid. The plaintiffs on the other hand have argued that they can show they have 'a real prospect of succeeding' at the eventual trial. As a result of these various contentions it has been necessary for each side to deploy in full all the legal arguments and for this court to give to them such mature consideration as it has been able. Consequently, to apply the rules laid down by Lord Diplock (which are designed to circumvent the necessity of deciding disputed facts or determining points of law without hearing sufficient argument) would in the circumstances seem to be inappropriate. The outcome of the full argument applied to the undisputed facts is to my mind clear."

However, as indicated, in the present case, the facts are far from clear and will only be made clear after a full hearing with cross-examination of the relevant witnesses.

Accordingly, I consider that the test of an "arguable question" is one of the matters to be taken into account in deciding whether the justice of the case requires that the injunction in this case be continued. It is not necessarily to be regarded as a threshold matter. I therefore look at the question of the adequacy of damages as a remedy.

The information before the Court indicates that the defendant is a very prosperous landlord company. However, the information regarding the financial position of the plaintiff is far from satisfactory. It is not denied that winding-up petitions were presented against the plaintiff company on two occasions last year. These were paid off but the fact that they were presented does raise some question as to the plaintiff's financial stability. However, I think in the circumstances which I shall discuss towards the end of my judgment, arising from my dialogue with counsel, that this particular difficulty can, in the circumstances, be

overcome.

Mr Bryan argued that damages would be an appropriate remedy in lieu of specific performance. I do not think that I can make this decision now. That must be for the Judge who hears the action for specific performance. The plaintiff claims that it has the lease of an obviously valuable shop site. The defendant says, well, it has another prospective tenant who wants not only the shop site but also a further area at the rear. However, I think that the balance of convenience must be to allow the plaintiff to litigate its claim for specific performance. It should be allowed to do so on stringent terms.

Counsel agreed that the proper rental for the shop, in the light of the new lease granted to the defendant by the Harbour Board, would be $800 per month. The defendant has prudently not accepted any rental from 1st February 1980; if I were to make the payment of $800 per month until the conclusion of the hearing a term of an injunction, without prejudice to the right of the defendant to argue that there was no lease given, I think that such a condition would satisfy the justice of the case.

Mr Monteith was also disposed to agree, as terms, to an order for security for costs under Section 467 of the Companies Act 1955, within a reasonable time and also that the various actions be heard very promptly.

Accordingly, the justice of the case requires in my view that the injunction be continued on fairly strict terms. The previous order will be varied and the injunction continued on the following terms:

(a) Within 48 hours the plaintiff pays to the defendant the sum of $1,600 being rental for the months of February and March 1980. Such rental may be accepted by the defendant without prejudice to its right to claim at the substantive hearing that there was no lease between the parties. If indeed that is the situation, the $800 per month will go towards damages for mesne profits or other damages;

(b) The ~~defendant~~ Plaintiff is, on the 1st day of each month pending final resolution of the action, to pay to the ~~plaintiff~~ defendant the sum of $800 for rental;

(c) The ~~defendant~~ Plaintiff is to pay or secure the sum of $1,000 as security for costs pursuant to Section 467 of the Companies Act 1955, such payment to be made or secured within 14 days; I leave it to counsel to consider an appropriate method of payment or security with liberty to apply;

(d) The present action is to be heard, together with A.1888/79 between the same parties, and both parties are to join in setting down both actions for trial within 14 days; all pleadings and interlocutory matters to be completed by then;

(e) If requested by the defendant, the plaintiff is to join in an application for an urgent fixture.

(f) Liberty to both parties to apply.

There is urgency, in view of the defendant's alternative arrangements with another potential tenant which are due to mature in June.

The question of costs in respect of this action is reserved pending the final hearing and will be resolved by the Judge who hears the final action between the parties.

R.D. Barker J.

Solicitors:

Duncan, Flower & Co., Auckland, for plaintiff.

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for defendant.

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