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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 1110/85

IN THE MATTER	of an Application pursuant to Rule 551 of the Code of Civil Procedure
BETWEEN	PHILIP NORTH HOLLOWAY and BEVERLEY BRYAN HOLLOWAY Plaintiffs
A N D	MICHAEL JOSEPH JACKSON First Defendant
A N D	SMART GROUP (NZ) LIMITED Second Defendant

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A. No. 1137/85

BETWEEN	KARANGAHAPE ROAD INTERNATIONAL VILLAGE LIMITED Plaintiff
A N D	PHILIP NORTH HOLLOWAY and BEVERLEY BRYAN HOLLOWAY First Defendant
A N D	SMART GROUP (NZ) LIMITED Second Defendant

Counsel: P T Finnigan for Karangahape Road International Village Limited
R J Craddock QC and J C Malcolm for Mr and Mrs Holloway
J N Bierre for Smart Group (NZ) Ltd

Hearing: 28, 29 & 30 May 1986, 3, 4, 5 & 6 June 1986 and 6, 7, 8 & 12 October 1987

Ruling: 12 October 1987

RULING OF CHILWELL J

At the conclusion of the evidence for Karangahape Road International Village Limited (Karangahape) the plaintiff in Action No 1137/85, Mr Craddock for Mr and Mrs Holloway moved in terms of Rule 490 of the High Court Rules that Karangahape be non suited. Rule 490 states:-

> "On an application by the defendant that the plaintiff be nonsuited, the Court may put the defendant to his election whether or not he will adduce evidence in the proceeding. If he elects to adduce evidence, the Court may reserve his application for non suit until that evidence has been given, when it shall be decided on the whole of the evidence then before the Court."

Mr Craddock submitted that this rule had altered previous practices in regard to putting the moving party to his election. He adopted the text and reasoning of the author of McGechan on Procedure at pages 586-591 and, in particular, the approach suggested at pages 590-591 as appropriate to the exercise of the discretions conferred by the rule. He submitted that this is a case where his client should not be put to an election whether or not to call evidence; that the non suit points should be decided on the present state of the evidence.

So that the Court could properly consider the exercise of its discretions, Mr Craddock made short submissions on three non suit points each of which, he submitted, if determined favourably to Mr and Mrs Holloway would be fatal to Karangahape's case. Those three points were, to put them in the form of submissions favourable to the case of Mr and Mrs Holloway:-

1. That Mr and Mrs Holloway were at the material times ready, able and willing to settle the transaction the subject of the agreement for sale and purchase made on 26 April 1985 between them as vendors and Michael Joseph Jackson or nominee as purchaser.

2. That neither Mr Jackson nor his nominee Karangahape was ready, able and willing to settle the transaction at the material times because they had not arranged a first mortgage in terms of the financial conditions of the agreement. Instead they had unilaterally substituted a first mortgage different in identity of mortgagee and in terms of the mortgage. The relevance of this submission is that Mr and Mrs Holloway had agreed to accept a second mortgage in satisfaction of part of the purchase price and therefore had an interest in the identity of the mortgagee and the terms of the first mortgage.

3. That Karangahape could not maintain this action to enforce the provisions of the agreement because there has never been privity of contract between Karangahape and Mr and Mrs Holloway. This submission involves the proposition that, if there was a nomination by Mr Jackson of Karangahape, the Contracts (Privity) Act 1982 does not apply to confer enforceable benefits

upon Karangahape under this agreement which designates the purchaser as "Michael Joseph Jackson or Nominee".

In his submissions in opposition to the motion Mr Finnigan for Karangahape indicated agreement with Mr Craddock's submissions in regard to Rule 490. He addressed his arguments to the non suit points submitting, in effect, that it would be premature to determine those issues at this stage. In his reply Mr Craddock considerably developed his arguments on the three non suit issues with the result that I considered it proper to give Mr Finnigan the right to reply.

The consequence is that I have received in submissions rather more than would be the case if my attention had been confined to the discretionary elements of Rule 490. However, my more indepth consideration of the non suit points has assisted me in considering how to exercise my discretion.

I reserved the whole matter on Thursday afternoon and indicated to counsel that I would require Friday to consider their submissions. This case had seven days of hearing in May and June 1986. It remained adjourned part heard until Tuesday of last week 6 October. It has been necessary for me to refresh my memory upon the evidence, the exhibits and the course of the hearing as well as to consider the submissions of counsel on the whole question

of non suit. The present fixture expires on Friday of this week 16 October. I say at once that while Mr Craddock's submissions were put with his usual clarity, I have not found the answers to the non suit points capable of easy solution nor have I found certainty in the law to be applied.

I am, however, confident that Rule 490 has done little to change the practice of this Court except to underscore the discretionary element which always existed but which tended to have become blurred by an over insistence upon putting the mover of a non suit to his election. This, for example, is the practice as stated in Cross on Evidence 3 NZ Ed 77 before Rule 490 came into force:-

> "A submission that there is no case to answer, may be made by one of the parties to proceedings before a judge alone. If this is done in a civil case the judge must decline to rule on the submission unless the party making it elects not to call evidence. At least two considerations justify this requirement. In the first place, the judge has to determine the facts as well as the law, and he ought not to be asked to express an opinion on the evidence until it is complete. No one would ask a jury at the end of a plaintiff's case to say what verdict they would be prepared to give if the defendant called no evidence. Secondly, the parties might be put to extra expense if the judge ruled in favour of the submission before the evidence was complete, for if the Court of Appeal were to decide against his ruling a new trial would be necessary so that the party who made the submission could call his evidence."

It is the word "must" in the second sentence of that passage which reflects a wrong conception of the previous

practice. With that exception the text correctly reflects the principal factors requiring consideration. The 1985 edition of the Supreme Court Practice Vol 1 544 states the practice more correctly:-

> "With certain exceptions (e.g. in libel where there is no evidence of malice - as to which, however, see Marbe v George Edwardes Ltd [1928] 1 K.B. 269, C.A.) it is inconvenient for the Judge to rule there is no case for a jury without hearing defendant's evidence (see Parry v Aluminium Corp [1940] W.N. 44). Though the Judge may properly invite the jury to dispense with summing-up in a proper case subject to plaintiff's right to address them, defendant's counsel should not invite the jury to stop the case before the summing-up (see Alexander v Burgoine [1940] W.N. 9). As to the inconvenience of asking a Judge sitting alone to hold that there is no case to answer at the conclusion of the evidence of the party on whom the onus lies, see Alexander v Rayson [1936] 1 K.B. 169. The Judge should generally refuse to rule on such a submission by the defendant unless he makes it clear that he does not intend to call evidence (Laurie v Raglan Co [1942] 1 K.B. 152, C.A.). But the Judge is not bound so to refuse, and if he does not put the party to his election whether to call evidence or not, the latter retains his right to call it if his submission fails (Young v Rank [1950] 2 K.B. 510; Storey v Storey [1961] P.63, [1960] 3 All E.R. 279, C.A.). A submission of no case may be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold that the burden has not been discharged. (ibid and Yuill v Yuill [1945] p.15)"

Instances of the Courts having in Judge alone cases exercised discretionary power to determine a submission of no case to answer without insisting upon election are Muller v Ebbw Vale Steel, Iron & Coal Co Ltd [1936] 2 ALL ER 1363 and The Union Bank of Australia Ltd v Puddy [1949] V.L.R. 242. In the former case Branson J said at 1365:-

> "I am pressed to say, in view of the decision of the court in the case of Alexander v Rayson, and in a former unreported case of Alex v Kerridge, that as a judge of first instance to whom a submission such as this is made at the end of the plaintiffs' case, I should not accede to it except upon the terms that the defendants should undertake not to call any further evidence upon any question of fact. Now, with the greatest possible respect for anything which falls from the Court of Appeal, I cannot find in the report of the case of Alexander v Rayson anything more than a statement that the suggested method of procedure is highly inconvenient. Now, once you come to the question of convenience, of course it must be a question which has to be decided according to the particular circumstances of the particular case, and I cannot think, if the Court of Appeal had intended to lay it down as an inflexible rule that a judge of first instance ought not to accede to a submission of no case made at the end of the plaintiffs' case except upon the terms that the defendants should be precluded from calling any further evidence, that their Lordships would not have laid that down in very different language from that which was adopted in the case of Alexander v Rayson. It seems to me that it must be a matter for the judge who is to try the case to decide for himself whether, in the particular case before him, and having regard to all the circumstances of it, it is likely to save the litigants before him expense and time and trouble to deal with the case by way of ruling upon the submission without putting any terms upon counsel upon either side, or whether it is better to say: "In this case I think it would be desirable that before I rule I should hear the whole of the evidence." If it is intended to be laid down as a general rule, it would save judges at first instance considerable trouble if it could be done, but while the matter remains expressed as a matter of convenience I conceive it to be my duty to apply my mind to the question whether in a particular case to act in one way or to act in the other is likely to be of more convenience to the parties whose interests I have in my hands than if I were to take a different view about it."

I have had the opportunity of giving careful consideration to the evidence and the arguments of counsel. Given that time I have come to the firm conclusion that I cannot carry out my judicial duty to the parties without proper

consideration of all the evidence. I have not found one of the three non suit points with its concomitant sub points capable of straight forward resolution. For example, it is not possible to resolve the first point as to whether or not Mr and Mrs Holloway were at the material times ready, able and willing to settle the transaction without deciding the issue of mistake. Was it the intention of the parties to include the land on which the party wall stands? If there was a mistake was it common or unilateral? What bearing does that question have on readiness, ability and willingness to settle? There is no authority of which I am aware and none was cited. The answer may well turn on the evidence and in particular upon the state of knowledge of the parties. It would be wholly wrong to try to determine this complicated matter on the basis that if my decision is found to be wrong the parties may come back to this Court for a rehearing on additional evidence and on the law. I am sure that, given reflective consideration, not one of the parties would think that I had given proper judicial consideration to the dispute they had left in my hands. Yet the answer to this first point is crucial to the case. If at the material times Mr and Mrs Holloway were not ready, able and willing to settle the question then arises whether they had the legal right to cancel the contract and whether or not Karangahape was in default on the day fixed for settlement in regard to the first mortgage finance arranged. Nor does the privity of contract question turn wholly on the Contracts (Privity) Act 1982. If that Act

does not assist Karangahape the question of novation at common law has to be faced. I cannot think that justice can be done to that question on the basis that if my decision is found to be wrong further evidence could be given at a rehearing.

The author of McGechan, in his discussion on Rule 490, correctly refers to Rule 4 which requires the Rules of Court to be so construed as to secure "the just, speedy, and inexpensive determination of any proceeding". Whatever the reason for the delay from June 1982 to now I do not consider that justice to the parties will be secured unless this Court knows whether or not there is to be further evidence, nor can it be secured without mature judicial consideration of all the issues.

Mr Bierre for the competing purchaser Smart Group (NZ) Ltd, also sought that Karangahape be non suited without his client being put to his election. He adopted Mr Craddock's submissions.

My ruling is that Mr and Mrs Holloway and Smart Group (NZ) Ltd be put to their election whether or not they will adduce evidence in the proceeding. If in either

case there is an election to give evidence I will reserve the particular application for non suit until that evidence has been given when it shall be decided on the whole of the evidence then before the Court.

Solicitor for Karangahape Road International Village Limited:	J G Donovan HOWICK
Solicitors for Mr and Mrs Holloway:	Thom Sexton & MacDonald AUCKLAND
Solicitors for Smart Group (NZ) Limited:	Morgan-Coakle Ryan & Collis, AUCKLAND