IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

M 3/84

IN THE MATTER of the Arbitration Act 1908

A N D

IN THE MATTER of a submission to arbitration dated 26th November 1981

BETWEEN ALAN GEORGE McKENZIE of Auckland, Company Manager

Plaintiff

A N D TERRY THOMAS EVANS of Mosgiel, Company Manager

Defendant

Hearing: 11 May 1984

Counsel: C.S. Withnall for the plaintiff
M. Radford for the defendant

Judgment: 11 JUN 1984

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

This matter is an application for the appointment by the Court of an arbitrator to be made in terms of s 6 of the Arbitration Act 1908. The plaintiff, Alan George McKenzie, seeks the appointment of Dennis Lumsden Wood of Dunedin, Barrister and Solicitor, as arbitrator to arbitrate in matters

that he claims are in dispute between himself and the defendant, Terry Thomas Evans. The plaintiff and the defendant are parties to a submission to arbitration contained in a certain deed of sale and purchase dated the 26th of November 1981, whereby the plaintiff was the vendor and the defendant was the purchaser of certain shares in two named companies, Temac Investments Ltd and Temac Holdings Ltd. The plaintiff contends that there is a dispute or disagreement between himself and the defendant which is within the terms of the submission to arbitration and that he served upon the defendant a written notice to appoint an arbitrator but the defendant ignored the request. The defendant on the other hand contends that there is no dispute between himself and the plaintiff which comes within the terms of the submission, which is contained in the second clause 21 of the deed and is in the following, somewhat ineptly worded, terms:

> "21. IN the event of the disagreement on the terms of this Agreement or the interpretation thereof such disagreement shall be referred to arbitration under the provisions of the Arbitration Act and its amendments."

Counsel were agreed that the procedural requirements of the Arbitration Act have been met and the only question is whether the dispute between the parties comes within the terms of the submission to arbitration clause set out above.

The circumstances in which this question arose are, according to the affidavits filed in support and opposition, as

follows. The plaintiff, according to the first recital in the deed, was the holder of certain shares in Temac Investments Ltd and Temac Holdings Ltd, which two companies held all the shares, except those already held by the parties, in certain other named companies. The plaintiff agreed to sell his shares in the two Temac companies to the defendant and the effect of the sale of those shares to the defendant, according to the plaintiff, was to give the defendant control of certain named American companies, the shares of which were owned by the two Temac companies. The plaintiff contends that the defendant would thus be in a position, because of his control of the American companies, to sell the assets of those companies. The plaintiff further contends that in terms of clause 8 of the deed of sale and purchase he was to take the sole control, ownership and responsibility for certain named business assets of some of the American companies and also a debt due to one of those companies. The plaintiff further contends that the defendant was required to arrange the transfer of the legal ownership of those assets to him but states that though he took over possession of the business assets the defendant did not transfer the legal ownership of them to him and that, in fact, the defendant subsequently sold the American companies to other persons and he never received the assets. Indeed, he stated that the purchasers of those business assets in the United States subsequently took legal action to recover them and he never received the full beneficial ownership of them.

Mr Withnall on these facts submitted that the defendant was in breach of a condition, or an implied condition, that he would ensure that the legal ownership of the American assets was assigned to the plaintiff by the American companies and that when the plaintiff made a claim on the defendant for the value of those assets the defendant disputed that he was under any such obligation to transfer the assets or that he was under any liability in respect of them. The plaintiff's case accordingly is that there is a disagreement between the plaintiff and the defendant as to the interpretation of the terms of the deed and such a disagreement is clearly within the language of the submission contained in clause 21.

The defendant, on the other hand, denied that he had failed to carry out his obligations under the deed and contended that the plaintiff had taken over and had sole control, ownership and responsibility for the various assets. He stated that he had no knowledge of whether or not the plaintiff took over the debt and said if he had wished to recover those monies it was up to him to take such steps as he thought proper to obtain them. He also contended that the plaintiff had entered into an agreement for the sale of certain of the assets and had received the proceeds of such sale. The defendant, in effect, said that he had done all that he was required to do in terms of the deed and contended there was thus no disagreement between himself and the plaintiff which came within the terms of the submission. The plaintiff, I should add, in an affidavit in answer to the defendant's affidavit had said that

though he had entered into an agreement for sale of certain of the assets it was ineffective because he did not have the legal ownership of the asset.

Mr Radford's argument was that the submission clause was an unusual one in the way in which it was drawn and that it related only to the interpretation of the terms of the deed but not to its performance. There were two reasons for that submission. The first was that the words of the submission were specific and plainly related only to interpretation of the deed. The second was that when the deed was read as a whole it was clear that the plaintiff as vendor was given certain specific remedies in case of default by the defendant as purchaser and therefore the meaning of the language of the submission was to be restricted to interpretation as the deed itself gave clear remedies to the plaintiff for defaults on the part of the defendant. In summary, the defendant's case was that he did not dispute his obligations under the deed and said that to the best of his knowledge he had carried them out but that if he had not then the plaintiff could invoke the specific remedies provided for in the deed to which reference has already been made.

Mr Withnall in reply submitted that the defendant had clearly not accepted in a formal admission in his affidavits or at this hearing that he was under an obligation to transfer the legal ownership of the assets to the plaintiff and that therefore there was a disagreement between the parties that came within the language of the submission. He further

submitted that the language of the submission should be construed disjunctively in the sense that it meant that it applied in the event of a disagreement either on the terms of the agreement or the interpretation of the terms of the agreement. The plaintiff's contention was that the dispute here could fall under both heads. First there was a dispute as to whether there was an implied term that the defendant should procure or ensure the assignment of the legal ownership of the assets to the plaintiff; and, secondly or alternatively, there was a dispute as to whether on the proper interpretation of the terms of the deed the defendant should procure or ensure such an assignment.

In my view there is a dispute between the parties that comes within the submission whatever way it is put. In paragraph 6 of his first affidavit the plaintiff stated that he had made a claim against the defendant for the value of the assets but the defendant had disputed that he was under any liability in terms of the deed to transfer the assets to him. The defendant in his affidavits did not specifically deny this and in my view Mr Withnall is right in his submission that unless the defendant accepts that he was under such a legal responsibility there is a dispute within the terms of the submission. It probably is not necessary for me to go further, but in my view the submission to arbitration does not go beyond determining what are the terms of the agreement in the disputed area and the meaning to be attributed to those terms. I accept Mr Radford's submission that the question of whether there has

been performance by the defendant of the agreement is not a matter included within the submission, though it may well be that once the arbitrator has decided what the terms are, and their proper interpretation, the question of whether the defendant has performed them will be plainly apparent.

There will therefore be an order for the appointment of an arbitrator. Mr Radford raised no objection to the appointment of Mr Wood and accordingly he is appointed. Neither counsel said anything as to the question of costs and so that question is reserved.

Solicitors for plaintiff: Race & Douglas (Dunedin)

Solicitor for defendant: Michael Radford (Dunedin)

McKeown v. Public Trustee

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 545/82

IN THE MATTER of the Law Reform (Testamentary Promises) Act 1949 and its amendments

BETWEEN RACHEL PINKERTON McKEOWN

Plaintiff

AND THE PUBLIC TRUSTEE OF NEW ZEALAND as Trustee in the Estate of GEORGE HENRY DAVIES late of Auckland, Deceased

First Defendant

AND IVOR CLARKSON of Auckland, Clerk and JEAN CLARKSON his wife

Second Defendants

Hearing: 3 September 1984

Counsel: J W Clearwater for Second Defendants
N W Ingram for Plaintiff

Judgment: 3 September 1984

ORAL JUDGMENT OF THORP J

This is a motion by the second defendants, the beneficiaries under the will of the late George Henry Davies, for an order striking out the Statement of Claim in proceedings brought by the plaintiff, Mrs McKeown against the Public Trustee as trustee of Mr Davies' will, for provision under the Law Reform (Testamentary Promises) Act 1949.

The motion was stated to be made on the grounds that the plaintiff was debarred from proceeding. However, Mr Clearwater for the applicant did not claim that the action was commenced outside the time prescribed by s 6 of the Law Reform (Testamentary Promises) legislation. Clearly he could not do so. On his own chronology, probate having been granted on 12 November 1981 and the Writ being filed on 3 June 1982, the proceedings were brought within the statutory limitation period.

The argument in fact proceeded upon the quite distinct grounds that, the estate of the testator having been fully distributed in 1982, and (as Mr Clearwater submitted) the plaintiff being no longer able to obtain a tracing order under s 49(3) of the Administration Act, the action could serve no purpose and was properly classified as frivolous and vexatious.

For the respondent Mr Ingram having noted that the motion could not succeed upon its stated ground, then presented me with a memorandum which carefully and methodically argued that the plaintiff could still seek leave to apply under s 49(3). He also referred me to an affidavit filed recently by the plaintiff's solicitor in which he reports that proceedings were issued on 31 August 1984 by way of a second Writ of Summons which seek special leave under s 49(3). He acknowledged that he had prepared argument on the basis that the motion would be fought principally on the question of the availability of leave under s 49(3).

It seemed to me that the appropriate course was to grant an application by Mr Clearwater for the addition of the second ground that the action was frivolous and vexatious and an abuse of the Court's procedures. That amendment was allowed on the basis, which was common ground between counsel, that the applicants could only succeed if they established that there was no jurisdiction available to the Court to grant leave under s 49(3).

I should perhaps note that I was advised at the outset by Mr Clearwater that he also had instructions from the Public Trustee, which had instructed him to abide the order of the Court.

The question whether jurisdiction may be available to grant leave under s 49(3) essentially rests on whether one prefers the interpretation of that legislation adopted by Roper J in Re Due (deceased) [1977] 1 NZLR 696, or that of Greig J in Re Hale [1981] 1 NZLR 784.

In the first Roper J was invited to consider three possible interpretations of s 49(3), a provision which is on any reading a tortious and untidy bit of legislation. He chose that which would exclude jurisdiction in cases where distribution had been completed prior to the bringing of the application. He found support for that view in the decision of McGregor J in Re Selby [1966] NZLR 650 and from the fact that each of the other two suggested interpretations of s 49(3) contained quite obvious flaws.

Greig J in Hale's case preferred to give s 49(3) an application without any specific time limit even when there had been a distribution. The reasons for his reaching that conclusion appear on pages 708 to 710 of the report. I note in particular that he did not accept that Selby's case was of assistance, for the reason that the legislation which McGregor J had to interpret was materially different from that enacted in 1969 which Greig J and I are both required to interpret.

I prefer the interpretation in Hale's case to any of those considered in Re Due. I would agree, with respect, with Roper J's preference of the interpretation which he adopted to either of the others available to him. But it seems to me, with due respect to His Honour, that the limitation built into the Due interpretation of s 49(3) rests on an artificial distinction which does not arise on the broader view taken in Hale.

For that reason I conclude that it is not open to this Court to find that the respondent cannot succeed on an application under s 49(3). Accordingly I must dismiss the present motion.

Before doing so I feel bound to note that the plaintiff's action for special leave has arrived very late and that I do not accept the submission made by Mr Ingram in the course of argument this morning that applications for special leave under s 49(3) must, in the order of things, be heard contemporaneously with the substantive claim or claims against the testator's estate.

The question of the manner of making applications for special leave has been considered in a number of cases in relation to Family Protection Act claims. There it has been clearly determined that a separate application must be made for special leave, and that it is not sufficient simply to file a writ or originating summons for substantive relief. However I can see no reason why, in the case of Testamentary Promises claims, application should not be made by originating motion with affidavits in support.

I note that one of the reasons Greig J was content to interpret s 49(3) as being available without specific time limit was that "The exercise of the Court's discretion will ensure that no unjust or long delayed application will be allowed to proceed."

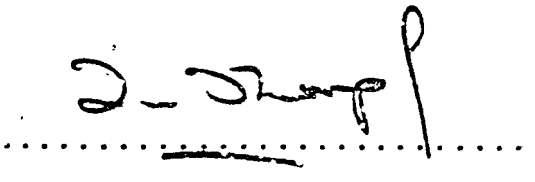
That statement hardly accords with the proposition that an applicant for special leave may simply file a Writ of Summons applying for special leave and then require the defendants to it to take all necessary steps to defend the substantive application and the action for special leave, including the hearing of both on the merits, no matter how long the delay in seeking leave, or how unjust it might be to grant it.

I am indebted to Mr Clearwater for the reference in his arguments in reply to a statement in Forkin v Public Trustee (unreported, Wellington A282/80 and A52/81) by O'Regan J. In those proceedings a notice of motion for special leave had been filed but was not pursued. The applicant chose instead to file a second Writ of Summons. His Honour expressed the opinion, on page 20 of his decision, that the Writ of Summons had been filed ex abundante and that the notice of motion was a proper exercise of the right to apply for special leave.

In my view applications for special leave should be made with sufficient statement of their grounds to enable the Court to determine whether or not the application is one which can be dealt with on affidavit or is one which can only be determined after a hearing of the plaintiff's claim on the merits.

It is a matter for Mr Ingram and his client to decide whether they wish to adopt that procedure. There is no proceedings before me on which I can require that that course be followed. They may, however, think fit to consider that if the views I have expressed find favour with the Judge who finally comes to determine the application for special leave, any additional delay which has resulted from failure to adopt that course would necessarily weigh against the application succeeding.

Here no attempt was made by Mr Ingram to explain the delays to date in seeking special leave. Although I must find against the Applicants on their motion, I do not consider their action in seeking finality unreasonable. The motion is dismissed. There will be no order as to costs.



Solicitors

Fookes & Clearwater, Takapuna for Second Defendants

Mahony Samuel Becker & Co, Auckland for Plaintiff

IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 59/84

BETWEEN ROBERT LOUIS McLACHLAN and ROBERT DOUGLAS McLACHLAN both of Hunterville, Farmers as executors of ANNIE MARIE McLACHLAN, Widow, deceased

Appellants

AND THOMAS GEORGE TAYLOR of Hunterville, Farmer

Respondent

Coram: Cooke J. (presiding)
McMullin J.
Somers J.

Hearing: 3 October 1984

Counsel: H.S. Lusk Q.C. for Appellants
J.R. Wild for Respondent

Judgment: 3 October 1984

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

The vendors as executors of their mother entered into a contract of sale and purchase of a farm property with the purchaser. The contract was dated 8 July 1982. By oversight a clause making the transaction subject to the consent of the Land Valuation Tribunal as required by s.25 of the Land Settlement Promotion and Land Acquisition Act 1952 was not included in that contract. For reasons of his own the purchaser wished to extricate himself from the contract. He took the point that it was illegal and void under the 1952 Act. The vendors sued for specific performance. In the High Court Quilliam J. made an order

We pause to note that Mr Wild does not suggest that this letter amounted to an election. It referred to the right to resell and sue for a deficiency given by a clause in the contract, but it expressly asked the purchaser to complete so as to preclude any need for the vendors to rely on that right.

Then on 22 October 1982 the vendors' solicitor wrote again to the purchaser's solicitor:

> R.M.S. Jones & Co.,
> Solicitors,
> P.O. Box 2,
> HUNTERVILLE.
> ATTENTION: Mr Flack
> Dear Sirs,
> re: McLACHLAN to TAYLOR
> Having had no reply to earlier correspondence my clients are now taking active steps to secure the offer referred to in my letter of 6 October. I enclose a copy of that letter of 6 October.
> Yours faithfully,
> L.H. POWELL

The natural reading of this letter in our view is that the vendors were now actively endeavouring to obtain or procure an offer from a third party. It is elementary that an election at common law must be an unequivocal choice between inconsistent courses of action. We cannot read this letter as an unequivocal choice of damages rather than specific performance. If the efforts of the vendors had

The reasons that we have given mean that the election argument must fail. For similar reasons an argument invoking the doctrine of approbation and reprobation, which Mr Wild also outlined, must fail. It becomes unnecessary to consider the question of detriment. It is to be noted that Quilliam J. thought that the election argument failed because there was no contract in existence at the relevant time, although he also mentioned that in any event the proposal referred to in the letters resulted only in a conditional contract which did not become binding. The fact that the contract between the present parties was not valid and binding at the material time plays no part in our own reasoning as to election. In the light of the remedies available under the Illegal Contracts Act it was a contract that could be validated. We see no reason why the vendors could not be found to have elected as between alternative remedies that would be available in the event of validation. The election argument founders rather, as we see the matter, because the common law ingredients of the doctrine are not made out.

As to the appeal by the vendors, this relates to the machinery for carrying out the validation and ordering specific performance. The Judge may not have had a great deal of assistance from counsel in the framing of the orders made in the High Court. In the result certain difficulties have been encountered. We accept that this Court can put

those terms. The result is that the appeal of the purchaser is dismissed. The appeal of the vendors is allowed to the extent of vacating the order made in the High Court and substituting an order in the terms submitted. It is desirable to record those as part of the present judgment. They are as follows:

(1) That pursuant to the provisions of the Illegal Contracts Act 1970 the contract signed by or on behalf of the parties hereto and dated 8 July 1982, insofar as it is deemed to be unlawful and of no effect by virtue of the Land Settlement Promotion and Land Acquisition Act 1952, be validated in whole.

(2) That the said contract be varied by substituting in clause 4 thereof 7 November 1984 for 13 August 1982 as 'the date for completion'.

(3) That the respondent specifically perform according to its terms the contract as validated and varied.

No order was made for costs in the Court below and likewise there will be no order in this Court. In refraining from making any order in this Court we have had regard to the fact that it has been necessary for the vendors to obtain some variation in the relief granted in the High Court.

R Blanchard J.

Solicitors:

L.H. Powell, Palmerston North, for Appellants

Flack Brown & Co., Taihape, for Respondent