28/4

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 359/86

3 NZLR

PRIORITY LOW

382

BETWEEN D.I. HENDERSON

Plaintiff

AND C. ST GEORGE, D.F. HOWARD, R.B. CHESNE & G. FRONTIERE

Defendants

Hearing: 21 April 1986

Counsel: Mr Sorrell for plaintiffs
Mr L. Stevens and Mr Thorp for defendants

Judgment: 21 April 1986

JUDGMENT OF HILLYER J

This is a motion for an interim injunction. The plaintiff says that he had a contract to purchase a horse from the defendants. The defendants say no contract was entered into. The plaintiff seeks to restrain the defendants from selling the horse to anyone else, pending determination of his claim to specific performance of his contract.

The principles on which interim injunctions are granted are now well known and started with American Cyanamid v Ethecon [1975] AC 396, explained in Fellowes & Fisher [1976] 1QB 122 and approved in New Zealand by the Court of Appeal in Consolidated Traders Ltd v Downes [1981] 2 NZLR.147.

In accordance with those cases the first inquiry is as to whether there is a serious question to be tried. Here the parties disagree on the question, whether a contract was entered into. The plaintiff basis his claim on two telexes dated 17 March 1986. There had been negotiations between the plaintiff and the defendants regarding the sale of the hose Lanfranco. The horse was on its way to Australia, but when the negotiations developed, was unloaded in New Zealand and the negotiations continued.

The telex from the plaintiff to the defendants as far as price was concerned, read as follows :

> "1. We would syndicate the horse for approximately 40 shares. We would sell these shares at $30,000 each. We would pay the vendor six shares in that syndicate, $250,000 immediately, and $250,000 in 12 months time (US$)."

That telex was replied to on behalf of the defendants by a telex which began:

> "Vendors agreed to terms per your telex of 17 March."

The telex from the defendants went on to talk about the place to which the first payment of $250,000 was to be forwarded and asked the name of the stud at which the horse would stand. The question of the infertility policy was mentioned.

There were then further communications between the plaintiff and the defendants, in the course of which a

number of questions were raised as to when the first instalment of $250,000 was to be paid, and several other matters. Importantly, there was discussion as to whether there would be 40 or 44 or 45 shares in the horse.

It is obvious that if the purchase price was to be US$500,000, plus six shares in the syndicate which owned the horse, the question of the number of shares in that syndicate was an essential term, because it affected the purchase price. Obviously 6/40ths would be worth more than 6/45ths of a horse. The telexes exchanged between the parties referred only to approximately 40 shares, and that in my view can no more give rise to a contract than an agreement to pay approximately $100,000 for a house.

On that basis therefore, I conclude that there is no serious question to be determined. It follows that I am not prepared to grant the interim injunction sought. I wish to make it clear that I have arrived at that decision on the papers in front of me, relating to the application for the interim injunction. Mr Sorrell specifically said in response to a question from me, that there was nothing in the papers that would throw any light on what might perhaps be, for example, a technical meaning of the term "approximately 40 shares", or whether there was any other reason why the purchase price could be determined accurately.

By that I mean only that this determination is as to the claim for the interim injunction and cannot affect the substantive action between the parties. If it appears in that substantive action that the plaintiff is entitled to specific performance of the contract he alleges, then he will be in the normal way entitled to damages, if the defendants sell the horse in breach of what has then been determined to be a valid contract.

Subject to those comments the application for an interim injunction is dismissed.

Mr Stevens has submitted that unusually this is a case in which costs should properly be awarded on a decision on a motion for an interim injunction. If however, eventually the claim to specific performance is upheld, that would undoubtedly be a matter which would affect the Court in determining the costs to be awarded. I have heard Mr Stevens expressing with some clarity the basis on which he submits that this is a special case, in particular as to the necessity for urgency, the problems of dealing with overseas principals and the substantial expense which has been incurred. All these are matters in my view, which can properly be taken into consideration when the final determination is made.

If the matter does not come to a final determination, leave is reserved to the defendants to make application

for costs on this interim injunction. I have no doubt the defendants will preserve the records which form the basis for Mr Stevens' submission to me.

P.G. Hillyer J

Solicitors
Nicholson Gribbin for plaintiff
Russell McVeagh McKenzie Bartleet & Co for defendants