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No Special Consideration

NZCR X

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY HELD AT
WELLINGTON

M.44/84

BETWEEN PETER ROBERT RALEIGH MULLIGAN

Applicant

AND JOHN RICHARD WOODWARD AND OTHERS

Respondents

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Hearing 16 February 1984

Counsel B. McClelland, QC, and C. A. McVeigh for Applicant
C. B. Atkinson, QC, for Respondents

Judgment 17 February 1984

JUDGMENT OF ONGLEY J

The abovenamed parties are parties also to a submission to arbitration of differences between them arising upon the dissolution of a partnership formerly existing between them in the practice of their profession as barristers and solicitors at Christchurch under the style of "Duncan Cotterill & Co.", a firm which was first established some 127 years ago. That firm has been dissolved by the retirement or death of partners on a number of occasions and reconstituted on each occasion by surviving and new partners. The basic partnership deed setting out the terms of the agreement between the parties to these proceedings is dated the 16th day of July 1924. There have been various alterations to those terms from time to time since that date, one such having been occasioned by the admission to partnership of the present applicant in the year 1962.

On 21 March 1983 the respondents gave written notice to the applicant that they intended to allow the then current term of the partnership to expire on 31 March 1983 and thenceforth to continue the practice themselves under the same firm name and in the same premises as theretofore. Differences arose on the dissolution which could not be resolved by agreement and which eventually were referred to the arbitration of Mr R. G. Collins, Barrister and Solicitor of Wellington. There was some delay in finalising the terms of reference but that has now been accomplished and it is expected that the hearing will take place towards the end of March. The applicant places the blame for the delay on the tardiness of the respondents but I do not think that it would serve any good purpose for me to enter upon an examination of that aspect of the dispute on this application.

Whatever the cause, it is now almost a year since the partnership termin-ated and the applicant left the premises where it had been carried on. Before he left he was aware of a proposal for an extensive reorganisation of the partnership offices involving alterations to the partitioning and necessitating changes to the fixtures, fittings and carpeting. The partnership offices comprise leasehold premises on the third floor of the Bank of New Zealand building in Cathedral Square, Christchurch. The Bank, of course, is the landlord. There are four separate leases which are not all for the same period or upon the

same rentals. Only one of them, accounting for about one half of the floor space, is assignable; the others have covenants against assignment. On 9 January 1984 contractors engaged by the respondents commenced the alteration work on the premises and the respondents' staff thereupon shifted to temporary accommodation. The rental payable for that accommodation is $3,455.00 per month. The estimated cost of the alterations to the premises is just under $300,000.00.

The applicant deposes that he did not become aware of this work being in progress until 26 January 1984 when he happened to visit the premises. He now seeks an order pursuant to Section 10 of the Arbitration Amendment Act 1938 which would have the effect of prohibiting further alteration work being carried out on the premises pending the determination of the reference to arbitration. Section 10 gives the Court the same power of making orders on a reference to arbitration as it has in relation to an action in respect of the matters set out in the First Schedule to the 1938 Act. Two such matters are the following:

> "(5) The preservation, interim custody, or sale of any goods which are the subject-matter of the reference.
>
> (6) ...
>
> (7) The detention, preservation, or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence."

The grounds for seeking a preservation order are set out specifically in the applicant's affidavit as follows:

> "9. THAT an arbitration award in my favour might involve a sale of the partnership's assets, including the lease and the fixtures and fittings as aforesaid. I am concerned that the work being carried out is completely destroying an asset of the above partnership or alternatively is so altering it as to make its condition completely different from that which it was at the time of dissolution.
>
> 10. ...
>
> 11. THAT so far as I am aware, there is no valuation of the unexpired term of the lease for the purpose of selling this. I am concerned that the work which is being carried out will make such a valuation well nigh impossible.
>
> 12. THAT I am further concerned that the alterations and work being undertaken will render the Arbitrator's task impossible so far as a sale and/or valuation of this property .... "

Mr Atkinson contends that the right to insist on a sale does not arise upon the termination of a partnership by the expiry of the term, which he submits is the situation here, and furthermore that in this case the treatment of the assets of the partnership on dissolution is the subject of agreement contained in documents which are not before the Court but will be explored during the course of the arbitration. As to the practicalities of sale he points out that the non-assignable leases would in all probability be unsaleable and suggests that a Court would not order them to be sold on a winding-up. That argument loses some force by reason of the concession that one of the leases which accounts for a substantial portion of the floor space is assignable. I assume that if work had to cease on one part of the premises it would affect the whole contract and all work would cease.

The applicant does not say at this stage that he insists on the sale of the leases; only that he wishes to keep open the options legally available to him. He does not accept that a valuation of the leases would be an adequate substitute for sale by auction because a valuation might not take into account the premium which might be obtainable from a buyer who obtained possession of premises so recently occupied by this eminent firm of barristers and solicitors.

I refrain from expressing a view on a number of these matters, whether questions of law or fact, for fear that I may trespass upon the province of the arbitrator to whom the parties have chosen to refer their differences for determination. It would not be right that any view that I might have formed on hearing this ancillary question should pre-empt the arguments which Counsel may wish to address to the arbitrator.

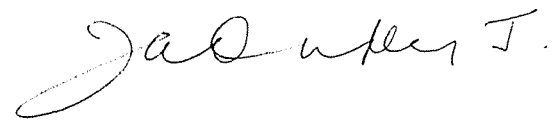
The order sought by Mr McClelland in terms of the Schedule to the Arbitration Amendment Act 1938 is an order in respect of "The ... preservation of any property or thing which is the subject of the reference or as to which any question may arise therein". Ordinarily that sort of order would be designed to prevent damage to or destruction of property. This case is somewhat unusual in that what is sought to be achieved is the preservation of the premises in their pristine state so that they may be put up for sale

in that state. The contention in the applicant's affidavit that the premises will be so changed as to be unable to be valued is, I think, refuted by Mr Baker's evidence. I would have little doubt that a valuer having access to the premises at a reasonably early date would be able to make a satisfactory valuation of the leases if that is what is required by the applicant. If it is a question of sale rather than valuation then a rather complex situation will arise if the alterations proceed to completion. The value of the premises and consequently the sale value of the leaseholds will be enhanced; but they will still be the same premises which are subject to the several leases. If the applicant is entitled to insist on sale as a matter of law then that right will be unaffected. Whether in that event the respondents would be entitled to compensation for the monies expended by them is a question which does not require to be answered on this application but it seems to me that if the applicant's proposition of law is correct, the respondent is assuming a greater risk than that which would be imposed on the applicant.

I am not satisfied that the order sought by the applicant is necessary to ensure that the arbitrator can do justice between the parties. The impact of such an order upon the respondents would be unduly oppressive and I do not believe that the applicant will be materially

prejudiced by the changes intended to be made to the premises. In the exercise of my discretion therefore I dismiss the application.

The respondents are allowed the sum of $150.00 costs plus court disbursements.



Solicitors:

G. S. Brockett, Christchurch, for Applicant
Duncan, Cotterill & Co., Christchurch, for Respondents