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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.2506/88

BETWEEN: G.M. FAULL & ORS

Plaintiffs

AND: AUSTRALASIAN BREEDING STABLES LIMITED (now known as STRATHMORE GROUP LIMITED)

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First Defendant

AND: AUSTRALASIAN BREEDING STABLES FINANCE LIMITED

Second Defendant

AND: P.S. WILSON

Third Party

Hearing: 4 February 1991

Counsel: Grant Millar for Plaintiffs
Douglas Alderslade for Second Defendant

Judgment: 4 February 1991

ORAL JUDGMENT OF TOMPKINS J

The second defendant has applied for orders granting leave to issue a writ of sequestration against certain of the plaintiffs and further consequential orders. It has also sought orders as to costs in respect of this application and in respect of an earlier application for the same writ.

Background

This litigation has had a somewhat long and tortuous history. I do not propose for the purpose of this judgment to set that history out in detail, but the present proceedings have their origin in an agreement entered into between the parties in November 1988 after the present proceedings had been commenced. It was part of that agreement that the plaintiffs would make

certain payments, including payments of interest, on amounts claimed by the second defendant to be owing by the plaintiffs, the liability for which has been challenged by the plaintiffs. Certain of the plaintiffs failed to make those interest payments.

The matter then came before Jeffries J who in a judgment issued on 15 June 1990 ordered specific performance of the agreement. I should add that under the terms of the agreement the payments of interest were to be made into the second defendant's solicitor's trust account to be held pending the resolution of the substantive action. The order specifically directed each plaintiff to pay interest in terms of the November 1988 agreement within 28 days from the date of the judgment, and thereafter as it falls due.

On 2 July 1990 the plaintiffs appealed to the Court of Appeal against the judgment of Jeffries J and, at the same time, filed an application to stay that judgment. That application to stay was heard by Jeffries J on 12 July 1990 and was dismissed. On 26 July 1990 the plaintiffs filed an application for the issue of a writ of sequestration on the grounds that the plaintiffs had failed to comply with the order for specific performance made by Jeffries J on 15 June 1990. That application came before me on 31 July 1990. As a result of discussions between counsel that day agreement was reached that the amounts due, which were then held by the plaintiffs' solicitors, should be paid to the defendants' solicitors in accordance with the original agreement on the basis that the money would be repaid if the decision of the Court of Appeal revoked the order for specific performance made by Jeffries J. The application for writ of sequestration was adjourned pending judgment in the Court of Appeal. That judgment dismissing the appeal was delivered on 3 August 1990.

A payment of interest was due by all the plaintiffs on 8 November 1990. Certain of the plaintiffs failed to pay. As a consequence this second application for a writ of sequestration was filed on 17 December 1990.

The Application for a Writ of Sequestration

By the time the application reached the court today all the plaintiffs, but two, had paid the interest payment due on 8 November 1990. The two that had not, Mr Sowman and Mr Pownall, have filed affidavits setting out the reasons why they have not made the payments due. In the case of Mr Sowman that payment was $3,289.52. In the case of Mr Pownall it was $3,614.52. Both deponents set out their financial position in some considerable detail. They both

say that in order to make the earlier payments they were forced to borrow, and that their capacity to borrow further has now been exhausted. They both depose to a modest level of earnings, and to liabilities that come close to equalling their assets.

In the course of submissions I indicated to Mr Alderslade a preliminary view that in light of the information in those two affidavits I would be reluctant to hold that the conduct of those two plaintiffs, in not making the payments when they were due, had been contumacious and wilful in the sense in which that expression was used by McGechan J in *Taylor Brothers Ltd v Taylor Textile Services (Auckland) Ltd* (CP.95/87, M.394/88; Wellington Registry, 1 November 1988). On that basis I questioned whether the severe remedy of a writ of sequestration would be justified. I expressed the view that the real problem was to get the substantive proceedings on for hearing as early as this could sensibly be done, so that the principal issues between the parties could be finally determined. Mr Alderslade having taken instructions from the second defendant then withdrew the application for a writ of sequestration against those two plaintiffs.

Costs

Mr Alderslade seeks orders for costs on a solicitor and client basis against the defaulting plaintiffs in respect of both first and second applications for writs of sequestration. In *Taylor Brothers* at the first hearing of the application, the decision on which is reported at (1987) 1 PRNZ 483, McGechan J ordered the defendants to pay the plaintiffs solicitor and client costs. This was in accordance with the practice that has been recognised that where writs of sequestration have been shown to be justified, it is appropriate that the defaulting party should meet the full costs of the applicant party in bringing the application to enforce the order of the court: see *Stancomb v Trowbridge UDC* [1910] 2 Ch. 190, Warrington J at 196. Mr Alderslade referred to a number of other decisions in England and in Australia where that practice had been followed. It was his submission that in both instances the bringing of the applications has been proved to be justified, although in the end orders on them were not made.

Mr Millar resists the application for costs on this basis on the grounds that the first application for writ of sequestration was issued only some 14 days after the dismissal of the application for stay to which Mr Alderslade responds by pointing out that the application to make the payments in respect of which

the application for the writ was issued arose out of the agreement made in November 1988. As to the second application Mr Alderslade refers to the extensive correspondence between the solicitors for the second defendant and the solicitors for the plaintiffs relating to late payments not only by Messrs Sowman and Pownall, but also by certain of the other plaintiffs whose payments were made late.

Having considered these submissions I am not satisfied that in this case an order for payment of solicitor and client costs is justified. I consider that there should be a substantial order for party and party costs.

In respect of the first application for a writ of sequestration there will be an order for costs in favour of the second defendant against all the plaintiffs, but for Messrs Inwards and McLeod jointly in the sum of $6,000. In the case of the second application for writ of sequestration there will be an order for costs in favour of the second defendant against those who were in default at the time that application was filed, namely, Messrs Cleal, Schofield, Vernon, Sowman, Pownall, Struthers jointly. I should add by way of clarification that Mr Cherrie was also in default, but all issues between him and the second defendant have been settled. The amount of the party and party costs in respect of the second application I fix at $4,000. In addition in each case there will be payable by those plaintiffs against whom the costs orders have been made the disbursements relating to each of the applications to be fixed by the registrar. Mr Cherrie remains liable for his share of the costs in respect of the first application.

The Future Conduct of the Proceedings

As I have indicated one of the reasons that persuaded me that it is not appropriate to grant the application for a writ of sequestration is my belief that the proceedings themselves should be brought to a conclusion at the earliest possible date. There has already been an application by the plaintiffs for a priority fixture, which application came before me on 12 November 1990. One of the reasons for the delay has been the rather late decision by the first defendant to apply for leave to issue third party notices, first, against Mr Clarke and then later against Mr Wilson. After opposed hearings both these applications have been granted.

I am advised that the third party notice has been served on Mr Clarke, but has not yet been served on Mr Wilson in respect of whom an order for substituted service has been made. In order to ensure that the substantive issues are determined with a minimum of delay I propose to allocate the case to be heard during the two weeks commencing on 17 June 1991, but I make it clear that I have fixed that date in the absence of the third parties and the first defendant, and also without the senior counsel who have been engaged by the plaintiffs and the first defendant being able to be heard. It is, therefore, rather an indication of when I consider the case should be heard than a firm fixture. I propose that there should now be a conference before me at the earliest possible date when all the parties should be represented when a final decision on a hearing date can be made, and when the necessary orders can be made to dispose of any interlocutory applications, and generally to ensure that the proceedings will be ready to be heard on the date fixed. Any counsel may notify the Registrar when he considers the conference should be held. A date can then be fixed at short notice.

Finally, I consider that this is a case that should be allocated to a judge to deal with all interlocutory matters as well as with the trial. Since my involvement in these proceedings seem to be greater than any of the various judicial officers who have dealt with various applications at various times, that judge will be me. All future conferences and interlocutory applications will be heard by me.

Solicitors for Plaintiffs: Macalister Mazengarb Perry Castle (Auckland)

Solicitors for Second Defendant: Chapman Tripp Sheffield Young (Auckland)