NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 211/84

965

BETWEEN WELLINGTON SPEEDWAY PROMOTIONS LIMITED a duly incorporated company having its registered office at Palmerston North, and carrying on business as a Speedway Promoter

First Plaintiff

A N D WILLIAM PETER DORN of Palmerston North, Company Director

Second Plaintiff

A N D WELLINGTON STOCK CAR SOCIETY INCORPORATED of Te Marua, Wellington

Defendant

Hearing: 31 July and 1 August 1984

Counsel: H.B. Rennie for the plaintiffs
G.L. Turkington for the defendant

Judgment: 9/8/84

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is a motion for an interim injunction. There are two plaintiffs: the first, Wellington Spedway Promotions Ltd, which I shall call "the Company", and the second, William Peter Dorn, of Palmerston North, who is a director of the Company. The defendant, the Wellington Stock Car Society Incorporated, I

shall call "the Society". The plaintiffs issued a writ on 28 June 1984 and in the statement of claim set out the basis of their action. It is alleged that by an undated written agreement the defendant in July 1982 entered into a contract with a man named Robertson and with Mr Dorn, the second plaintiff, under which they would act as promoters of a stock car speedway at Te Marua and in terms of which the defendant Society would grant them a lease of certain land at Te Marua, where the speedway is held, on the terms set out in the written agreement. It is further alleged that the plaintiff Company took over the contract from Robertson and Mr Dorn with the concurrence of the defendant Society but that the Society is now in breach of the contract. The Company and Mr Dorn seek a variety of remedies from the Society including an order for specific performance of the contract by executing a deed of lease and an injunction to restrain the Society from committing a variety of acts in breach of the contract and the lease and from interfering with the operation of the speedway by the plaintiffs.

The background to the action is a somewhat tangled one but to follow the basis of this motion for an interim injunction it is necessary for me to set out very briefly and generally the facts disclosed or alleged in the fairly lengthy affidavits and the exhibits attached to them. Unhappily there are a good many issues which appear to be hotly contested. The Society is the owner of land at Te Marua, near Upper Hutt, on which is situated the Te Marua Speedway. It purchased this land in

1981, though at the time the land was leased to a company which carried on stock car racing on behalf of the Society. In October of that year the lease expired and the Society arranged for the operation of the speedway by another operator, but without granting a lease of the premises, through the 1981/82 season which extends from October to March. The Society then decided to seek the services of a promoter for the next racing season and advertised in the Wellington papers. It received a reply from a Mr Bruce Robertson, who was well known to a number of the members of the Society, and negotiations were embarked upon. The statement of claim alleged that the negotiations commenced between the Society, Mr Robertson and Mr Dorn, and this allegation was admitted in the statement of defence. A document was prepared, though by whom is not clear though it obviously originated with Mr Robertson, which was headed "Basis for a Lease Agreement Between Wellington Speedway Promotions and the Wellington Stock Car Society Incorporated". The statement of claim alleges that the defendant contracted with Robertson and Mr Dorn on the terms set out in this document and that the defendant was at the time aware that a company was to take over the interests of Robertson and Mr Dorn in the contract. The statement of claim goes on to allege that later the defendant confirmed that this contract was binding on it and that it was aware that a company was to take over the rights of Robertson and Dorn under the agreement. The defendant, on the other, hand denied a contract existed at all, though it admitted the existence of the document headed "Basis

for a Lease Agreement". The affidavits filed on each side contain the evidence supporting the opposing contentions, to some of which I shall refer shortly, but it is clear that there are sharply disputed factual issues in relation to the arrangements between the parties and whether those arrangements and discussions constitute a binding contract.

It is necessary, before resuming the narrative of events, to refer now to a particular provision contained in the Basis for a Lease Agreement document. The particular provision is as follows:

> "8. (b) This agreement subject to completing the sale agreement for the purchase of assets and leases from Mr D. Berry."

The last operator of the speedway had been Mr D. Berry and it appears clear that a somewhat unusual situation existed in relation to what were described in the affidavits and exhibits as the assets by which the speedway was carried on. On the land there are a speedway track and a number of buildings such as an office block, which includes the announcer's box, a cook-house, pump shed, tower lights, toilet blocks, certain machinery and other items, all of which were referred to as assets. It was accepted that these assets had belonged to the previous operator, Mr Berry, notwithstanding that most of them would ordinarily be understood as fixtures and thus a part of the land. In result, whatever might ordinarily have been the situation, the parties accepted that by express agreement between the Society and the previous operator, Mr Berry, these

assets belonged to him. It followed that for the proposed operation of the speedway to be carried on in terms of the document headed "Basis for a Lease Agreement" the operators had to purchase these assets from Mr Berry. The Society's then solicitors, Messrs Chapman, Tripp & Co., wrote a letter, dated 6 August 1982, addressed to Bruce Robertson, in which it was stated that they had been instructed by the Society to confirm that they were instructed to prepare a lease between it and "your company yet to be incorporated" in relation to the Te Marua speedway contract. The letter then went on to refer to the basis for a lease document and said that they were instructed that it was to be the basis for the formal lease document that they were to draw up. It went on to say that the letter was written specifically so that Mr Robertson might know that it was in order for him to proceed to purchase the assets from Mr D. Berry before 10 August 1982. The letter said there seemed to be no problem about his doing that because if he took the ownership of those assets then the Society would have no choice but to enter into a lease with him or to purchase assets from him in any event. The assets were purchased on 11 August 1982 by the plaintiff Company. In passing it may be noted that they belonged not to Mr Berry but to a company called Stockcar Promotions (Wellington) Ltd, with which Mr Berry was associated. It should also be noted that the plaintiff Company was in fact already in existence, though at that stage it was called "Wanganui Speedway Promotions Ltd", the shares in which were held by Mr Dorn as to 999 shares and as to one share by

another person, C.D.P. Dorn. The Company at a later date, on 6 December 1982, changed its name to Wellington Speedway Promotions Ltd. The position therefore, stated broadly, would appear to be that in August 1982 the Society owned the land at Te Marua, the plaintiff owned the assets, and the parties were in a state where either they were, as the defendant Society contends, still negotiating for a firm contract under which the speedway was to be carried on or, as the plaintiffs contend, there was a contract in terms of which a formal lease was later to be prepared.

There is a contest on the evidence as to how the matter then developed. Mr Dorn states that the Society's solicitors did not prepare the formal lease document, though requests were made for it from time to time. A letter was written, dated 8 October 1982, by the defendant to the Manager, Wellington Speedway Promotions Ltd, and marked for the attention of Mr Bill Dorn, which stated that it was written to confirm that the Society had entered into an agreement with Speedway Promotions Ltd to lease the speedway to it. The defendant Society contends, however, that this letter was written to enable an application to be made to the Speedway Board of Control for a licence to operate and was not meant to acknowledge that there was in fact an agreement to lease the speedway. However, whatever the true position, the 1982/83 stock car season was operated by the first plaintiff and payments in terms of the document "Basis for a Lease Agreement" were made by the first plaintiff in respect of rental, and

monetary allowances were apparently made by the Society to the first plaintiff in accordance with certain provisions in the agreement document. The document does not specifically or expressly deal with this latter matter but the plaintiffs contend that implicit in the agreement constituted by the document and by the subsequent discussions and conduct was a contract that the Society would purchase from the first plaintiff the assets at a figure of $50,000 and that the allowances referred to above and which are referred to in the document were part payment by the Society to the first plaintiff for the purchase of those assets. It is clear that the Society's annual accounts include the assets as a Society asset and the balance due, after taking into account the abovementioned monetary allowances, as a term liability. The Society, on the other hand, contends that though it accepts it is committed to buying the assets for $50,000 that is a transaction quite separate from the lease transaction. After the 1982/83 season was over negotiations were renewed and in particular in May 1983 a meeting was held at the office of Messrs Chapman, Tripp & Co. There were representatives of the Society present and also Messrs Robertson and Dorn.
Mr Armstrong, a partner in Chapman, Tripp & Co., stated in an affidavit he made that all the outstanding issues appeared to be resolved, save one, and the meeting concluded on the basis that parties would negotiate between themselves upon that whereupon he would prepare a draft lease. The parties, however, could not reach agreement. Thereafter there were

further discussions, correspondence from the solicitors and what were described as "without prejudice" discussions, though this limitation appears to have been more honoured in its breach than its observance. The 1983/84 season was embarked upon by the first plaintiff and the parties held another meeting on 26 October 1983 but no settlement was reached. The first plaintiff contends it carried on in terms of the Basis for a Lease Agreement document and the payments for rental and the allowances mentioned earlier were made as before; the Society contends that this was not so but that it permitted the company to continue on a monthly basis. Then in April 1984 the parties negotiated further. The Company contends an agreement was reached whereby the status quo would be maintained but the Society disputes this. The Society contends the Company has vacated the premises. The Society served what were described as notices to quit, on the basis that the Company was in possession as a monthly tenant, and it was at this point that the alleged agreement to preserve the status quo was reached. Mr Dorn contends he had instructed the Company's solicitors to issue proceedings in the second week of April but withdrew these when it agreed to withdraw the notices to quit. The situation between the parties deteriorated but it does not seem to be disputed that it is necessary that some decision be reached as to the operation of the speedway in the coming season which is only two months away. It is clear that preparations must be put in hand both in respect of the speedway and on the part of prospective competitors.

The principles to be applied in determining whether an interim injunction should be issued are now reasonably well known, though it should perhaps be said that their formulation and application still remain somewhat uncertain. However, for the purposes of this case the position can, I think, be stated as a three step one, and certainly this was the way counsel argued it. The Court must determine, first, whether there is a serious question to be tried; second, if there is, whether damages are an adequate remedy for the plaintiff; and, third, if they are not, where lies the balance of convenience. I turn therefore to the first step. Is there a serious question to be tried? Mr Rennie submitted there was clearly a serious question to be tried. He accepted that there were plainly a number of matters of fact which were in dispute but submitted that if the plaintiffs established the matters pleaded then there was a contract between the defendant and the Company which included an agreement to lease the land to the plaintiff. He further submitted that the whole course of conduct between the parties was relied on to establish the contract, not just the contents of the written document, and that the matters which the plaintiffs contended had been agreed upon were sufficient to create a valid agreement to lease. Mr Turkington, on the other hand, argued strongly that the parties had not reached an agreement for there were clearly matters which required to be settled which were left outstanding. He further submitted that the plaintiffs by their pleadings had relied on the document as constituting all the

terms of the contract but the matters set out in it are insufficient or too imprecise to constitute a binding agreement to lease. He then canvassed certain matters which he argued related to terms which are essential to a lease and which he submitted are not provided for with sufficient certainty in the document. It is necessary therefore to consider the particular matters raised by Turkington as being fatal to the validity of the alleged lease as well as the broad submission that no agreement was reached. Before doing so, however, I record that it is clear that there are disputed matters of fact and ordinarily it would follow that if those disputed factual matters are matters necessary to the determination of the case there is a serious question to be tried. Lord Diplock, giving the judgment of the Privy Council in Eng Mee Yong v Letchumanan [1980] AC 331 at 338, said:

> "Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried."

I deal first with the particular matters Mr Turkington raised as being essential to an agreement for a lease; namely, identity of the parties, the premises, the time of commencement and the duration of the lease, and lastly the rent payable. I propose to refer to them in the that order, though it is not

precisely the order he adopted. It may be noted that these four matters are stated in Halsbury's Laws of England (4th edn), Vol. 27, para 57, to be essential for the creation of an agreement for a lease.

The identity of the parties: Mr Turkington submitted that the defendant Society thought it was dealing with Mr Robertson and that he was going to be involved in the company that was to take over the proposed lease; and, further, that the plaintiff Company did not exist in October 1982, which was the date pleaded as being the date on which the defendant Society confirmed the contract with the plaintiff Company. Mr Rennie, on the other hand, submitted that the Basis for a Lease Agreement was entered into between the defendant Society and an unincorporated body described as Wellington Speedway Promotions, which on the affidavit evidence consisted of Messrs Robertson and Dorn, and that the agreement was taken over by the plaintiff Company with the knowledge and consent of the defendant; and, further, that the plaintiff Company was in fact in existence throughout and it was clear by August 1982 that it was going to change its then name of Wanganui Speedway Promotions Ltd to Wellington Speedway Promotions Ltd, which I have noted earlier was in fact done in December 1982. The defendant Society in fact wrote the letter dated 8 October 1982 to Wellington Speedway Promotions Ltd to which reference has already been made. I am satisfied that there is certainly a serious question to be tried on this matter.

The premises: Mr Turkington submitted that the statement of claim made no reference to the area to be leased and that

the Basis for a Lease Agreement document did not do so either. Further, that there was no agreement between the parties which related to the area of land to be leased arising out of the discussions and negotiations and it was in fact an issue which was never settled between them. He pointed to certain arrangements between the Society and a local Pony Club as supporting his submission that the actual premises to be leased were never settled between the parties. Mr Rennie, on the other hand, had indicated at the commencement of the hearing that an amended statement of claim was to be filed defining the land accurately, and that it was clear from the affidavits that the defendant Society had previously leased their land to the previous operators notwithstanding the arrangements with the Pony Club. Mr Dorn asserted in his second affidavit that agreement over the land had been reached and certainly the affidavit made on behalf of the defendant Society in relation to this point seems to be directed to the Pony Club issue. I am satisfied there is a serious question to be tried on this point.

The time of commencement and the duration of the lease: Mr Turkington submitted that both these matters were not adequately provided for in the Basis for a Lease document. Certainly no precise date is given in the document for commencement but it did purport to provide the term of the lease. Mr Turkington contended that this provision was imprecise. I accept Mr Rennie's submissions on these points to the extent that I am satisfied there is a serious question to

be tried both as to the commencement date and term of the lease. It may well be, in the light of the purpose of the lease, the nature of the premises and the understanding implicit in the discussions between the parties, that a date for the commencement can be ascertained. On the question of the term I am satisfied that this is a matter of construction of the document and the language is not too imprecise for determination.

The rent: Mr Turkington submitted that while the first part of the provision for rent contained in the Basis for a Lease document is clear the latter part is not. I think the provision is by no means clear but what it means is a matter of construing the language used and that is clearly arguable. At all events I am certainly not prepared to hold that it is so confused as to be unenforceable for uncertainty.

Mr Turkington also raised certain other matters such as the provision for maintenance, promotion rights and insurance, but I do not consider these go to the enforceability or binding nature of the arrangements. These matters were more relevant to the broad submission that no agreement had in fact been reached. I am satisfied that question is clearly a disputed matter of fact in respect of which there is evidence not on the face of it implausible. It follows that on that issue there is a serious question to be tried. I add that some submissions were also made in respect of the assets, which the defendant Society accepted it was committed to purchase at a fixed price, but I do not think they assist the defendant. In my view,

therefore, there is a serious question to be tried and I move on to the second of the three steps to be determined, which is whether damages are an adequate remedy for the plaintiff.

Mr Rennie submitted they would not be for a number of reasons. I do not propose to canvass them all but the principal one is that if the plaintiff company is unable to carry on the speedway over the coming season its goodwill in the speedway and its operation will be irretrievably damaged, if not destroyed, and it would not be practicable to assess the amount of its loss. This factor was emphasised in Mr Rennie's submission by reference to the somewhat unusual rental provisions of the alleged lease which would have made the lease more valuable to the plaintiff company as the years passed. Mr Rennie also submitted that there was doubt as to the ability of the defendant Society to satisfy a judgment of the proportions that the plaintiff might obtain but I was not impressed with that argument. Mr Turkington submitted that damages would be adequate and that, in view of clause 4 of the Basis for a Lease document, the defendant Society would be able to terminate the lease and on such termination the amount of damages was quantified with certainty. I do not accept this submission of Mr Turkington. There is no evidence on which I can be satisfied that invoking the clause is either a practicable proposition or a likely one. I do not think damages would be an adequate remedy.

This leaves the third and final step of where lies the balance of convenience. Mr Rennie submitted this plainly

favoured the plaintiff Company. An injunction would preserve the status quo and protect the plaintiff Company's rights and investment without causing any real harm to the defendant Society. The plaintiff Company had after all carried on the speedway over the last two seasons. Mr Rennie accepted that the plaintiff Company would be obliged to carry on the speedway over the coming season and that any injunction should be on terms that required it to do so. The granting of an injunction would mean only a delay in recovering possession of the land to the defendant Society; the refusal to grant one would mean the end of the plaintiff Company's business in running the speedway. Mr Turkington's main argument in opposition was that an injunction would require two unfriendly parties unwillingly to co-operate in the running of the speedway over the coming season. I do not think that the functions or role of the defendant Society in the operation are such as to make this a real difficulty, and I am satisfied that the balance of convenience thus favours the plaintiff Company.

Counsel argued the question of the Court's general discretion and Mr Turkington raised specifically the question of delay on the part of the plaintiff Company in commencing proceedings. Mr Turkington accepted there was no blame attributable to the period between March this year and the date the writ was actually issued. I do not think it is shown there was any undue delay before then. The parties seem to have been engaged in discussions and negotiations throughout most of the period and the speedway was in fact being carried on.

There will, therefore, be an order granting an interim

injunction in terms of the motion save that it will be limited to restraining the defendant Society, its officers, servants and agents from doing the specified acts. The injunction will also be issued subject to the condition that the plaintiff Company carries on the speedway through the coming season in accordance with the practice followed during the last two seasons. Leave is reserved to either party to apply further if agreement cannot be reached as to the form of the injunction. The costs of this motion are to be costs in the action.

Solicitors for plaintiffs: Macalister, Mazengarb, Parkin & Rose (Wellington)

Solicitor for defendant: G.L. Turkington (Wellington)