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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.93/83

BETWEEN RICHARD JOHN CURTIS of Wellington, company director

175

Plaintiff

AND J.J. CURTIS & COMPANY LIMITED

Defendant

AND R.C.J. BROAD & OTHERS

Third Parties

Hearing 6 March 1984

Counsel J. R. Wild for Plaintiff
I. R. Millard for Defendant
R. A. Dobson for Third Parties

Judgment 8/3/84

JUDGMENT OF ONGLEY J

The effect of the judgment in this action delivered on 15 February 1984 was to discharge an interim injunction made on 30 March 1984 and so clear the way for the sale by the third parties of their shares in the defendant company to a single purchaser and to permit the registration of that purchaser as holder of the shares. A further consequence is that/the pre-emptive right of the plaintiff to acquire some portion of those shares pursuant to the Articles of Association of the defendant company can not now be exercised because of the failure of the directors of the company to comply with the requirements of the Articles of Association in relation to the proposed sale of the shares.

The plaintiff has appealed against the judgment upon the ground that it is erroneous in fact and in law. If the appeal succeeds the pre-emptive rights conferred by the Articles would be re-instated in principle but in the result could not be exercised because the shares in question would by then have passed to another purchaser leaving the plaintiff with no remedy against the present defendant and third parties.

The application now before me seeks a further injunction pending the outcome of the appeal in the same terms as an interim injunction granted on 31 March 1983. To grant such interim relief would suspend the effect of the judgment and have very similar consequences of a stay of execution by a Court of first instance under R.35 of the Court of Appeal Rules 1955. I think the same principles as are relevant to an application of that sort are applicable here: Erinford Properties Ltd & Anor. v Cheshire County Council /1974/ 1 Ch. 261. So long as an appeal is made bona fide and is not frivolous and would be rendered nugatory unless a stay is granted the Court will ordinarily grant a stay but will consider as a relevant factor in exercising its discretion any injurious effect that may be occasioned to the opposing party through being deprived of the fruits of judgment: The King v The Merchants Association of New Zealand (Inc.) & Ors /1913/ 32 NZLR 175.

I do not view the plaintiff's appeal as frivolous and it is clear that unless the proposed sale of shares is delayed the appeal will be without purpose. I accept that a delay will occasion some disadvantage to the third parties who in the main are elderly people, financially dependent upon income from their investments, and that they wish to realise their capital in the defendant company which in existing circumstances is returning no dividend to them. I shall endeavour to alleviate that position to some extent in the order which I intend to make.

So far as the application is to be determined upon the application of principles applicable to the grant of an interim injunction it is my view that there is a serious question to be argued on appeal and that the balance of convenience favours preserving the status quo so that the property whic h is the subject of the dispute will be preserved pending the outcome of the appeal.

Mr Millard acting for the defendant company and Mr Dobson acting for the third parties submitted that in the event of a further interim injunction being granted terms should be attached to it which would mitigate the impact upon the persons they represent. Both joined in

proposing that the plaintiff should undertake that in the event of the appeal being successful he would purchase, at the option of the third parties, the shares which they have agreed to sell to Hotspur Holdings Limited at the price of $2.55 per share agreed to be paid by that purchaser. The implementation of any such bargain between the parties to these proceedings is of course dependent upon it being practicable having regard to the pre-emptive rights conferred by the Articles of Association in the event of the directors being required to find a purchaser or purchasers for the shares by the machinery provided by the Articles. Subject to that consideration, however, Mr Wild's client agrees to give such an undertaking.

Both counsel also urge that the plaintiff should be required to pay interest at the rate of 10% per annum on an amount equivalent to the purchase price of the shares, such interest to run retrospectively from 16 May 1983 until the disposal of the appeal. That would equate the eventual payment by the plaintiff to that expected to be received from Hotspur Holdings Limited which has invested the purchase moneys in an interest-bearing fund from that date pending transfer of the shares to it, upon an undertaking to pay the accumulated interest to the third parties when it acquires the shares. Not unreasonably

the third parties wish eventually to obtain the same return from either purchaser, whichever shall prove to be successful in acquiring the shares. In my view I cannot fairly commit the plaintiff to that course. Hotspur Holdings Limited has chosen to make a bargain with the third parties along those lines. No doubt it suited both to do so. They have been cooperating in their endeavours to bring about completion of the sale to Hotspur. I am not suggesting anything sinister when I say that, but their efforts have prevented the plaintiff from obtaining the shares he wishes to have. Should it be established on appeal that he is entitled to have had those shares all along, and has been deprived of them, I do not see why he should be required to pay interest on money which has not been applied to that end. Now, however, he is seeking an indulgence and I think it right that he should pay interest from the date of the judgment of this Court dismissing his action until the disposal of the appeal at the rate of 10% per annum on the purchase price of such shares as he shall then acquire as a result of the decision of the Court of Appeal.

Mr Dobson also sought a further condition as to costs, suggesting that the defendant should be responsible for the solicitor and client costs of the third parties. I cannot see any justification for that. The defendant may have to bear some costs in the end but I make no

prognosis with regard to that possibility at this stage. The costs are reserved and in my view should remain so until the disposal of the appeal.

I will grant the injunction in terms of the motion subject to the conditions which I have indicated above I regard as appropriate. The condition as to interest is clear enough. The undertaking as to purchase of the shares is more difficult. I will leave the terms to be agreed upon by Counsel and in the case of disagreement will settle them myself. The undertaking is to be in writing signed by the plaintiff and lodged in the Court.

The costs of this motion and the order thereon are reserved.

Solicitors:

Roache Cain & Chapman, Wellington, for the Plaintiff
Young Swan Morison McKay, Wellington, for the Defendant
Stone & Co., Wellington, for the Third Parties