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evidence by deposit

Set 3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 856/86

BF 1200

1406

UNDER the Land Transfer Act 1952
BETWEEN ADRIAN JAMES SCOTT and
SYLVIA MARGARET SCOTT
Plaintiffs
A N D DEBORAH WENDY SULLIVAN
Defendant

Hearing 5th September 1986
Counsel R. Hindle for plaintiffs
G. Jenkins for defendant
Date 5th September 1986

ORAL JUDGMENT OF TOMPKINS J

The plaintiffs have applied for an order pursuant to r 501 that the evidence of the plaintiff, Mr Scott, and the plaintiffs' solicitor, Mr Irvine, be given by affidavits made by them in support of interlocutory proceedings in this action. Mr Jenkins, for the defendant, has indicated that the defendant desires the production of both witnesses for cross-examination. An order under r 501 cannot therefore be made if the witness can be produced.

There is an apparent conflict between r 501 and r 496. That rule provides

"496. Evidence to be given orally - Except where otherwise directed by the court or required or authorised by these rules or by any Act, disputed

questions of fact arising at the trial of any proceeding shall be determined on evidence given by means of witnesses examined orally in open Court."

It appears on the face of that rule that the Court has a discretion to direct at the trial of any proceeding that disputed questions of fact be determined otherwise than by means of witnesses examined orally in open court, but rule 501 expressly provides that an order authorising the evidence of a witness be given by affidavit shall not be made if the requirements in r 501(2) are not fulfilled.

"501. Evidence by affidavit pursuant to order of Court

(1) The Court may, even though no agreement for the giving of evidence by affidavit has been made, at any time for sufficient reason order, on such conditions as the Court thinks reasonable, -

(a) That any particular fact or facts may be proved by affidavit; or

(b) That the evidence of any witness may be given by affidavit read at the trial, or on any application for judgment.

(2) Notwithstanding subclause (1), where -

(a) An opposite party desires the production of a witness for cross-examination; and

(b) The witness can be produced, -
an order shall not be made authorising the evidence of the witness to be given by affidavit."

It is my view on a reading of the rules that where the evidence of a witness is sought to be given by affidavit that position is covered by r 501 which, having regard to its express terms overrides the discretion otherwise given to the Court by r 496.

Mr Scott is in England. He therefore is not a witness who "can be produced". It seems to me that that part of the rule is intended to be interpreted reasonably so that whether a witness

"can be produced" is to be decided by considering whether it is reasonable in the circumstances of the case that he be produced in person at the hearing.

I am also influenced in reaching this conclusion by the view that I have formed that on the matters truly in issue between the parties that will require to be decided in determining the claim, Mr Scott's evidence is of peripheral and background value rather than relating directly to the factual matters that are relevant to those issues.

Mr Irvine can be produced. He is at present on vacation, his non attendance today no doubt being due to the fact that this action has been brought on for hearing quickly, but he could be available, if not today certainly at an adjourned date.

There will therefore be an order that the evidence of Mr Scott be given by his affidavit of 18th July 1986, being read at the trial. The application for the evidence of Mr Irvine to be given by affidavit is refused.



Solicitors

Messrs Simpson Grierson Butler White, Auckland for plaintiffs
J. P. Jamieson Esq., Auckland for defendant