IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

M 94/83

BETWEEN DAVID PEET of Katikati, Contractor

Appellant

A N D DENNIS WILLIAM HORNER of Katikati, Orchardist and ROBERT HEATH SMART of Tauranga, Deck Officer

Respondents

Hearing: 20 September 1984

Counsel: I.B. Thomas for the appellant
P.G. Mabey for the respondents

Judgment: Delivered - 5 OCT 1984

C.W. BRITTISTLE
Deputy Registrar

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This is an appeal from a judgment of the District Court at Tauranga given on 15 April 1983. Both parties in the District Court have appealed, or so I was advised by counsel at the hearing, though the papers I have before me do not show this to be the case. At all events, I was advised by counsel that the defendant in the court below, David Peet, first appealed and that his appeal was promptly followed by a cross appeal by the plaintiffs, Dennis William Horner and Robert Heath Smart. At all events, by arrangement of counsel, Mr Thomas for Peet addressed the Court first.

It is not necessary to canvass all the material before the District Court for the purpose of dealing with this appeal, which in substance involves a relatively narrow point. The basis of the action, as disclosed by the statement of claim, was that the respondents, Horner and Smart, carried on in partnership the business of orchardists and nurserymen at Katikati. They entered into a contract with the appellant, Peet, in terms of which Peet was to carry out certain weed control spraying in their forest nursery. Peet carried out the spraying and Horner and Smart allege that as a result thousands of willow cuttings for shelter belt plantings died and they suffered considerable loss amounting to some $35,831.35, though they abandoned any claim in excess of $12,000, no doubt to keep the claim within the jurisdiction of the District Court. The claim was founded on two causes of action: first in negligence, it being alleged that Peet had been negligent in a number of ways in relation to the spray used and its application; and second in contract, it being alleged that it was a term of the contract that Peet would use reasonable care and diligence and that he failed to do so. The defence raised was a denial of negligence and breach of contract and a positive defence was raised that if the respondents as plaintiffs had in fact suffered any loss for which the appellant as defendant was liable then the respondents had failed to mitigate their loss and were guilty of contributory negligence. I note in passing that the appellant as defendant had made a counter-claim for charges for work done amounting to $455.00 but this does not

appear to have been dealt with by the District Court and was not mentioned before me. The counter-claim apparently related to a different matter from that which was the subject of the claim.

After hearing evidence for the plaintiffs which was given by the respondent, Dennis William Horner, and for the defendant which was given by the appellant, David Peet, and a Mr Ian Granville Brown, an orchardist and agriculture contractor, the learned District Court judge, Judge Wilson, gave judgment. His first words were, "I am going to nonsuit you, Mr Kripas". Mr Kripas was counsel for the respondents as plaintiffs in the District Court. The judge next said that his reason was that there was no evidence about the "Caragard" spray that the appellant had used. The judge then went on to discuss briefly the allegations of negligence in the statement of claim, remarked on the lack of evidence on certain aspects, and concluded by saying that he had completely insufficient information as to the type of spray that had been used and in result he proposed to nonsuit the respondents.

Mr Thomas submitted that the learned District Court judge was wrong, for three reasons, to enter judgment of nonsuit. The first was that once the judge commenced to give his judgment he was bound to give judgment for one party or the other and could not change his mind and order a nonsuit. The second was that once the judge had heard all the evidence put forward by both parties he should, if he was not satisfied that the plaintiffs had proved their case, have given judgment for

the defendant rather than nonsuiting the plaintiffs. The third reason was that in any event the circumstances were such that there was no justification for a nonsuit so as to allow the plaintiffs a second trial in which to try to prove their case. Mr Mabey for the respondents submitted that the judge was entitled in terms of the relevant District Court rule to enter a nonsuit at the time he did but if that submission was not upheld then on their cross appeal the respondents submitted the proper judgment on the evidence was judgment in their favour, presumably, though this was not submitted, for the amount claimed. Mr Mabey, when I put the matter to him, accepted that if the appellant's appeal failed the respondents' cross appeal should be treated as abandoned.

I do not think the appellant has made out any of the three grounds urged in support of the appeal. In my view, the first ground is based upon a misconception of the position. Mr Thomas argued that once the judge commenced his judgment he had to give judgment for one side or another. He referred to two cases, Marae Mahuta v Henare Kaihau [1916] NZLR 566 and Foley v Bank of New Zealand [1953] NZLR 303 at 306, and also referred to Wily & Crutchley's District Court Practice (8th edn) at 317. I do not think those cases assist Mr Thomas's argument, for they are concerned with the question of a plaintiff seeking to elect to be nonsuited or asking the court to enter a nonsuit after judgment for the defendant had been given. It is clear that in those circumstances judgment of nonsuit should not be given but that is not the position here.

The notes in Wily & Crutchley do not take the matter any further. What happened here was that at the conclusion of the evidence the judge nonsuited the plaintiffs and then gave his reasons for the nonsuit. He never embarked upon delivery of a judgment for one party or the other. His very first words made his view clear. This, in my view, was in direct accord with R 204 of the District Court Rules 1948, which is in the following terms:

> "204(1) Where the plaintiff appears but does not prove his claim to the satisfaction of the Court, the Judge may either nonsuit him, or give judgment for the defendant"

Here the judge decided to nonsuit the plaintiff and said so in plain words which were followed, very properly, by his reasons for so deciding. There was no question of his deciding in favour of one party, commencing to give judgment and then changing his mind. He started, as I have earlier noted, by saying he was going to nonsuit the plaintiffs.

The second ground was that, having heard all the evidence, the judge was obliged to enter judgment for one party or the other and in the circumstances that judgment should have been in favour of the appellant as defendant. Mr Thomas relied on the wording of R 204 for this submission and emphasised that it would be unjust to expose the appellant to a second action on the basis that "a party should not be twice vexed with the same litigation" when all the facts were in the hands of the other

party. However, in my view, the wording of the rule makes it clear that the judge has a discretion; it says he may either nonsuit the plaintiff or give judgment for the defendant. Mr Thomas then referred to several cases in which the question of the way in which a judge should exercise the discretion is canvassed and he referred in particular to McCabe v Cassidy [1966] NZLR 112, where Hardie Boys J. reviews the authorities. In my view, the position appears to be that it is a matter of a broad and unfettered discretion. There may well be cases where the general principle expressed in Hoystead v Commissioner of Taxation [1926] AC 155 at 170 as adapted by Fair J. in Foley v Bank of New Zealand (supra) at p 308, that a person should not be twice vexed with proceedings in the same matter and that if a party has all the facts within his knowledge and chooses to bring his action in a certain form in relation to those facts then he must accept the position and cannot be allowed to bring the matter up again in subsequent proceedings, should be applied. This is really another way of expressing the maxim that the public interest requires there should be an end to litigation. On the other hand, there may be cases where in the circumstances it is proper that a party should be allowed to try again and it may be that such cases will arise more often for reasons related to the evidence than to the form of the proceedings or the causes of action pleaded. In such cases, and McCabe v Cassidy is one where the judge relied on the basis that in the learned Magistrate's view there may have been further evidence available that could be put before the Court.

the appropriate test to apply is that if the plaintiff has called all the evidence that is available then there should be judgment for the defendant but if there may be other evidence available which would enable the plaintiff to establish his case then he should be given the opportunity to establish it. See also Beattie J. in Van der Veeken v Watsons Farm (Pukepoto) Ltd [1974] 2 NZLR 146 at p 154 and Myers C.J. in Boracure (N.Z.) Ltd v Meads [1946] NZLR 192 at 199. It is clear that Judge Wilson was of the view that there was other evidence available on the crucial question of the spray used and, indeed, on the way in which it was used. It follows that for the appellant to succeed on this ground he has to show that the Judge was clearly wrong in his exercise of the discretion given him: I do not think the appellant has established that.

The third ground, that in any event the circumstances were such that there was no justification for a nonsuit, was supported by Mr Thomas referring to the various matters mentioned by the judge in his reasons for entering a nonsuit and submitting that there was in fact evidence given upon those matters or that there was no evidence at all. The learned judge, however, as Hardie Boys J. said in McCabe & Cassidy, is in a better position than this Court to assess the facts and so determine whether there should be a nonsuit or judgment for the defendant. As I have already noted, the learned judge was clearly of the view that there might be other evidence available which would enable the plaintiffs to establish their case. I add that I have read the transcript of the evidence

and considered the points relied upon by Mr Thomas but I am not satisfied the judge was clearly wrong, which I would have to be before this ground could succeed.

In result the appeal fails and accordingly the cross appeal is deemed abandoned. The respondents are allowed costs in the sum of $200.

Solicitors for appellant: Holland, Beckett & Co. (Tauranga)

Solicitors for respondents: Jackson, Reeves & Friis (Tauranga)