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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.17/84

260

BETWEEN JOSEPH PATRICK TREVOR MOLLOY

Plaintiff

A N D ELIZABETH RICHARDS

Defendant

IN CHAMBERS:

Hearing: 17 February 1984

Counsel: C.A. McVeigh for Plaintiff
D.H. Hicks for Defendant

Judgment: 21 FEB 1984

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JUDGMENT OF COOK J.

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While no finding of fact is made in relation to this application, it appears from the affidavits filed that on 21st April 1982 the parties entered into a contract for the sale by the defendant to the plaintiff of standing trees on the former's property at Glenroy. The logging period was to extend over what is described as "two summer seasons", commencing in the summer season of 1982/83. The agreement provided a formula and procedure for calculating the total price, but required a minimum amount of $69,558. This was to be paid by a deposit of $14,000, half on the signing of the agreement and not later than 10th April 1982 and the other half before logging commenced; thereafter, payments were to be made during the '82/83 logging season at the ráte of $5,000 per month. That is by no means the total content of the agreement, but sufficient for present purposes. It seems that $7,000, the first half of the deposit, was paid in April 1982 and the second half on 10th November 1982.

The plaintiff experienced problems, which he ascribes to the weather, an explanation which the defendant does not accept, and found difficulties meeting the payments required of him. On 3rd March 1983, Miss Richards' solicitors wrote to the plaintiff's solicitors a letter in which they

stated that it was quite apparent that the plaintiff was unable to perform his obligations under the agreement with regard to either maintaining logging at an acceptable, required level or making the cash payments as stipulated. They suggested, without prejudice to Miss Richards' strict legal rights, that the agreement be renegotiated. A meeting was held, one outcome being that the monthly payment was reduced to $4,000. It seems that two such payments, or the equivalent,were made but further difficulties were encountered.

The plaintiff's solicitors then wrote; in brief, asking that the plaintiff should be able to remove $4,000 worth of timber over the winter months as wet weather had prevented removal during April and May. This letter was acknowledged, but nothing seems to have come of the request. Later in June, Miss Richards' solicitors wrote again, asking for payment for the $4,000 which they claimed had been due at the end of May. In September 1983 the Canterbury Forestry Foundation, which markets and manages the sale of timber throughout Canterbury and acts as forestry advisor to the defendant, wrote reviewing the situation at that time pointing out that, on the previous season's logging rate, the volume of wood remaining could not be harvested before 31st May 1984 as required by the agreement; that Miss Richards would not be willing to extend the term and suggesting that a new agreement be negotiated based on a smaller volume; should the plaintiff wish to continue, however, with the original agreement, eight monthly payments of $4,820 would be required to be paid on the 20th of each month commencing on 20th October 1983, thus making up the balance of the minimum sale price of which $31,000 had so far been paid. This was followed by a letter,undated but which must have been sent between 20th October 1983 and 18th November 1983, pointing out that they had not received a reply to their earlier letter or the payment due on 20th October. It stated that unless that payment and the one due on 20th November were paid by the latter date, the sale agreement would be cancelled and access to the trees would be denied. To this the plaintiff's solicitors responded on 18th November, saying that their client had every intention of honouring the agreement with Miss Richards but had encountered numerous difficulties in meeting his commitments, most of which had not been of his own making; that he agreed to continue to make payments of $4,820

on the last day of each month until 30th June 1984 and requested a month's extension of the time in which the contract was to be completed. The Foundation wrote on the 22nd November stating that Miss Richards did not agree to the plaintiff's request for a further delay in payment or for an extension of one month to the logging completion date. The letter then stated that, according to their earlier written notice, as they had not received the schedule payments due on 20th October and 20th November, they regarded all existing contractual arrangements for sale of timber between Miss Richards and the plaintiff to be terminated. Miss Richards, however, was prepared to negotiate a new agreement for part of the wood. They set out the basic terms and asked to be advised not later than 30th November if the plaintiff wished to take up Miss Richards' offer. Conditions upon which the plaintiff might continue logging were set out. His solicitors wrote on 30th November stating the plaintiff's wishes, the details of which need not be stated, but they included the statement that certain areas from which the plaintiff wished to continue removing timber had a recoverable timber value of $39,322; that as the plaintiff had already paid $31,000 this left the sum of $8,322 to be paid over the next seven months. Accordingly their client proposed to pay monthly the sum of $1,188.85, such payments to be made on the last day of each month until 31st May.

On 12th December the Foundation wrote stating that they now considered all existing contractual arrangements for the sale of timber between Miss Richards and the plaintiff to be terminated. They assumed from the last letter mentioned that the plaintiff wished to finish logging certain blocks and accordingly they had drafted a new agreement. This was offered without prejudice to Miss Richards' rights under the earlier agreement and it was stipulated that this agreement must be signed and returned to their office by 4 p.m. on 16th December 1983 together with payment of $2,567 being the first payment due; failing that, Miss Richards would make such other arrangements as she considered necessary to complete the sale of her trees. It seems that the fresh agreement which was sent had been signed on Miss Richards' behalf. As they had received no reply by 20th December, they wrote stating that they assumed the plaintiff did not wish to take up the offer and they therefore

advised that no further felling of trees on the property by him would be permitted. He might gain access to the property to remove logs which had already been cut or his machinery or equipment, but only by arrangement with the Foundation or Miss Richards. To this the plaintiff's solcitors responded on 22nd December sending the contract signed by the plaintiff but, stating that in view of the last letter from the Foundation, they were not sending the payment of $2,567 but were holding it until they received advice that the plaintiff would be allowed to enter the property.

According to the plaintiff's affidavit, on or about the 18th January last, he went to the property to continue logging timber but found the place locked so that he was unable to enter or continue any logging whatsoever. He maintains that the payments he had made to date pursuant to the contract amounted to $31,000, but, as against that, he had logged and felled timber to a total value of $17,520 only. In a final letter dated 8th February received following the date of the plaintiff's first affidavit, the Foundation wrote saying that as the agreement was received well after the 16th December deadline, Miss Richards was now making other arrangements to complete the sale of her trees. She was prepared, however, to allow the plaintiff access to her property to harvest any remaining trees in block 4 only, being one of the wood lots which he had been entitled to harvest under the original agreement, and to remove any logs already cut. The plaintiff, however, takes the view that the offer contained in that letter is of no value to him as the maximum amount he could get off that block would be about $3,000 worth of timber.

Faced with this situation, (but prior to the receipt of the letter of 8th February) the plaintiff issued a writ against the defendant in which he seeks a declaration that the defendant has acted in breach of contract between them, a permanent mandatory injunction ordering the defendant to allow the plaintiff access to the property for the milling of timber pursuant to the terms of the contract and an enquiry into the damage suffered. As a further and alternative course of action, it is claimed that the agreement was a "credit contract" within the term of the Credit Contracts Act 1981 and that, if the

defendant is not in breach of contract as earlier alleged, the contract contains terms which are oppressive to the plaintiff. Accordingly, the plaintiff seeks an order under Section 10 of the Credit Contracts Act reopening the contract and consequential orders pursuant to Section 14.

The present application, following an amendment which was made at the outset of the hearing, is for an interim injunction ordering the defendant to allow the plaintiff access to her property for the purpose of milling and removing timber pursuant to the contract between the parties and preventing the defendant from disposing of the said timber pending the determination of the writ of summons and statement of claim in the matter. The principles governing the issue of an interim injunction are not in dispute. For present purposes it is sufficient to quote the statement from the judgment of Cooke J. in Consolidated Traders Limited v Downes (1981) 2 N.Z.L.R. 247 at 255:-

> "Two major matters to be considered on interlocutory or interim injunction applications are whether there is a serious question to be tried and the balance of convenience. They are not the only matters, but they are important. The guiding principle has been said by high authority to be the balance of convenience: Eng Mee Yong v Letchumanan (1980) AC 331, 337; (1979) 3 WLR 373, 377, per Lord Diplock delivering the judgment of the Privy Council."

As to whether there was a serious question, Mr McVeigh listed a number of matters which he submitted fell to be determined. I do not think I need elaborate upon this aspect. While it appears there was a failure by the plaintiff to comply with the obligations which he initially undertook, it is clear that there are many questions which arise as to the contract between the parties. At the time when the Foundation, on Miss Richards' behalf, treated all arrangements between the parties as at an end, what were the existing contractual arrangements between them; what breaches, if any, had there been and generally what the rights and obligations of either party might be. I am satisfied that there are serious questions.

Before turning to the balance of convenience, consideration must be given to the nature of the interim

injunction which is sought. Following the amendment made at the outset of the hearing, it is in two parts:

(1) Ordering the defendant to allow the plaintiff access to her property for the purpose of milling and removing timber pursuant to the contract between the parties; and

(2) Preventing the defendant from disposing of the timber.

As to the first, Mr McVeigh submitted that it could be on the basis of the original contract with the reduced payments arranged in March 1983. The defendant maintains, however, that the reduced payments were for the 1982/83 season only. On the subject of payment, the agreement itself provides:-

> "Payment for logs and roundwood is to be in advance in instalments as specified below:
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> (i) A deposit of 20% of the minimum payment is to be paid before logging starts as follows
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> .....
>
> (ii) Further payments to be made during the 1982-83 logging season will be paid MONTHLY once logging commences as follows:
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> .....
>
> (iii) A further payment schedule for the trees held over until the 1983-84 summer season is to be agreed upon after the first season's logging has been completed. The schedule will be based on payments determined according to new stumpage rates adjusted for inflation as specified in clause 3 and will include a deposit of $7,000 to be paid before logging commences in the second season."

It seems further that any variation which may have been agreed upon in March 1983 included matters such as the sequence in which areas would be logged. An order could not be made in terms of the motion without some amplification as one of the principal questions for decision is what the terms of the contract between the parties may be, certainly in respect of the 83/84 season. Nor do I see that it could properly be made with the qualification that Mr McVeigh suggests, as this would require the defendant to permit the plaintiff to endeavour to perform terms of a contract which 12 months earlier he failed to perform,

terms which it appears have to some extent been varied. I am unable to see that, on the information before the Court, it is possible to stipulate other terms and, wherever the balance of convenience may lie and notwithstanding the sympathy one may have for the plaintiff in the predicament in which he finds himself, I do not consider it possible to make an order as sought on this aspect of the interim injunction.

There is no similar problem as to the other aspect, restraining the defendant from selling the timber elsewhere, and, in relation to that, I turn to consider the question of convenience. The plaintiff maintains that he has made payments to the extent of $31,000 but that the total value of the timber which he has logged and felled is only $17,520.68; that as a result of being refused access to the property he is "unable to continue and complete approximately $110,000 worth of contracts over the next 12 months". What the real significance of that statement may be and what quantity of timber it represents, I do not know. He says further that he has hire purchase commitments on the plant of approximately $1,000 per month which he is unable to meet; that he is receiving no income at all from any source at the moment and his financial position is desperate. All his capital is involved in his business. He has five people completely unemployed as a result.

One can readily accept that his position is serious, but it must be viewed in perspective. While it appears that he has paid substantially more to the defendant than the value of the timber extracted, he has not demonstrated that he is in any better position to carry out his obligations under the contract than he was when the current season started. As for the defendant, she maintains that the failure of the plaintiff to carry out his obligations under the original agreement has caused her a great deal of inconvenience. She had planned on using the proceeds of the sale of the timber to pay for permanent improvements on the farm; she had made commitments to spend about $25,000 in drainage works but has been obliged to defer other planned expenditure. As to damages as a remedy, the plaintiff would seem unlikely to be able to meet very much in that respect, should the defendant succeed in any claim against him arising from an injunction being made against her,

and one can only assume that, as the owner of the property on which the timber is standing, she would be in a better position to pay damages to the plaintiff should she be found to have been in breach, substantial though the damages might then be. Overall, however, I think the situation is one where the status quo should be preserved so far as that is possible; that the defendant should be prevented from selling the timber elsewhere. Accordingly, an order is made restraining the defendant from disposing of the timber which is the subject of the agreement of 21st April 1982 pending the determination of the writ issued by the plaintiff. Costs are reserved.

Solicitors:

Spencer & Walker, Ashburton, for Plaintiff
Rhodes & Co., Christchurch, for Defendant.