

BETWEEN COLLEEN VIVIAN ELLISON

Plaintiff

A N D BOLTON ENTERPRISES LIMITED

First Defendant

A N D MICHAEL DAVID CURTIS

Second Defendant

Hearing: 15 October 1986

Counsel: A.W. Robinson and G.P.P. Cone for Plaintiff
R.A. Fraser for Defendants

ORAL JUDGMENT OF WILLIAMSON J.

This is an application by the Plaintiff for an interlocutory order concerning the sale proceeds of the Cupid Shop businesses. The application seeks orders that the whole or part of the proceeds of sale of these businesses be paid directly, or through a receiver, to the Plaintiff for her use through her solicitors, Cuninghame Taylor and Thomson, on such terms and conditions as this Court thinks just and appropriate. It also seeks further directions and orders, including an order that the proceedings be tried at such time as this Court thinks proper.

The grounds for that application, as expressed in the motion, are that the Plaintiff was required to discharge obligations under a matrimonial property settlement and consequently required part of the proceeds of the sale of the businesses for that purpose. The application was made in reliance on Rules 436, 437, 438 and 442 of the High Court Rules 1985. A notice of opposition has been filed, and as part of that opposition challenge is made to the jurisdiction under which such orders could be made. At the hearing of this matter Mr Robinson for the Plaintiff argued that orders of this nature could be made pursuant to Rules 331-335 of the High Court Rules 1985.

The facts concerning the proceedings between the Plaintiff and the Defendants are of such length that it is inappropriate to include them in this judgment. It is sufficient to record that the proceedings concern the rights of the parties in connection with businesses known as the Cupid Shops carried on at 159 Gloucester Street and 68 Manchester Street.

On the 27th January 1984 these proceedings were issued seeking damages against the First and Second Defendants for trespass, loss of profits, and for punitive damages arising out of an alleged entry by the First and Second Defendants to the premises of these businesses. The Defendants have counterclaimed for alleged outstanding instalments payable pursuant to the agreement between the Plaintiff and the First Defendant's assignor.

On the 1st February 1984 an order was made in this Court that the First and Second Defendants vacate the premises to enable the Plaintiff to continue carrying on her business from them.

On the 27th June 1984 the proceedings came on for hearing in this Court before Hardie Boys J but were adjourned to enable pleadings to be finalised so that all matters in issue between the parties could be dealt with at the same time. Since that day no further hearing has been sought or obtained, and indeed the pleadings are not yet complete.

On Friday last an application was heard in this Court by Heron J. He then made orders appointing Peter Hames of Christchurch to be Receiver of the businesses and authorised him to sell the businesses upon the terms specified in agreements which were attached to the affidavits filed in support. Ancillary orders were made requiring the Plaintiff to deliver to the Receiver all of the documents relating to the businesses and requiring the Receiver to file accounts in this Court every three months from the 10th October 1986.

The present application had been filed at a later time to the application for appointment of a receiver, and was called before Heron J. on the 10th October but adjourned until today when time was available to hear the matter.

As a preliminary matter Counsel for the Defendants, Mr Fraser, indicated that he wished to cross-examine the Plaintiff upon the affidavits she had made because of the speed with which the proceedings had been brought on for hearing and because he alleged that the affidavits lacked detail sufficient for a decision to be made. Under Rule 254 of the High Court Rules 1985 such cross-examination requires leave and leave is given only when special circumstances can be shown.

While I appreciate the force and significance of the two matters argued by Mr Fraser, they do not in my view constitute special circumstances within the meaning of the Rule and accordingly I declined to give leave for the Plaintiff to be cross-examined on the affidavits she has made in these proceedings.

In support of this application the Plaintiff has made two affidavits concerning not only the circumstances of her carrying on of the businesses and their sale, but also concerning the lengthy and obviously difficult matrimonial proceedings in which she has been involved. Her affidavit indicates that she now requires \$23,000 in order to make payment to her husband under the terms of a matrimonial property settlement which was completed following a judgment given by District Court Judge Bisphan on the 5th June 1986. She also indicates in the affidavit that she has various domestic accounts and costs in relation to the business in respect of which she requires a further \$3,000.

It has been argued that this Court should make an order allowing the receiver to advance a sum of \$26,000, out of a total fund of approximately \$33,000 which he should have following the sale of the businesses, so that the Plaintiff can meet these commitments. It is submitted that this sum could be

secured on the former matrimonial property which will then be solely owned by the Plaintiff and which has a present value of \$72,500 inclusive of \$2,000 chattels. That property already has a first mortgage to the Housing Corporation securing a sum of \$41,300. The mortgage was originally for \$42,500.

The application has been prompted by a fear that the benefit of the matrimonial property settlement will be lost unless payment can be made and because of the strains which this and other matters have caused to the Plaintiff's health. There is evidence that her health in June of 1984 was under considerable threat and that since then she has had to receive some treatment. There is no evidence but I have been informed from the Bar that she is now in a state of remission.

For the Defendants Mr Fraser challenges the making of such an order, firstly on the basis that there is no jurisdiction in the Court to make the order, and secondly upon the basis that the proposed order would not provide sufficient security in any event.

As to the first matter of jurisdiction, Rule 331, under which this order is sought, states:

" (1) In any proceeding, the Court may make orders for the detention, custody, or preservation of any property.

(2) An order under subclause (1) may authorise any person to enter any land or do any other thing for the purpose of giving effect to the order.

(3) In a proceeding concerning the right of any party to a fund, the Court may order that the fund be paid into Court or otherwise secured."

Rule 335 states:

"Where application is made for an order under Rule 331 or Rule 332, the Court may treat the application as though it were also an application for directions under Rule 437 and may give directions accordingly."

The order made last Friday to appoint a receiver is one which had as its primary object not only the wise sale of the businesses but also the preservation of the property which is in dispute between the Plaintiff and Defendants. The present order which is sought seeks a change in the way in which the funds produced by the sale of the businesses are to be held. No specific precedent for the making of such order has been referred to. Under Rule 331(3) the Court's power is "in a proceeding concerning the right of any party to a fund". These proceedings concern the rights of the parties to the businesses and to instalments arising under agreements relating to those businesses but do not directly concern the right of the parties to a fund. It may be said, as Mr Robinson has argued, that in effect the moneys arising from the business are now held in a fund or are to be held in a fund by the receiver so that in practical terms the dispute between the parties is as to their rights to the moneys constituting that fund.

For myself I have doubt that the jurisdiction can be extended to proceedings which, although not referring expressly to any fund, concern it in a practical way. I am also conscious that the purpose of the Rule, which is indicated as much by the words of the total Rule as by the words in subclause (c) "may order that the fund be paid into Court or otherwise secured", is essentially to preserve the property. The object of the orders now sought in this application is not to preserve the property but rather to enable the Plaintiff to satisfy other obligations which she has personally but on the basis that the moneys could in any event be secured by her.

In view of the wording of Rule 331 and its purpose I do not believe that this Court has a jurisdiction to make the orders now sought.

If I am wrong in that I have also considered the merits of making orders as sought. I am concerned that ultimately they could result in a loss to the parties in these proceedings because the property which is offered as security will be heavily mortgaged and there can be no confidence that

the Plaintiff would be able to meet the obligations necessary under the mortgages on the property. If she were able to then no doubt it would not have been a difficult task for the money to have been found elsewhere. I feel sympathetic to the Plaintiff and the matters which have been urged on her behalf, but I do not consider that this order can be made on the basis proposed in a way which will be just to all the parties concerned in these proceedings.

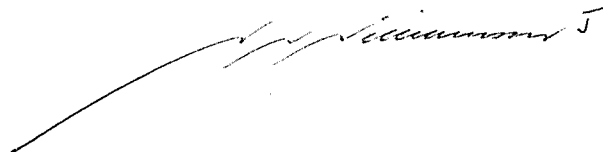
It is appropriate on this application to also consider whether directions ought to be given. I believe that they should because of the past delays and the necessity for a speedy resolution of all matters in dispute so that the funds available can then be finally released. For the reasons I have given I refuse the application before me but direct that:

First, any other interlocutory applications of any nature by either party are to be made within 14 days.

Secondly, the parties are to complete and file a praecipe setting the matter down for hearing within a period of one month.

Thirdly, the parties are then to seek a conference with the Executive Judge to enable a firm and urgent date, if possible, to be given for the hearing of the matter.

Costs will be reserved.



Solicitors:

Taylor Shaw & Anderson, Christchurch, for Plaintiff
R.A.McL. Fraser, Christchurch, for Defendants