26/7 NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.No.1408/89

LOW PRIORITY

747

BETWEEN C.N. JONES

Plaintiff

A N D J. SEGEDIN LIMITED

First Defendant

A N D A.S. MOORE

Second Defendant

Hearing: 14 July 1989

Counsel: Mr Carter for Plaintiff
Mr Lal for Defendants

Judgment: 14 July 1989

ORAL JUDGMENT OF GAULT J.

The first and second defendants seek rescission of an interim injunction granted ex parte by Thorp J. late on Friday 30 June 1989. Subject to conditions he ordered an interim injunction -

(1) Restraining the defendants or their servants or agents from attempting to or taking any steps whatsoever to terminate the plaintiff's occupancy of Campbells Restaurant at Greenlane, Auckland;

(2) Restraining the first defendant or its servants or agents from offering for sale, selling or taking any step to complete the sale of Campbells Restaurant business to the second defendant or to any third party;

pending further order of this Court..."

A principal ground for recision is that there was not full disclosure by and on behalf of the plaintiff at the time the application was made. There is some suggestion that the obligation of full disclosure may not be as important now as it may have been in the past and, in this respect, I was referred to the notes in paragraph 7 (c) of Rule 264 from McGechan on Procedure where it is stated -

> "In Ellinger v Guiness Mahon [1939] 4 All ER 16, 25 the view was taken that non disclosure of material facts in an ex parte application does not necessarily mean the ex parte order should be rescinded. If upon application to set aside the omitted facts emerge, and it still appears nevertheless that the order should be made, the ex parte order will not be set aside so as to require a second application. The position would differ if the order had been obtained "by something which amounts to attempt to deceive the Court" (ibid) (Compare however The Hagen [1908] P 189, 201-2). The more liberal approach is reinforced by Carter Holt Ltd v Fletcher Holdings Ltd [1980] 2 NZLR 80,84 which emphasises that an application for review is a proceeding de novo. The matter is approached afresh on the basis of evidence adduced on the application, and full argument. On that approach, the manner in which the original ex parte order was obtained becomes of relatively less importance. In the rare situation of statements or omissions found to have been made deliberately, with intent to mislead, doubtless the Court would rescind upon a r 264 review. In such situation, however, application under r 266 is more likely."

I am of the view that the obligation should not be undermined and, notwithstanding that a new application may be made, if it is shown that there has been a failure to disclose material facts, the sanction of rescission must remain. I consider however, that since there is to be adopted the de novo approach to an application for rescission, the Court will examine carefully whether any matter not disclosed would have

been material. I will deal with the alleged failure to disclose, advanced on behalf of the defendants, in due course after outlining the nature of the dispute so that materiality can more easily be assessed.

The plaintiff sues the first and second defendants alleging first, breach of a contract under which she claims to be entitled first to remain in occupation of restaurant premises at Greenlane in Auckland, and secondly to a right of purchase of the business that has been carried on in those premises over recent months. She alleges further causes of action in conspiracy, breaches of fiduciary duty by the second defendant and inducement to breach contractual relations.

In the course of argument Mr Carter foreshadowed a further amendment to the statement of claim to alleged rights as a servant.

The first defendant is the owner of a motel complex, the address of which is given as 226-230 Greenlane Road, Epsom. In late 1985 it was decided to open a restaurant within that complex, primarily to serve the motel guests. It was called "Campbells Restaurant". Licences were obtained under the Sale of Liquor Act and the appropriate permits were a Tourist House Keeper's Licence and Tourist House Premises Licence.

Because it was proving uneconomic, or because the first defendant did not wish to continue involvement with the

restaurant, and probably both, it was resolved that the restaurant business would be sold. Advertisements were placed on the basis that the sale did not include any goodwill and real estate agents were appointed.

About the same time the first defendant began negotiations with the plaintiff. She had been managing another restaurant where she employed the second defendant as chef. She was approached by a Mr Hadad, who was a member of the Segedin family, with a view to an introduction to the first defendant and possible management of Campbells Restaurant. Negotiations appear to have taken place during December 1988 and an agreement was signed, probably at the end of that month, although the document exhibited in the evidence does not show the day of the month. I was referred to a good deal of evidence of communications in the form of negotiations leading to that agreement and, while they cannot be relied upon to construe the terms of the document, they may, in due course, prove to have some relevance to arguments as to the plaintiff's rights outside the document. The agreement purports to appoint the plaintiff as manager of Campbells Restaurant. However, the nature of the arrangement can be appreciated from the following clauses of the document (although clause 1 appears to have an omission) -

> "1. THE Company shall appoint the Manager of CAMPBELLS RESTAURANT for the period commencing 4th of January 1989 and ending on the 30th of June 1989.
>
> 2. THE Company shall grant to the Manager a licence to occupy the Restaurant and to have the free use of all

chattels, plant, fittings and fixtures belonging to the Company and used within the Restaurant.

...

4. THE Manager shall during the term of this Agreement properly manage the Restaurant and conserve the business in accordance with sound business practice and shall comply in all respects with all and any Licences issued under the Sale of Liquor Act and relating to the Restaurant. The manager will apply for a manager's certificate in terms of the Sale of Liquor Act as soon as possible.

...

13. THIS Agreement is a preliminary Agreement and is subject to such proper or other written Agreement as either of the parties may require.

...

15. IN the event that the Manager manages the Restaurant to the satisfaction of the Company, or the majority of its shareholders, and should the Company decide to sell the restaurant business, then the Manager shall be given the first right of refusal to the sale, on terms and conditions then agreed upon between the Company and the Manager."

In the first cause of action the plaintiff claims that she entered into the agreement to manage the restaurant on the basis that her management contract would be extended until such time as the first defendant was willing to dispose of the business to her. She says further that, pursuant to the right in clause 15 of the agreement she now is entitled to purchase the restaurant because the first defendant in fact has decided to sell the business to the second defendant.

As I understand the arguments for the plaintiff, the right to continue in occupancy of the restaurant after the expiry of the written agreement on 30 June 1989, is based on four

grounds. They are first, representations made prior to the completion of the written contract and not included in the signed document. In particular, reference is made to clause 13 of the agreement, to the haste in which the document was signed at the end of the year and to the fact that the final form of document as signed was not submitted to the plaintiff's solicitor before execution.

The second ground is that of collateral contract. It is claimed that the plaintiff was induced to enter into the written agreement because of the existence of a collateral agreement that if she were able to build up the business and make it viable her right of "management" would continue until the first defendant decided to sell to her.

The third ground is that the written agreement records, in effect, a master and servant arrangement under which the plaintiff as employee would be entitled to reasonable notice of termination. This argument proceeds on the assumption that the period specified in the agreement is simply a minimum term.

The fourth ground, and one raised only in the course of argument before me, is that of promissory estoppel. It is said that the plaintiff was led by the first defendant, to believe that she would be entitled to remain after the end of June and that before the first defendant can assert its strict legal rights to remove her, she must be given a reasonable period of notice.

The right to purchase is advanced upon two grounds. The first is that there was an advertisement published by the first defendant in January 1989, after execution of the written agreement with the plaintiff, which clearly evidenced decision to sell and so triggered the right of purchase in clause 15 of the agreement.

The second ground is that the first defendant recently has entered into an agreement to sell the business to the second defendant. The evidence indicates clearly that there is an arrangement between those two parties but details of it are scarce. Both emphatically deny that that arrangement is in the nature of a sale. I have been asked to infer that it is a management arrangement similar to that embodied in the agreement between the first defendant and the plaintiff.

The first defendant says that even if the plaintiff were able to establish a right to continue in occupation, or a right to purchase (both of which are vigorously contested), they clearly cannot be relied upon by the plaintiff in the circumstances because those rights were conditional upon satisfactory management and that condition has been breached in numerous ways.

There is a good deal of affidavit evidence going to the manner of operation of the business by the plaintiff, the state of the premises and the conduct of the plaintiff. These matters are denied and some of the affidavits are expressed in

strong terms. It is asserted that some of the deponents are less than impartial. It is also said that some of the complaints go to the performance of the second defendant with whom the first defendant has recently entered into an arrangement. It is further said that some of the matters, the subject of complaint, would not be breaches of the agreement in any event.

Whether or not there have been breaches by the plaintiff of the agreement will be determined at the trial of this proceeding when the evidence of the witnesses can be given and tested in cross-examination. At this stage it is inappropriate to make factual findings on contested facts, particularly where credibility is involved, unless that is necessary in determining the present application. I do record that a letter was written to the plaintiff by the first defendant, dated 27 May 1989 in which a number of alleged breaches were enumerated. The plaintiff takes issue with the factual allegations. The evidence indicates that that letter was drafted by the solicitor for the first defendant over a month before it was sent, which may perhaps bear upon the seriousness of the alleged breaches. It is appropriate also to record that the arrangement apparently made between the first defendant and the second defendant was made without any notice or indication to the plaintiff, who at the time was the employer of the second defendant.

The evidence in the affidavits is to the effect that a

director of the first defendant approached the second defendant with a view to a management arrangement following expiry of the agreement with the plaintiff. It was not until 3 p.m. on 28 June that the plaintiff learned that she was expected to vacate the premises on 30th June. In her first affidavit she said, and I quote -

> "Until last Wednesday nothing was said to me by the first defendant and I believed that from casual discussions with Maria Segedin who manages the motel that the agreement would run on. At 3.00pm on Wednesday 28 June I received a letter from the first defendant dated 27 June..."

The text of that letter reads -

> "I am writing to advise that the six month management contract expires on 30 June 1989.
>
> I will not be renewing the contract.
>
> In compliance with clause 12 of the management agreement I wish you to vacate and deliver up all plant fittings and fixtures in the restaurant and all papers, books and documents relating to the business and to the premises in good order and condition, and close the business at midnight on 30 June 1989.
>
> I will send a person just after midnight to collect all keys and to lock the restaurant..."

Bearing in mind the de novo approach to applications for rescission of interim injunctions, as indicated in Carter Holt Holdings Limited v Fletcher Holdings Limited [1980] 2 NZLR 80,84 the appropriate approach is now well established following the decision of the House of Lords in American Cyanimid Co. v Ethicon Limited [1975] AC 396, and Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited [1985] 2

NZLR 129. Those cases require first a determination of whether the plaintiff has shown on the affidavit evidence a serious question to be determined in the substantive proceedings. If that is shown the Court must then examine the balance of convenience and the overall interests of justice and so fix the position of the parties so as best to preserve their respective rights until such time as the Court can examine and determine the substantive issues.

I turn then to deal with the various claims made by the plaintiff to determine whether there is a serious question to be determined.

In relation to the claimed right to continue in occupation of the restaurant, I do not see that the plaintiff can obtain great support from any alleged pre-contract representations. Such representations would have been in the nature of future promises and not representations of present or past fact. Section 6 of the Contractual Remedies Act 1979 does not extend to providing a remedy for such representations. See Ware v Johnson [1984] 2 NZLR 518, 537. Further the remedy for breach of pre-contract representations under s.6 lies in damages, not in specific performance.

So far as concerns the alleged collateral contract the evidence in the affidavits before me carries the plaintiff little further than a possible agreement to agree; an arrangement to consider an extended arrangement at some time

in the future. Even if that carries with it, as argued by Mr Carter, a duty to negotiate, it seems to me that the remedy for failure to do so would lie in damages.

A similar problem arises from the plaintiff's argument that the written agreement evidenced a master and servant relationship which would have implied, as a matter of law, the obligation to give reasonable notice. A breach of that obligation, in almost all circumstances, is dealt with by remedy in damages, assessed by reference to remuneration in substitution for the period of notice that would have been reasonable. Mr Carter argued that in special circumstances an injunction may be the appropriate remedy but the arguments in support of the special nature of the arrangement to place it in that category are the same as would support the argument that the written agreement in fact represents a contract between independent parties, rather than an employer/employee arrangement. If it is not a master and servant relationship then the reasonable notice obligation is not there.

The final ground advanced in support of continued occupancy was that of promissory estoppel. This was not pleaded but, if that is overlooked and it is to be borne in mind the pressure under which pleadings were prepared in this case, there may be an argument on behalf of the plaintiff that she was entitled to reasonable notice if the first defendant intended to assert its strict legal rights under the agreement. Whether or not that is so will be a matter for

evidence at the trial but I cannot discount the possibility of an argument being advanced with some justification on that ground.

Turning to the claimed right of purchase, I am inclined to the view that the advertisement published in January, after the execution of the written agreement, was really just an overflow from the advertising conducted in December, at a time when there was a decision to attempt to sell the restaurant. I do not think that January advertisement will be found to reflect a separate decision after the date of agreement, to sell the restaurant. Therefore I think it unlikely that the plaintiff will succeed in establishing that the right of purchase in clause 15 of the agreement was triggered at that time.

The second ground upon which it is said the right to purchase arises, is the decision by the first defendant to enter into an arrangement with the second defendant. While it may be that this arrangement is no more than a "management" arrangement of a kind which previously existed between the first defendant and the plaintiff, that is not clear on the evidence and it is perhaps surprising that the defendants have not been fully open with the Court and disclosed details of that arrangement. If it is simply the same management arrangement then probably it would be outside the operation of clause 15 of the agreement because, in its context clause 15 must be taken to refer to sale of a business by a transaction

different from that actually embodied in that agreement. However it will be for determination at the trial whether the arrangement that has been reached constitutes a sale of the business.

It appears that the concept of "management" has been devised to circumvent problems under the Sale of Liquor Act which would necessitate the purchaser obtaining a new licence. However, if the substance of the transaction is examined and it is similar to that previously in existence, it will be found to provide for a right of occupation of premises subject to the payment of rent, with the "manager" responsible for operating the business enjoying profits and suffering losses, employing staff and purchasing and owning stock. It may well be arguable that to enter into an arrangement having those characteristics could constitute a sale of the business (as distinct from the premises).

Accordingly, while it would be wrong to give any indication that I regard the arguments of the plaintiff as of great strength, I am not prepared at this point to find that she has no arguable case.

Before I proceed, it is convenient now to deal with a number of preliminary matters raised by Mr Lal in the course of his submissions. First he asked me to rule at the outset that the interim injunction granted by Thorp J. is "void" on the ground that the conditions imposed at the time of granting

that order have not been complied with. I indicated at the time that I was not prepared to make such a ruling and I record that I see little point in so doing, at a time when I was about to embark upon a de novo consideration of the whole matter. Further, in all the circumstances I am not satisfied that there was not at least substantial compliance with the conditions in all the circumstances.

The second preliminary point raised by Mr Lal was based upon a dictum in the judgment of Mahon J. in the Carter Holt Holdings Limited v Fletcher case, suggesting that the plaintiff is confined to the circumstances advanced in support of the original application for interim injunction and should not be allowed to rely on different circumstances in opposition to the application for rescission. While that may be so in a strict sense, clearly reasonable opportunity must be given to bring evidence in opposition to the application for rescission and in each case the line must be drawn in a realistic way. In the present case I am of the view that such evidence as I find it necessary to rely upon for this judgment is not inconsistent with the evidence advanced originally in support of the application for injunction.

It is now necessary to deal with the assertions of failure of disclosure by the plaintiff in support of the original application. I have considered this with care because as I have indicated at the beginning of this judgment, I regard the matter as serious and I do not resile from that in any way

simply by dealing with this point relatively briefly.

Thorp J. was presented with the application at the end of what is becoming almost an impossible week of judicial service as duty Judge in Auckland, and was required to deal with it late on Friday on an urgent basis, having regard to the impending expiry of the written agreement. I have no doubt that his approach at that time was to hold the position in the short term while the matter could be subjected to service and argument, if that was the wish of the defendants. Of the matters referred to as inadequate disclosure, there are two which I consider require attention. The first is the failure by the plaintiff to disclose her liabilities. In her affidavit in support of the application she included a list of assets without indicating her liabilities. So far as the assets are concerned, further evidence indicates there may have been some over-valuation but I do not regard that as of the same significance.

The second matter is the failure by counsel who appeared before Thorp J. to inform him that the solicitor for the first defendant had indicated, on the basis of instructions he had received from one of the directors of the first defendant, that there had been no agreement for sale nor was there any intention on the part of the first defendant to sell the business. Mr Carter, from the Bar, outlined the circumstances as they arose and while I can understand that he felt justified, in view of the other information given to him by

the solicitor for the first defendant in the course of action he followed, it is certainly the case that Thorp J. should have been told.

However, I am satisfied that in the circumstances it would have made no difference. Since the Judge clearly was intent upon holding the position, and he had sent counsel away in an effort to ascertain whether this could be arranged without an order from the Court, I am quite satisfied that he would have made the same interim order even if he had been given the information I have referred to.

The other matters advanced do not strike me as having the necessary materiality.

It is necessary then to turn to the balance of convenience and the overall considerations of justice with a view to determining what should happen between now and the time this proceeding can be tried. The period should not necessarily be long but congestion in the Courts means that realistically it could be some months before a fixture can be allocated for a trial which clearly would last most of a week. For the plaintiff it is said that she has invested six months of work in building up the business, in establishing a clientele and bringing the business to the point where it is now profitable. She says that it would be disastrous for her to be removed peremptorily from the premises, although she does indicate that she has arranged for alternative premises from

which she might carry on business so as to preserve some aspects of the present business. On her behalf I was urged to maintain the status quo.

For the defendants I was referred to the damage to the business of the motel complex arising from the unsatisfactory and alleged unsavoury manner in which the restaurant business is conducted and, for the second defendant, I was referred to the commitments he has made to commence business in the premises which will be costly and give rise to loss if he is not able to proceed.

For the defendants a strong attack was mounted upon the financial standing of the plaintiff and her ability to meet any award of damages. This was replied to on behalf of the plaintiff by an argument first that the financial standing of the plaintiff must be considered against the quantum of loss likely to be suffered by the defendants and further it was said that her financial position would be better if the first defendant would pay her money said to be owing. There is no question raised as to the ability of at least the first defendant to meet an award of damages.

I am of the view that whatever decision is made the unsuccessful party is likely to suffer some loss that is unquantifiable. In the case of the defendants, alleged damage to the motel business is to be taken into account but any detailed finding on that by me would involve making findings

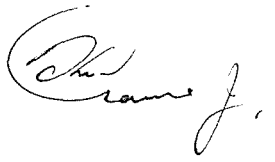
on the allegations of breaches of contract by the plaintiff and I am not prepared to do that on the contested affidavit evidence.

In the case of the plaintiff, undoubtedly she will lose at least some benefit of the work she undertook in the belief (on her evidence) she was building up a business she would eventually acquire.

I incline to the view that the balance tends to lie in favour of the plaintiff, subject to a question of her ability to meet any award of damages which might flow from her continued occupation if it is eventually held to be unjustified. Such a decision would also meet the "counsel of prudence" of retaining the status quo when other factors are more or less in balance. However, I do have a real reservation about the plaintiff's financial position and I do not think that would be greatly improved by the sums in dispute with the first defendant.

In the circumstances I have reached the view that the best course to adopt is to refuse the application for rescission but to impose a condition that the injunction will continue to operate provided that the plaintiff provides, to the satisfaction of the defendants, or failing their agreement the satisfaction of the Registrar, a bond or other security in the sum of $30,000 to serve as security against any adverse award of damages which might flow from a judgment in favour of the defendants at trial.

In the event that this condition is not met the interim injunction will lapse at 4 p.m. on 3 August 1989. Costs are reserved.



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