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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.298/83 X

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LR 89

BETWEEN DAVID NELSON THOMAS

Plaintiff

A N D C. & A. ANDERSON LIMITED

First Defendant

A N D KEITH DOUGLAS HITCHON

Second Defendant

A N D POULTRY PROCESSORS (NORTH CANTERBURY) LIMITED

Third Defendant

Hearing: 2nd, 3rd, 15th & 17th November, 1983
Submissions - 5th December 1983

Counsel: C.B. Atkinson, Q.C. & A.C. Hughes-Johnson for Plaintiff
D.H. Hicks for First & Second Defendants
J. Cadenhead & H.D.P. Van Schreven for Third Defendant

Judgment: 8/2/84

JUDGMENT OF COOK J.

Mr Thomas, the plaintiff, claims against C. & A. Anderson Limited, the first defendant, that on 19th August 1983 the latter by its agent, Mr Hitchon, the second defendant, entered into an agreement with him for the sale and purchase of certain plant, fittings and equipment for the sum of $87,000 and certain dry stock at cost with possession to be given and taken on 29th August 1983; alternatively, that on 27th August 1983, the first defendant, by its agent the second defendant, entered into an agreement with him substantially to the same effect; that the first defendant refused to deliver up possession of the assets which were the subject of the first

or, alternatively, the second agreement and indicated that it did not intend to perform its obligations, whereas he, the plaintiff, had at all material times been prepared to perform his part of either agreement.

In like manner, Mr Thomas claims against Mr Hitchon, the second defendant, that on 19th August 1983 or, alternatively, on 27th August 1983, the latter entered into an agreement with him whereby Mr Hitchon agreed to lease to him a certain property in Christchurch, possession to be given on 29th August 1983; that in breach of one or other agreement Mr Hitchon refused to surrender possession of the property to him and indicated by his conduct that he did not intend to perform his contractual obligations, whereas Mr Thomas had been prepared to perform his.

Against each of them, the first and second defendants, the plaintiff seeks an order for specific performance and an enquiry as to damages suffered. The defence is substantially to the effect that on neither date was a binding agreement entered into between either defendant and the plaintiff.

The claims against the third defendant are to the effect that it has entered into possession of the property and taken possession of the assets; alternatively, that it has wrongfully detained the assets or procured a breach by the first and second defendants of the contracts between them and the plaintiff. Before consideration of these claims becomes necessary, however, it must first be found that binding contracts exist between the plaintiff and the first and second defendants.

Background:

C. & A. Anderson Limited, of which Mr Hitchon is a director, had been carrying on business for some time as a manufacturer of meat products in premises belonging to Mr Hitchon. The company was not faring well and had got into a measure of financial difficulty with the result that Mr Hitchon decided that he should seek a purchaser for the assets of the business but, that in any event, should one be not forthcoming it would have to close down. Mr Thomas, also

engaged in the meat-processing business, became aware of this and, following certain preliminary contacts, discussions between him and Mr Hitchon were held on 19th August 1983 with a view to negotiating the sale by C. & A. Anderson Limited of its assets together with possession and occupation of the premises by way of a lease from Mr Hitchon. On that date a measure of agreement was reached; whether binding or not being one of the main questions for decision. Mr Thomas prepared two memoranda to which further reference will be made in detail; one relating to plant owned by the first defendant and the second to a lease of the premises with an option to purchase.

It was accepted that properly drawn documents should follow, but it did not prove possible for Mr Thomas or Mr Hitchon to see their solicitors or, certainly, for their respective solicitors to confer until Friday, the 26th August. Then followed further and somewhat rushed negotiations aimed at reaching a point where possession of the plant and premises could, pursuant to binding agreements between the parties, be given and taken on Monday, 29th August, the day upon which Mr Hitchon had decided either to hand over to a purchaser or to close down the business. There were discussions on the Friday with the result that Mr Cottrell, in the absence of his partner who normally acted for Mr Hitchon, prepared draft agreements between the parties, i.e. one between the first defendant and Mr Thomas in respect of plant and certain stock and one between Mr Thomas and Mr Hitchon in respect of the property. A number of points were raised for negotiation and final agreement between the parties. There was no time on the Friday to complete these negotiations but, with the approval of Mr Cottrell who was not to be available on the Saturday, Mr Hitchon and Mr Stokes, acting for Mr Thomas, met on that day. Details were thrashed out and amendments made to the draft agreements which Mr Cottrell had prepared. The two forms of agreement were then signed by Mr Thomas. Mr Hitchon did not sign but wished to place them before his solicitor and obtain the latter's approval before doing so. These documents and the state of agreement between the parties at that point must also be considered in detail.

On the Sunday, however, contact was made between Mr Hitchon and the third defendant, Poultry Processors (North

Canterbury) Limited. A bargain was very rapidly reached for the sale of both the C. & A. Anderson assets and the Hitchon property and Mr Thomas was then informed that that had been done. His reactions and subsequent events do not assist in resolving the question whether, when Mr Hitchon signed the agreement with Poultry Processors, he and C. & A. Anderson Ltd were bound by the memoranda signed on the 19th August or, alternatively, although not actually signed by him or on behalf of the company, the terms which had been negotiated and committed to writing on 27th August, but signed by Mr Thomas only.

Memoranda of 19th August:

These were written by Mr Thomas in his own hand-writing and placed before Mr Hitchon for signature. The first relates to the plant of the business and commences as follows:-

> "Agreement between D. Hitchon and D. Thomas for the purchase of plant at premises 22 Kingsley Street and other sundry matters."

Then follows the price for the plant, the latter being identified by reference to an attached sheet. The memo then concludes:-

> "Payment ½ end of September
> ½ end of November
>
> Interest payable on outstanding balance.
> Drystock - excluding branded products purchase at cost.
> Take over pet food and all other manufacturing.
> Restraint of trade 5 yrs."

The second memorandum as prepared by Mr Thomas reads as follows:-

> "Agreement between D. Hitchon and D. Thomas for the lease of premises at 22 Kingsley St.
>
> Terms:
>
> (1) Price $1-75 per square ft for 8000 sq ft i.e. $14,000 per
>
> (2) We pay rates but not insurance.
>
> (3) Lease for one year. Thereafter 4 x 5 yrs renewal.
>
> (4) Right of purchase at valuation."

Mr Hitchon was not prepared to sign them as they stood, on the face of them purporting to be concluded agreements. He required some qualification and as a result the following was added to each:-

> "The above points are the notification of intent to agree on the terms mentioned in brief."

With that addition, the papers were signed.

For the plaintiff it was submitted that these constituted concluded contracts, that all essential terms were agreed upon or machinery to fix them was agreed; that every step taken after that date was consistent with the parties workin out their agreement. Stress was laid upon the steps that were taken during the following week by Mr Thomas to prepare for taking over the business on the 29th. These included certain arrangements in respect of staff, a letter prepared by Mr Thomas and signed by Mr Hitchon and sent to customers to the effect that the business was changing hands but without stating the purchaser. Certain alterations were made to plant and even locks were changed. While it seems that Mr Hitchon was aware to a greater or lesser degree of what was being done and either joined in, as with the letter, or made no protest, all steps appear to have been originated by Mr Thomas.

The question must depend primarily upon the interpretation to be placed on the memoranda mentioned. Clearly they were not intended as the final expression of the transaction between the parties but, despite this, did they have binding effect. As to the principles which apply, it was urged that an agreement, intended to be immediately binding until replaced with another, is binding if not uncertain and for that proposition the authority cited is Branca v. Cobarro (1947) K.B. 854, but there the agreement contained a clause as follows:-

> "This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed."

It was held that, upon the true meaning of those words, the agreement remained effective until a fully legalised agreement was drawn up and signed. No doubt that was so in that case, but the situation here is by no means as clear cut as that and, in particular, the qualification added by Mr Hitchon must be considered. It was submitted, further, that, in a similar manner, an agreement has binding force which may not be certain in all respects but contains machinery to make certain that which is uncertain. In this case, however, the memoranda are by no means certain on every aspect and they do not contain any machinery for resolving such points. Nor was there evidence to establish satisfactorily that there was any collateral agreement that points left in doubt should be determined in any particular way other than negotiation between the parties.

In Masters v. Cameron (1954) 91 CLR 353, the question of preliminary contracts was discussed with particular reference to documents setting out details of an arrangement between parties containing expressions such as "subject to contract" or "subject to the preparation of a formal contract". In the judgment of the High Court of Australia, the following appears:-

> " The first question in the appeal is whether, as Wolff J. considered, this document on its true construction constitutes a binding contract between the respondent and the appellants, or only a record of terms upon which the signatories were agreed as a basis for the negotiation of a contract. Plainly enough they were agreed that there should be a sale and purchase, and the parties, the property, the price, and the date for possession were all clearly settled between them. All the essentials of a contract are there; but whether there is a contract depends entirely upon the meaning and effect of the final sentence in that portion of the document which the appellant signed.
>
> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend

> no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. .....
> .....
>
> Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own : Governor &c. of the Poor of Kingston-upon-Hull v. Petch (1854) 10 Exch. 610 (156 E.R. 583). The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in Summergreene v. Parker (1950) 80 C.L.R. 304 or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed."

And then at page 362:-

> " The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape : Farmer v. Honan (1919) 26 C.L.R. 183. Nor is any formula, such as 'subject to contract', so intractable as always and necessarily to produce that result: CF. Filby v. Hounsell (1896) 2 Ch.737. But the natural sense of such words was shown by the language of Lord Westbury when he said in Chinnock v Marchioness of Ely (1865) 4 De. G.J. & S. 638 (46 E.R. 1066): 'if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation' (1865) 4 De G.J. & S. 638, at p. 646 (46 E.R., at p. 1069). Again, Sire George Jessel M.R. said in Crossley v. Maycock (1874) L.R. 18 Eq., at p. 180, [illegible]: 'if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce' (1874) L.R. 18 Eq. at pp. 181, 182."

In the present case, even if the additional words had not been added by Mr Hitchon, there must be some doubt whether the memoranda were sufficiently precise to leave no uncertainty as

to the terms of the bargain which they purported to evidence; but these words were added. I cannot read them other than as an indication that an end to negotiation had not been reached; that each memorandum was no more than a record of the then intentions of the parties as to the essential terms of a transaction to be entered into between them; not a statement of a concluded agreement binding them until and unless formal documents incorporating those, and such other terms, if any, as might by mutual consent be included, were prepared and signed.

Stress was placed on the steps taken by Mr Thomas in relation to the plant and premises and in giving notification of the fact that the business was being sold and these acts were pointed to as acts of part performance. Mr Thomas maintains that he believes that there was a contract in existence, Mr Hitchon says he never intended that there should be and did not understand that there was. Whether Mr Thomas really believed that there was a contract I cannot be certain; if he did, his company's letter to the Health Inspector of 25th August 1983, in which it is stated:-

> "We are at present negotiating the purchase of plant and lease of buildings of the business known as C. & A. Anderson Smallgoods."

and later in the letter:-

> "However we understand from Mr C.Bryant that the premises are operating under dispensation from your department. We would respectfully request that this be allowed to continue in the immediate future, in the event of our company becoming involved.",

was misleading and intended to mislead and I am not impressed with his manager's explanation that it was drafted prior to the 19th. Taking all things into account, I see the various things done as being in strong expectation of a contract being concluded, but no more than that.

In any event, it is clear that a number of questions had still to be resolved. Mr Stokes, who acted for Mr Thomas, sets them out in his affidavit. In para. 2.3 he refers to the urgency that was required and states that several of the

alterations required by the documents prepared by Mr Cottrell, i.e. the first draft, were not in accordance with the agreement signed the previous week. On the Saturday morning there were still a number of points to be resolved. These are set out in paragraph 2.4; information regarding requisitions to be given to Mr Thomas, his personal guarantee required, the balance of the purchase price to be by single payment not two, interest at 16% not 14%, and matters relating to goodwill and restraint of trade which were not acceptable. There appears to have been no suggestion that any of these points had already been determined between the parties and consequently were not open for further negotiation.

In addition, it is clear from the memoranda themselves, that on the 19th points remained to be resolved in respect of matters mentioned in them. The rate of interest on unpaid balances, the extent of the restraint of trade, the terms upon which a right to purchase the property was granted. While very quick agreement may have been forthcoming on these points when they were discussed, they still had to be agreed upon. For all these reasons I am satisfied that the memoranda of 19th August did not constitute binding contracts between the parties and may not be relied upon by the plaintiff.

Events of 26th and 27th August:

As mentioned, the details of the two contract documents was worked out over two days, the 26th and 27th. The first draft was prepared by Mr Cottrell and then, on Friday and Saturday, terms other than the basic terms of price, rental payable, rights of renewal and possession date were negotiated until a point was reached where there was agreement as to what the documents should contain, but subject to Mr Hitchon taking them back to Mr Cottrell for approval. Mr Thomas had signed. Mr Hitchon never did, nor did his company execute the one in which it was involved. If they are to have binding force then it must be found that in some way Mr Hitchon had so expressed his agreement on his own behalf and that of his company to the terms which they contained that he and his company were bound, subject only to his solcitor's approval as to the legal draftsmanship; that he was under an obligation to place them before Mr Cottrell but, having failed to do so,

was bound by them and not free to sell elsewhere.

There was a great deal of evidence as to what different people, in particular Mr Stokes, on behalf of Mr Thomas, and Mr Cottrell and Mr Hitchon, understood the position to be; also a good deal of conflict in the evidence. Mr Stokes accepted that Mr Hitchon would have to go back to his own solicitor to have him approve what the parties with his assistance had agreed to during the Saturday, but finally made it clear that in his view that approval would be limited to the wording of the documents as opposed to the substance. His understanding also was that questions of debenture holders' consent posed no problem. Mr Cottrell was of the view that Mr Hitchon would not sign anything without discussing it further with him. His recollection of what was said in relation to the debenture holders did not tally with the account given by Mr Stokes. He said he had given no assurance that the debenture holders had agreed as he personally had not spoken to any of them; he had merely conveyed the impression that Mr Hitchon had received a favourable response from one of them. I in no way doubt the sincerity of either witness, but the negotiations were conducted in a great hurry under difficult conditions and, to a considerable extent, in the absence of Mr Cottrell. It is entirely understandable that wrong impressions may have been created.

It is clear from the evidence that it was intended that the formal documents would be signed by, or on behalf of, either party to each of them. I see it as a case not dissimilar to that considered in Concord Enterprises Ltd v. Anthony Motors (Hutt) Ltd (1981) 2 N.Z.L.R. 385 and note in particular that portion of the judgment of the Court delivered by Cooke J. at 388:-

> " Counsel for the appellant rightly stress that the test whether a contract has been concluded is objective. This is so no matter whether the classical analysis of offer and acceptance be treated as all-sufficient or whether the somewhat wider approach mentioned in Boulder Consolidated Ltd v Tangaere (1980) 1 NZLR 560, 562-563, be preferred .....
> ...

Here there were negotiations conducted partly

between the solicitors with reference back to their respective clients and partly between the parties directly. The evidence, including Mr Craddock's note of 12 December 1974, shows that the purpose of the negotiations was to have prepared by the manufacturer's solicitors and executed by both parties an important commercial agreement of some complexity. In such circumstances we think the normal inference in New Zealand is that the parties do not intend to be bound before the agreement has been drawn up and executed on both sides.

In Carruthers v Whitaker (1975) 2 NZLR 667, 671, Richmond J delivering the leading judgment in this Court said:

> ' It is established by the evidence to which I have earlier referred that at the time when the parties instructed their respective solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act in this way then the ordinary inference from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view.'

This case is in the different field of commercial contracts, where there is not by law the same need for signed writing as evidence, but in our opinion the natural inference is the same in the absence of factors to the contrary.

Unless that inference is displaced the result is that, even although all the terms to be included in the document have been agreed, there is no contract and each party has a locus poenitentiae until at least execution on both sides. It may be that exchange or delivery of executed documents is also necessary, but that need not now be decided. Cases can arise where, without exception of a document on one side or both, the parties act on it, so that an implied contract arises. Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 is a leading illustration. But that is not this case."

I cannot see that the inference has been displaced here; nor can I see that it is a similar situation to that which was considered

by the Court of Appeal in Provost Developments Ltd v Collingwood Towers Ltd (1980) 2 N.Z.L.R. 205. There the contract was signed by both parties and contained the express provision:-

> "Subject to solicitors approval by Friday, 30 June 1978 by 5 pm"

an obligation thereby being imposed on each party (as the proviso was for the benefit of each). As expressed by Cooke J. at page 211:-

> " For these reasons I think that there is generally a distinction between subject to contract and solicitors' approval conditions and that it should not be blurred; that in the present case there was a conditional contract whereunder the parties were bound to exercise reasonable diligence to consult their respective solicitors so as to enable the contract to be considered adequately by the specified time (Friday 30 June 1978, by 5 pm); and that the solicitors were required to consider the contract bona fide and reasonably. The factors to be taken into account by the solicitors must have been intended to be those pertaining to the distinctive field of expertise of a solicitor instructed to peruse a contract of sale and purchase of land. In Boote's case these were shortly referred to as the conveyancing aspects of the transaction. I go on to say something about their nature."

Here there was no signature by one party. With the somewhat confused evidence, it would not be easy to find that the sole reason for Mr Hitchon taking the documents back to Mr Cottrell was to have them vetted for any legal pit-fall, but even if that were the proper conclusion, the situation is a different one. There it was held by Holland J. at first instance that the contemplated approval was not designed as a pre-requisite to formation of the contract itself but was simply to ensure that its operation would be suspended pending the necessary approval on each side. Here it is clear that it was intended that the document should be signed by each party involved. Prior to signature, no contract was in existence and consequently it cannot be said that there was an obligation upon Mr Hitchon to seek this approval. A party is at liberty to change his mind and withdraw up to the moment when agreement in the intended form is reached. There is no half-way mark;

there must be a point of time when each party becomes bound and prior to which neither is. To withdraw at the last minute when agreement seems ensured may not enhance a person's reputation in the commercial world, but he is entitled to do so.

I am unable to see that Mr Hitchon or his company became bound by the events of the 26th and 27th August and consequently the claim in that respect must fail also.

Accordingly, the plaintiff fails in his claim against both the first and second defendants and they are entitled to judgment. In these circumstances, no claim can survive against the third defendant and it is entitled to judgment also. There is no need to consider the application for a non-suit made by Mr Cadenhead, or the other matters which were argued at length. All questions of costs are reserved.

T. Eichelbaum J

Solicitors:

Dougall, Stringer & Co., Christchurch, for Plaintiff
Rhodes & Co., Christchurch, for First Defendant & 2nd Defendant
Clark, Boyce & Co., Christchurch, for Third Defendant.