IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

③ R57

A.331/84

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BETWEEN RONALD ERNEST JAMES OLDFIELD of Clevedon, Boat Builder

Plaintiff

AND WILLIAM J. VAN DER VEGTE of Papakura, Swimming Pool Contractor

First Defendant

AND TED TAIATINI MARINE LIMITED a duly incorporated company having its registered office at 6-10 Kitchener Street, Auckland, Marine Engineers

Second Defendant

AND THOMAS EDWARD TAIATINI of Eastern Beach, Company Director

Third Defendant

Hearing: 10th May, 1984

Counsel: McCarthy for Plaintiff
Witten-Hannah for First Defendant
Impey for Second and Third Defendants

ORAL JUDGMENT OF SINCLAIR, J.

This is an application for an interim injunction in respect of an alleged partnership suggested to exist at some stage between the Plaintiff and the First Defendant. Whatever may be the true position as between these parties, at the present time I am faced with evidence which shows that whatever happened it was extremely loose and not reduced to writing; this may, in due course, force the Court to go in a particular direction, but it has provided, as is so often the case between parties who do not reduce their dealings to

writing, a veritable playground for lawyers.

All of the contentions between the parties relate to the design of a particular type of boat referred to as a "Mirage 6000 SR". To succeed in his claim the Plaintiff must establish, because this is what is in the statement of claim, that a partnership in fact existed between himself and Mr Van Der Vegte. If he cannot establish such a partnership then there were, as I see it at the moment and on the information before me, no legal relationships between the parties at all and Mr Oldfield will have to accept the consequences of the discussions which took place and which, as I have mentioned before, on the face of them are extremely loose. If he can establish a partnership then whatever may have been the position before the 14th December, 1983 there was certainly no partnership after that date because a letter from the Defendant's solicitor effectively brought whatever possible legal relationships had been in existence to an end.

The original letter from my recollection was written by the Plaintiff's solicitors on 9th December, 1983 relating to certain matters in issue between the parties. That letter was replied to on 14th December, 1983 and then there was a silence until these proceedings were issued in this Court on 6th April, 1984 - a delay of nearly four months. In the meantime the First Defendant had proceeded to manufacture, if not also design to the point where it could be manufactured, the boat which I have referred to as a Mirage 6000 SR. If, in December 1983, the Plaintiff had taken action to halt any further development of this particular boat on the basis which

he now suggests, the position as I perceive it would have been vastly different in that the First Defendant would have been faced with an application to the Court to maintain the status quo which at that stage would have been prior to the construction, as I see it, of any of the boats in question. However, I find myself in considerable difficulties in deciding that there should be any injunction at all. Before an injunction can be granted the Plaintiff must bring himself within Rule 462 of the Code of Civil Procedure and that Rule reads as follows:

> "Where the assistance of the Court is sought to restrain any officer or person from breach of any duty incumbent upon him which he has threatened or has already commenced to commit, the Court may issue a writ of injunction to restrain such threatened breach or the continuance of any breach which is of a continuous character."

Thus the Plaintiff must establish at this stage on a balance of probabilities that a partnership existed at least until the 14th December, 1983 so as to cast upon the First Defendant a duty to him in relation to the terms of that partnership. That particular rule has been considered in this Court in the case of Forsythe Downs Ltd v. Miller (1974)1 N.Z.L.R. 542. In that case the Court pointed out that the rule in New Zealand was somewhat restrictive in its application and was vastly different from that which operated in England which gave the Court power to grant an interlocutory injunction in all cases in which it is made to appear to the Court to be just or convenient that such an order should be made. In respect of the English version Wilson, J. had this to say:

> "There is no general provision in New Zealand to that effect. Under R 462 it was necessary for the plaintiff to show that the defendant had committed,

"or was threatening to commit, a breach of some duty incumbent on him. Such a duty must be a legal duty."

Therefore, before the Plaintiff can really get to first base he must at this stage be able to persuade me on a balance of probabilities that he has established the existence of a partnership. The Defendant rejects that and says that as an abundance of caution a notice was given terminating any alleged partnership in case the Court should hold that one did in fact exist. I therefore address my mind to the terms of the partnership. What were they? What does the evidence disclose the terms of the partnership to be? I simply say that I cannot, on the evidence at the moment, spell out the existence of a partnership and I pose these questions: What was its capital? In what proportions was the capital to be provided by the Plaintiff and the First Defendant? In what proportions were the profits and/or losses to be shared? What was to happen on dissolution? Were any rights to be given to one partner as against the other to acquire the other person's share and, if so, on what terms? Who were to be the bankers? Who was to have power to sign cheques, or was this to be a partnership implied by virtue of the provisions of the Partnership Act?

I cannot satisfactorily answer any of those questions and if I now resort to the granting of an injunction as against the Defendant it could only be on the basis that I am satisfied on a balance of probabilities that the existence of such a partnership has been so established. Being not so satisfied then I am of the view that the Plaintiff cannot at the present time bring himself within the ambit of Rule 462 of the Code of Civil Procedure. If I did resort to the granting of an

injunction it may well be that I would be doing the very thing which a long line of cases says that I may not do and that is, in an interlocutory application, come to a decision which may have the result of determining one of the main matters in issue between the parties. I repeat one of the main matters in issue is the existence of a partnership or not.

I refer to the decisions in N.W.L. Ltd v. Woods (1979)3 All E.R. 614 and Cayne and Anor v. Global Natural Resources (1984)1 All E.R. 225. Both of those cases highlight the fact that a Court ought not, in an interlocutory proceeding, to decide a matter which may have the result of deciding one of the main matters in issue between the parties.

If a partnership did exist and was brought to an end by the notice which was given on 14th December, 1983 the only way in which the Plaintiff can at present succeed is if he can persuade the Court that there is some residual duty on the shoulders of the First Defendant which would warrant, in all the circumstances, the Court intervening by the way of interlocutory injunction.

Firstly I point to the delay between the 14th December, 1983 and the 6th April, 1984, a period of nearly four months, where obviously the First Defendant has altered his position and his counsel says that in reliance upon the fact of there having been no response to the letter of December 1983, he then came to the conclusion that the Plaintiff had accepted his contentions and that he was free to proceed as he desired.

But even if I may be taking too narrow a view of all that has occurred, to my mind this is one of the classic cases where damages would be an appropriate remedy. If a partnership

did exist and it has now come to an end, then of course the Plaintiff is entitled to call the First Defendant to account for the assets of the partnership and to account for any moneys which have been earned by the partnership. If the First Defendant has continued to use partnership assets after the date of dissolution he can be called to account not only for the profits he has received, but he will also find himself faced with having to pay for what is in fact the conversion and use of the partnership assets. Having regard to what has been disclosed in his affidavit as to his means, I am satisfied on a balance of probabilities that the Defendant could meet any such award of damages, remembering that this particular venture was in its infancy with developmental and advertising costs being probably in the forefront in the initial stages of the venture. On the other hand, when one has a look at the Plaintiff's position if an injunction were to be granted I would have serious doubts as to whether he was in any financial situation at all to meet any award of damages even on a modest basis.

Therefore, having regard to the delay which has occurred, in my mind the status quo as envisaged by the cases commencing with American Cyanamid Co v. Ethicon Ltd (1975) A.C. 396 is most definitely in favour of allowing the Defendant to proceed as he is at the moment but he, of course, will now be aware of the consequences which he must face if in fact the Court later finds that a partnership did exist. In any event, I am of the view that damages is an adequate remedy.

In those circumstances the present application must be dismissed.

The first Defendant is entitled to costs which, in the

circumstances, I fix at $650 and any necessary disbursements. Any question of costs for the Second and Third Defendants is reserved.

P. G. Hillyer J.

SOLICITORS:

Price Foulk Brabant & Hogan, Manukau City, for Plaintiff

Armstrong Murray Morton & Witten-Hannah, Auckland for First Defendant

McElroy Duncan & Preddle, Auckland for Second and Third Defendants