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IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CP37/90

2802 2

LOW PRIORITY

BETWEEN: BRIAN EDWIN GREEN of Palmerston North, Director and VOLUMEX INVESTMENTS LIMITED a duly incorporated company having its registered office at Palmerston North

Plaintiffs

AND S G HARVEY LIMITED a duly incorporated company having its registered office at Wanganui

First Defendant

AND ANDREW BEATTIE GIBSON of Hawera, Developer

Second Defendant

AND: ALAN J FAULKNER of Wanganui, Registered Valuer

Third Party

Hearing: 5 December 1990

Counsel: No appearance for plaintiffs
Mr I R Millard Wellington for defendants to oppose
Mr R M Goldsbury for third party in support

Judgment: 3rd January 91

JUDGMENT OF MASTER J H WILLIAMS QC

The third party, Mr Faulkner, applies to this Court for an order striking out the third party notice issued against him on the grounds that the defendants' claim against him does not fall within any of the limbs of R 75.

This proceeding was initially issued as an application for summary judgment but the defendants opposed it and, when the summary judgment application first came on for hearing on 2 May, the plaintiffs accepted that the case was inappropriate

for the summary judgment procedure. The application to that end was accordingly dismissed and timetable orders were made by consent. That timetable included the issue of a third party notice by 31 May. That was done and the papers were served on Mr Faulkner on 2 August. Further pleadings were served on him on 19 September and he applied for the striking out of the third party notice on 7 November.

A precis of the current pleadings in this matter will assist in the determination of this application. The amended Statement of Claim says that the defendants agreed to sell to Mr Green (and Volumex as his nominee) all the shares in the first defendant. The sole asset of the first defendant was a building known as the DIC Complex at 101-105 Heretaunga Street, Hastings. The purchase price was $1 million. The premises were leased to a company called DIC Stores Ltd for 15 years pursuant to a lease dated 28 June 1985. That lease provided for rent reviews every two and a half years. When the defendants acquired the DIC Complex in 1988 Mr Faulkner had been retained by a promoter of the sale to advise on the rent for the review for the period 28 December 1987 - 27 June 1990. The defendants adopted Mr Faulkner's appointment and their claim against him says that on 18 January 1988 Mr Faulkner did a rent valuation assessment recommending a rent for the complex of $155,000 per annum. The defendants say that it was in reliance on that valuation that they agreed to sell the DIC Complex to the plaintiffs pursuant to a contract dated 21 March 1989 and a deed of covenant of the same date. The defendants also say that during the course of lengthy negotiations leading up to that contract, they showed the plaintiffs Mr Faulkner's rental valuation. The Statement of Claim against Mr Faulkner says that the plaintiffs and the defendants agree that the plaintiffs would manage the rent review but that there was a clause in the agreement for sale and purchase pursuant to which the defendants guaranteed a minimal rental on that review of $140,000 per annum. Thereafter, the Statement of Claim says, the plaintiffs continued using the third party's services.

The pleadings say that between March 1988 and August 1989 the lessee made offers to Mr Faulkner of rental of $120,000 per annum, $127,000 per annum and $128,200 per annum and that Mr Faulkner either advised rejection or turned the offer down or did not even refer it to the plaintiffs or the defendants.

The rental went to arbitration in August 1989. The defendants claim that at the arbitration Mr Faulkner reduced his original rental assessment of $155,000 to $144,000. The rental was set by the umpire whose award of 14 August 1989 fixed the rental at $110,700 per annum with an additional sum of $3,200 once the lessor had made the basement watertight. In an annex to his award but forming part of it, the umpire set out his reasons for reaching the figure which he awarded. Those reasons included comments which could only be described as trenchantly critical of Mr Faulkner.

As a result of all of that, the plaintiffs' claim an indemnity for the short-fall on the annual rental between the $110,700 plus $3,200 figure and $140,000 but acknowledge receiving $29,500 in part payment. That claim was extended for the whole of the two and a half year period covered by the rent reviews and for additional interest caused by the short-fall. The plaintiffs also claim against the defendants pursuant to the ratchet clause in the lease for any difference in the rental set for the two and a half year period from 28 June 1990 and $140,000 and for loss of bargain in a reduction in the value of the building by virtue of the reduced rental. The plaintiffs also claim that the property was misrepresented to them by the defendants in the sense that they were told by them it would yield a rental of at least $140,000 per annum and the plaintiffs say that in making the representation Mr Gibson was relying on and showed them Mr Faulkner's rental valuation of $155,000. There is an additonal claim based on a breach of warranty in relation to the allegation that the building was not watertight.

In their statement of defence and counter-claim, the defendants allege that the plaintiffs failed to supervise Mr Faulkner in the negotiations and the arbitration and continued to use his services:

> " ... even when it became apparent that Mr Faulkner was unable to or unwilling to supply information as to comparable rentals that would support his valuation and was evading his responsibilities to obtain a prompt and proper resolution of the matter."

They claim that they therefore lost the opportunity to accept the rental offer of $128,200 and are liable for the shortfall between the actual rental and $140,000 as a consequence. They seek damages of $43,750. There is an alternative claim alleging that the plaintiffs have failed to mitigate their loss because Mr Faulkner "totally failed to support his rent assessment" at the arbitration, that that was in breach of Mr Faulkner's duty to the plaintiffs to exercise reasonable skill and care and that the plaintiffs have failed to mitigate their loss by pursuing Mr Faulkner.

The defendants' claim against Mr Faulkner is based on an allegation of a lack of reasonable skill and care in advising on the rent payable on the rent review and in conducting negotiations with the lessee and an allegation that Mr Faulkner ought to have known that the sale price would be based on the rental expectations and he therefore owed a duty to the defendants to advise on the rent and conduct negotiations skilfully, in particular having regard to the existence of the ratchet clause. They claim a breach of those obligations both when Mr Faulkner was advising them and when his services were adopted by the plaintiffs and they say that if they are liable to the plaintiffs pursuant to the rental guarantee then they are entitled to relief against Mr Faulkner by way of an indemnity against all liability which they might have incurred to the plaintiffs or damages for the rental difference. Mr Faulkner has yet to file a statement of defence.

In short then, as far as Mr Faulkner is concerned, the defendants claim he owed them a duty of care during the period of their ownership in relation to the assessment of rental and that that duty of care continued after the sale because of their continued liability under the guarantee. The defendants say either that his $155,000 valuation was justifiable, in which case he was negligent in not justifying it at the arbitration, or that it was not justifiable in which case he was negligent in treating the rental offers as he did and in particular by allegedly declining the offer of $128,200. Alternatively, they claim that Mr Faulkner was negligent both in his original rental estimation and in his actions leading up to and during the arbitration. The plaintiffs have not, as yet, joined Mr Faulkner as a defendant alleging breach of any duty to them either in the the original rental assessment (if they can show that he knew or ought to have known that it would be shown to them as prospective purchasers) or in his conduct during the course of negotiations and during the arbitration. They have presumably adopted this course because they have the comfort of the defendants' rental guarantee. Mr Millard, counsel for the defendants, appeared to summarise the position accurately during the hearing of this application when he submitted:

> " ... the Third Party cannot have it both ways. He cannot both say that his valuation of $155,000.00 per annum was right or at least within an acceptable measure of tolerance and also say that his conduct at the arbitration was justified given that no evidence was adduced to support his valuation. In that event, he must be liable to either the Plaintiffs or the Defendants or possibly both."

Mr Faulkner's joinder was pursuant to R 75(1)(b)(c) and (d) which entitle the issue of a third party notice in circumstances:

> " ...

(b) That the Defendant is entitled to any relief or remedy relating to or connected with the subject-matter of the proceeding and substantially the same as some relief or remedy claimed by the Plaintiff against him; or

(c) That any question or issue in the proceeding should properly be determined not only as between the Plaintiff and the Defendant but also as between the Plaintiff, the Defendant, and the third party or between any or either of them; or

(d) That any question or issue relating to or connected with the subject-matter of the proceeding is substantially the same as some question or issue arising between the Plaintiff and the Defendant and should properly be determined as aforesaid..."

For Mr Faulkner's joinder to be justified pursuant to R 75(1)(b) the defendants must show that they are entitled to some relief or remedy against him which is substantially the same as that claimed from them. Mr Goldsbury, counsel for Mr Faulkner, relied on the decision in Myers v N & J Sherick Limited [1974] 1 All ER 81, 85. In that case a purchaser of land sued the vendors for failing to disclose that an underlease had been varied so that it could not be determined by the underlessor and the defendants sought to join their solicitors as third parties. In allowing the application, Goff J held:

" In my judgment, although similarity of the facts is an important element, it is not necessarily decisive, and the fact that the third party claim is designed to determine who should ultimately bear the loss is also very important. Each case must depend on its own facts and, in my judgment, there is here sufficient similarity to satisfy the... rule."

That decision, however, in this Court's view, tells against Mr Faulkner. In this case, the plaintiffs' claims against the defendants include claims for rental shortfall throughout the two and a half year period and beyond. Clearly enough, the amount of that shortfall might have been affected by the settlement offers made by the lessee and is affected by the umpire's award. The relief which the defendants seek against Mr Faulkner is indemnity against their liability to the

plaintiffs. Given the allegations made against Mr Faulkner concerning his initial rental valuation and his conduct leading up to and in the arbitration, it could not be said that the relief or remedy which the defendants seek against Mr Faulkner does not relate to or is not connected with the subject matter of the proceeding and is not substantially the same as the relief sought by the plaintiffs.

As to R 75(1)(c), the determination of issues between plaintiff and defendant on the one hand and defendant and third party on the other, reference was again made to Myers v Sherick (supra at 85-86) but, again, in this Court's view, that case tells against Mr Faulkner. Goff J held:

> " ... Counsel says there are no common issues, and provided the defendants do not compromise without the consent of the firm, but properly fight the action and lose, then the judgment will be conclusive against the firm as to the defendants' liability to the plaintiff and the quantum of damage. In my judgment, however, that is not so. In their claim for breach of duty, the defendants must prove their loss, and the firm, if not brought into the main action as third parties will not be bound by the judgment in it, but will be free to dispute the extent of the defendants' true liability. In particular, in my view, it will be open to the firm to argue afresh the point taken in the defence to the main action that the plaintiff is not entitled to sue on the implied covenants, because of alleged illegality in connection with the statement of the consideration and the stamping of the transfer.
>
> " In my judgment, there is here 'a question or issue relating to or connected with the original subject-matter of the action' which, subject to the court's undoubted discretion, the defendants are entitled to have determined not only as between the plaintiff and themselves, but also as between the firm..."

Reference was also made to Stevenson v National Bank of New Zealand Ltd [1987] 2 NZLR 331 which was a claim in contract against guarantor who sought to add a claim in negligence against the receivers of the company whose indebtedness he had guaranteed. In granting the application the Court of Appeal held that the fact that one claim was in contract and the other in tort did not afford any reason for declining to join the

receiver and held that the defendants' liability to the Bank should be determined not only between the Bank and the defendant but as between the Bank, the defendant and the receivers.

In this case, it cannot be doubted that the propriety of Mr Faulkner's rental valuation will be a question in issue in the proceeding as will his conduct during the negotiations leading up to and in the arbitration itself. Because of the allegation that Mr Faulkner owed duties of care to the defendants and then to the plaintiffs or to both, it is clear in this Court's view that Mr Faulkner's actions do raise questions or issues which require to be determined between plaintiff and defendant on the one hand and defendant and third party on the other.

Similar considerations apply to R 75(1)(d) and attract the same comments.

The final matter which needs to be considered is the discretion confered on the Court by R 75(4) which reads:

> " On any application for leave under this rule the Court shall have regard to the delay to the plaintiff as well as to all other relevant circumstances and may grant or refuse leave or may grant leave upon such terms as may appear just."

In considering the exercise of that discretion, the following are the salient features:

1. Delay to the plaintiffs was obviously not a consideration which motivated them. Although served with this application, they declined to take any part in the hearing.

2. The learned authors of McGechan on Procedure make it clear that the criteria pursuant to which the Court will act in applications under R 160 are those under R 75 (McGechan on Procedure para 160.04(3) p 3.183) which directs the Court back to a consideration of the terms of R 75 previously discussed.

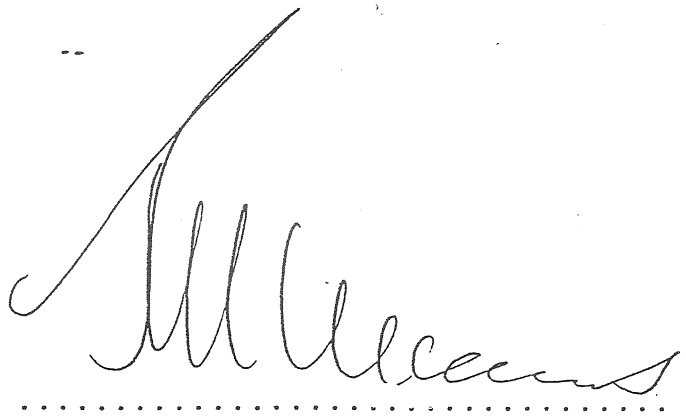
3. "The overriding object of the third party rules is to enable all the issues to be dealt with in one action" (Turpin v Direct Transport Ltd [1975] 2 NZLR 172, 175).

4. What is unusual in this case is the changing nature of those to whom Mr Faulkner owed a duty of care at various stages. His actions at each of those stages will obviously be the subject of scrutiny at trial. It is almost certain that he would be called as a witness by one or other of the parties. In order to enable all the issues to be dealt with in the one action, it is preferable that he is present as a party as well as a witness. It may be of assistance to him to have counsel available to protect his interests in the event that he is called as a witness either by the plaintiffs or the defendants.

5. Even if Mr Faulkner's application to be struck out as a third party in this proceeding were successful, counsel for the defendants advised the Court that it is highly probable that a separate proceeding would be issued against him by the defendants and that an application for consolidation of that proceeding with this would follow. It seems that it would be difficult to decline such an application having regard to the criteria set out in R 382.

In all those circumstances, this Court concludes that the third party notice issued by the defendants against Mr Faulkner falls within the terms of R 75 and that, both for that reason and as a matter of discretion, he ought to be retained as a third

party in this proceeding. Mr Faulkner's application to be struck out as a third party is accordingly dismissed. Costs are reserved (hearing time 1hr 40mins).



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Master J H Williams QC

Solicitors: Cooper Rapley, Palmerston North for plaintiffs
Halliwells, Hawera for defendants
Treadwell Gordon & Co, Wanganui for third party