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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 299/88

BETWEEN HUNGRY HORSE RESTAURANTS (1986) LIMITED

Plaintiff

AND [redacted] JESSON and RAEWYN SHERYL JESSON

Defendants

Hearing: 16 January 1989

Counsel: Mr McGuire for plaintiff
Mr Smyth for defendants

Judgment: 17 January 1989

JUDGMENT OF THORP J

This is an application by the defendants, Mr & Mrs Jesson, to strike out those portions of the amended statement of claim in which the plaintiff Hungry Horse Restaurants (1986) Ltd, seeks specific performance of an alleged agreement to assign to it a lease of the premises from which the defendants operated a Hungry Horse Restaurant as franchisees of the plaintiff from April 1985 until the end of 1987.

The parties fell out over a number of aspects of the franchise contract, and the defendants purported to cancel that contract by reason of defaults by the plaintiff in its duties as franchisor in February 1988. From that

date until they sold their business and the lease to third parties in October 1988 for $160,000, the defendants operated a different kind of restaurant business, having a generally Mexican character.

When the plaintiff received the notice of cancellation it brought the present action, seeking first to prevent the use of the site for any other business than a Hungry Horse Restaurant, secondly to obtain specific performance of an agreement said to have been made in July 1987 of which one term was said to be that the defendants would re-assign the lease to the plaintiff, and thirdly an undefined amount of damages for breach of terms of the franchise contract.

It also filed an application for interim relief in the first two respects sought by its substantive proceedings.

The interim application was heard by Barker J on 16 March 1988. The judgment notes that the only claim pursued was that seeking to enjoin the carrying on of a competing business. That application was refused. His Honour made clear and strict timetable orders to ensure that the substantive claim could be brought to a hearing without delay. Those orders required a statement of defence to be filed by the end of March, and all other necessary steps to be taken so that a praecipe would be

filed before the end of April. He directed a Rule 438 conference to be held as soon as the praecipe was filed, and offered to receive and consider a priority application, were this thought appropriate.

A statement of defence and counterclaim was filed within the time directed, but no further formal step was taken by either party until on 20 December 1988 the plaintiff filed a notice of change of solicitor. The initial reason for such inactivity seems to have been that the parties were engaged in overall settlement negotiations from March until some undefined date in July 1988. In the course of those negotiations, the defendants offered to sell the business and leasehold to the plaintiff for $185,000. The plaintiff counter-offered $30,000.

It is plain from the affidavits on both sides that the defendants were having difficulty meeting their creditors, and that this was well known to the plaintiff. What is not plain is why, notwithstanding that situation and the arrangements made in March which would have ensured that the substantive proceedings could have been completed well before the end of 1988, no other action was taken by the plaintiff, particularly having regard to its claim for specific performance under the alleged agreement of July 1987.

The present application has been given urgency because the contract for sale entered into by the defendants with third parties, a Mr & Mrs Duncan, has become unconditional, and was due for settlement this day, but is the subject of a requisition by the purchasers who have been informed by the plaintiff of its outstanding claim for the leasehold by virtue of the present action.

Understandably, the Duncans are not prepared to settle unless they can be assured that there is no prior claim to the leasehold. Hence these proceedings.

Uncontradicted evidence also discloses that the Duncans have committed themselves to expenditure in excess of $100,000 in respect of the premises they believed they had bought, and that they will have a very substantial claim for damages against the defendants if their purchase does not proceed.

The present application is made on three separate grounds.

The first two, which rely on Rules 186 and 478 and the Court's general jurisdiction to strike out claims which are frivolous or vexatious or which have been the subject of inordinate delay, clearly cannot be sustained.

The third ground as pleaded was that:

"The plaintiff is guilty of laches which disentitle it to the relief sought in the prayers for relief."

That ground was shown by the plaintiff's written submissions, and was clearly recognised by Mr McGuire for the plaintiff to amount to the claim that, in the circumstances of this case, the plaintiff's delays and their effect were such that the Court could not now properly exercise discretion in favour of the grant of specific performance: and it was to this point that the argument has almost wholly been addressed.

This Court is always hesitant to refuse a hearing on the merits, and I should have preferred more time to consider the application. But it is clearly a true case of urgency, the relevant principles are well settled, and I believe that they clearly point towards the granting of the application, subject to a condition which will be specified later.

There is in my view no doubt that by July 1988 and indeed long before that date, the defendants' financial position was known to the plaintiff to be precarious. Further, there is no contest that the plaintiff was advised by the defendants' solicitors during the negotiations which followed its refusal of interim relief that "the defendants' only interest is to sell up, get out and go to Australia." In those circumstances I can see nothing unreasonable in the defendants, three months

having passed since the negotiations between themselves and the plaintiff had broken down without any further action from the plaintiff, entering into a contract to sell their business and leasehold for a figure $130,000 more than the plaintiff had offered them.

Further, the obvious and substantial prejudice to the defendants and the Duncans if the plaintiff is allowed to pursue its specific performance claims are both matters properly to be taken into account in assessing the overall justice and merits of the alternative courses open to the Court.

Finally, the delay between July 1988 and January 1989 in taking any effective steps to prosecute its specific performance claims was in my view an excessive delay on behalf of the plaintiff.

Both counsel referred to the decision of Quilliam J in Hickey v Bruhns [1977] 2 NZLR 71, which conveniently summarises the decisions to that date relating to the effect of laches or delay on suits for specific performance. His Honour's review shows that there has been no significant alteration in the basic principles since their declaration by the Privy Council in Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, the principal statement (set out on p.76 of Hickey) reads:

> "Where it be practically unjust to give a remedy, either because the party has, by his conduct,

> done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy".

Here the effect of maintaining the right to specific performance as well as damages would probably be to make the defendants insolvent, faced as they would be by claims both from the plaintiff and from the Duncans, and having effectively brought to a close their own business activities, discharging staff and running down stocks in reliance upon the sale to the Duncans.

The same course would equally be prejudicial to the Duncans whose interests as bona fide purchasers without notice should be considered by the Court in determining where the balance of justice lies. Mr McGuire argued in reliance on a passage in Halsbury that prejudice to third parties should only be brought into account in relation to contracts pre-existing the contract of which specific performance was sought. That is certainly not the view which I have understood to be the conventional view, and is disapproved in Spry on Equitable Remedies, (3rd Ed,) p.196-197, and the various authorities there cited.

The prejudice to the plaintiff from being deprived of the right to claim the leasehold seems to me to be substantially less, having regard to the facts:

1. Of its own valuation of the leasehold and business,
2. That the property has not been a Hungry Horse outlet for approximately 12 months, and
3. That any substantial addition to the defendants' present liabilities must materially reduce any possibility of the plaintiff recovering damage which may be found payable to it in terms of the claimed breaches of the franchise contract.

It did appear to me during the hearing that in addition any prejudice to the plaintiff might be reduced if the defendants were required to deposit in Court any surplus of the proceeds of the sale to the Duncans over amounts presently charged against those proceeds. For that purpose I asked that counsel provide details of existing commitments against those sale proceeds. Unfortunately it has not been possible to obtain an agreed statement of such liabilities. A statement which really amounts to a statement of affairs which Mr Smyth has provided to the court, no doubt representing the instructions of his clients, shows them as having now only two substantial assets, the proceeds of sale under the contract with the Duncans and a house presently for sale at a sum of $225,000.

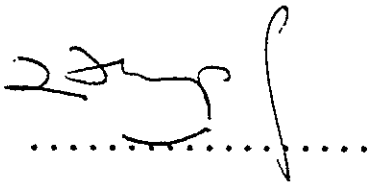
Creditors, some only of which are classified as having any form of secured claim against the proceeds of sale or against the house property, total a figure slightly in excess of the proceeds receivable from the sale of the house, if sold at its asking price, and the restaurant business and leasehold, if the sale to the Duncans is completed.

The Court cannot realistically in those circumstances require a payment into Court of more than the relatively nominal figure of $10,000 which the defendants suggest. Indeed on their figures this could only be obtained through the generosity of some other member of their family. At the same time the information set out in the memorandum, though I note it is not an agreed memorandum, certainly does not suggest that the Court was misguided in expressing concern for the situation of the Duncans were their contract to be aborted.

All in all, I remain of the view that the justice of the case is better met by granting the application, as I now do, subject to payment into Court before the sealing of the Order of the sum of $10,000 by way of security against the plaintiff's remaining claims until further Order of the Court, and reserving leave to either party to apply for further directions, either in respect of the present judgment of its implementation or in relation to the procedures to be followed to obtain determination of the remaining outstanding claims.

Costs of today's application are reserved.

I record that Mr Smyth as counsel for the defendants accepts that the undertaking previously given by them and recorded at p.7 of the judgment of Barker J, delivered on 16 March 1988, should extend to the primary documents from which the figures set out in the memorandum given to the Court today were computed.



T.M. Thorp J

Solicitors

C.J. McGuire for plaintiff
Keegan Alexander Tedcastle & Friedlander for defendants

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