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N2LR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No 1775/87

538

BETWEEN	T J F HAYDON AND R H OLDEMAN
	First Plaintiffs
A N D	EQUITICORP HOLDINGS LIMITED and ANOTHER
	Second Plaintiffs
AND	LOMBARD INSURANCE COMPANY LIMITED AND ANOTHER
	First Defendants
A N D	ASSURANCES GENERALES DE FRANCE AND OTHERS
	Second Defendants
A N D	STILL TAYLOR ASSOCIATES LIMITED
	Third Defendant
A N D	HOGG ROBINSON AGENCIES LIMITED
	Fourth Defendant

Hearing 12th June 1989 (In Chambers)

Counsel Mr Andersen for both Plaintiffs
Mr Jones for the first Defendant
Mr Fee for the second Defendants
Miss Hunt for the third Defendant
Mr Rennie for the fourth Defendant

Judgment 26 JUN 1989

JUDGMENT OF MASTER R P TOWLE

On the 30th June 1987 the plaintiffs instituted these present proceedings, initially in the commercial list. They relate to a claim by a farm partnership as the first plaintiffs and by the second plaintiffs as financiers to the farm venture against various insurance companies and brokers following upon the mysterious disappearance some time on or about the 30th June 1986 of 4554 head of deer from the first plaintiff's property near Taupo. Some were recovered but the claim is based upon an alleged loss of 3837 head. Judgment was originally sought in an amount of approximately $5.4 million for the loss of deer together with further damages relating to loss of profits for an amount in excess of $2 million plus interest to the point where the total claim now exceeds $11 million.

The first plaintiffs are both insolvent, their affairs being administered pursuant to an approved scheme made under Part XV of the Insolvency Act. Although this fact was known to the defendants after service of the proceedings they did not take steps initially to apply under Rule 60 for orders for security against the first plaintiffs, being content to rely upon the solvency of the second plaintiffs who had a major interest in the litigation to try to establish that indemnity lay with the

various insurance companies.

That situation changed dramatically when the Equiticorp group of companies itself got into major difficulty early this year. It is itself under statutory receivership and there are now grave doubts as to whether the second plaintiffs could meet any reasonable order for costs in the event that the claim should fail entirely.

The present hearing before me related to applications brought or supported by all four defendants seeking orders for security. For the plaintiffs, Mr Andersen did not seriously dispute that this was a proper case where a Court should make an order under Rule 60 and the hearing extended primarily to determining what was a proper amount to order to be given by way of security before the claim proceeds.

There has already been substantial delay in bringing the litigation to this stage. Its passage through the commercial list was unsuccessful and it was returned to the ordinary list long ago. There have been extensive interlocutory applications and proceedings which have been dealt with in part but the matter is still some considerable way off a hearing. The various factors which

have to be weighed in dealing with an application under Rule 60 are very conveniently summarised in the notes to that rule in McGechan on Procedure and the following matters should be recorded as having been considered by me in reaching a decision.

As far as the first two sets of defendants are concerned, the first defendants are liable as to 48% and the second defendants as to 52% of the insurance risk if liability should be established under the policy. There are extensive defences filed on behalf of both of the groups of insurance company defendants who are disputing liability at all in view of the uncertainty of the time at which the stock escaped which was very close to the point when the insurance cover was about to expire. The argument is first, that the claim is not covered at all but that even if it were within the scope of the policy the plaintiffs were in serious breach in failing to keep proper stock records with details of progeny and in not keeping stock properly tagged. Because the wires of the farm's boundary fences were found to be cut after the deer escaped, a fraud by the first plaintiff is raised by the first defendant at this stage in relation to the circumstances of the claim and counsel for the second defendants has indicated that an amended statement of

defence may be filed by them making similar allegations. While it is impossible to form an accurate assessment of the plaintiffs' eventual prospects of success it is a long way from being an open and shut case and there is a distinct possibility that the claim could fail in its entirety. I do not believe that this is a case where the plaintiffs can be heard to claim that their impecuniousity has been caused by the very acts of the defendants on which the proceeding is founded nor is there the slightest suggestion that the defendants might have deliberately set out to injure the plaintiffs. The third and fourth defendants are joined in on the basis that if the first defendants were able to escape liability on the grounds that there was no valid policy of insurance existing at the time, then the brokers had failed to arrange alternative insurance to protect the plaintiffs. There do not appear to be any matters arising which are of exceptional public importance in the dispute, the matter being purely one of contract as between the various parties.

Applying these various factors and considering the balancing required to ensure that an impecunious plaintiff with a genuine claim should not be shut out altogether from having it ventilated, I consider that this is a proper case when substantial security should be given. I

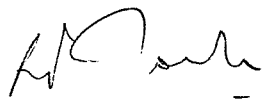
have not been assisted by the absence of any affidavit on behalf of the receiver of the troubled Equiticorp group but understand from counsel that it would be possible for a sum to be set aside and placed on interest bearing deposit as directed to satisfy any reasonable order which the Court might make for security.

I am advised that the hearing time would be likely to occupy not less than four weeks and that a substantial number of witnesses might be required to be called both from Europe and Australia. All the second defendant insurance companies are domiciled overseas and the 52% risk is placed in London with various insurance companies. Complicated questions of insurance law may well arise and there are also extensive issues of fact which will have to be traversed relating to the escape and tracing of the stock. All four defendants have already been required to incur substantial costs variously estimated by counsel from between $20,000 and $50,000 or more in preparation of their respective defences to this stage. The matter is still some way off trial. The first plaintiffs are clearly in no position to give any security for costs which could only be satisfied out of their creditors pool under the Part XV arrangement. They are not on legal aid. The only practical way of dealing with the matter would be

by the receiver acting as already indicated.

As to quantum I have given regard to certain of the recent instances where substantial security has been given as set out in note 7 to Rule 60 by McGechan. I think this is a right case where there should be a global order of security given rather than that the order be fixed in relation to each individual defendant or group of defendants

Dealing with these various factors as best I can I believe that a fair sum for which security must be given should be fixed at $300,000 and direct that all proceedings in this matter should be stayed until notification has been given by the statutory receiver of the second plaintiff that he has placed such sum in a separate interest bearing account to be retained and not disbursed pending further order of the Court. The costs of this hearing are reserved.



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MASTER R P TOWLE

Solicitors

Rudd Watts & Stone, Auckland, for First and Second Plaintiffs
Heaney Jones, Auckland, for First Defendants
Bell Gully Buddle Weir, Auckland, for Second Defendants
Russell McVeagh McKenzie Bartleet & Co, Auckland, for Third Defendants
Kensington Swan, Auckland, for Fourth Defendant