

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

5/6

CP 133/92

NOT
RECOMMENDED

830

BETWEEN FOSTER SUPERMARKET LIMITED
a duly incorporated company at
Christchurch

Plaintiff

A N D MICHAEL PATRICK CHICK of Christ-
church, Fruit and Vegetable Retailer

First Defendant

A N D GILLMAN REAL ESTATE LIMITED

Second Defendant

Hearing: 15th May 1992

Counsel: Melinda Ching for Plaintiff
H.C. Matthews for Defendants

ORAL JUDGMENT OF WILLIAMSON J.

The First Defendant in these proceedings has applied for orders discharging an ex parte injunction which was made urgently in this matter on the 10th April last. It required the First Defendant to hold the proceeds of the sale of a business known as Garden Fresh Shop 25 South City Mall, Christchurch, in the trust account of the Defendant's solicitors. After service of the ex parte injunction it was discovered that a sum had already been paid by the First Defendant's solicitors to the lessor of the business premises in relation to arrears and other amounts owing by the First Defendant. This sum was \$33,389.45. The amount that is presently held in the trust account of the First Defendant's solicitors is \$61,228.67.

In these proceedings it is sought to have the injunction discharged and those funds made available for use by the First Defendant so that debts amounting to \$21,898 (including \$3,347.00 for GST and PAYE) can be paid and the balance of \$39,330 can be used by the First Defendant in the purchase of another business.

APPLICABLE PRINCIPLES

The principles which must be applied in an application of this nature are the same as those which are applied in an application for interim injunction on notice. In broad terms the Court is concerned to approach the matter first inquiring whether there is a serious question to be tried between the parties; and secondly, what is the balance of convenience pending the substantive hearing of the proceedings. Overall the Court must consider where the justice of the matter lies in the interim.

The approach to such applications has been the subject of discussion in a number of cases. The principles are now, however, conveniently and succinctly set out in the Court of Appeal decision in the case of *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 in a passage to which both Counsel have referred.

" Whether there is a serious question to be tried and the balance of convenience are two broad questions providing an accepted framework for approaching these applications. As the NWL speeches bring out, the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question. At this final stage, if he has found the balance of convenience overwhelmingly or very clearly one way - as the Chief Justice did here - it will usually be right to be

guided accordingly. But if the other rival considerations are still fairly poised, regard to the relative strengths of the cases of the parties will usually be appropriate. We use the word 'usually' deliberately and do not attempt any more precise formula: an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities."

SERIOUS QUESTION

In the present case the factual situation is subject to considerable dispute between the parties. It is common ground that the Plaintiff agreed to purchase the First Defendant's business and that both parties signed a written agreement dated the 31st January 1992. In the written agreement there was provision for a "turnover warranty of \$11,000 per week including GST for a period of 10 weeks". The agreement also contained inter alia a special condition in the following terms:

"Subject to the turnover figure being \$12,500 per week for the two week period immediately prior to the confirmation date of Friday 13th March 1992."

It was common ground that the turnover figure for the two week period specified did not reach the sum of \$12,500 per week but that the Plaintiff accepted a turnover of less than that amount and proceeded to settle the transaction.

The areas of dispute between the parties concern first whether or not the turnover warranty in the agreement was met; second, whether there were oral representations made by the First and Second Defendants inducing the Plaintiff to enter into the contract to the effect that the real turnover was substantially more than \$11,000 per week; and thirdly, whether there was a representation made by the First Defendant prior to the

settlement that the turnover would be sufficient to meet the outgoings listed in a budget prepared for or on behalf of the Plaintiff.

Counsel have urged upon me today various points as to the strength of their individual cases in relation to the above three matters and further issues in dispute. Other than to say that there is force in the points made by Counsel for their respective sides, I am unable to reach any determination about those matters. Such a determination could only follow from a substantive hearing when both parties can be heard and seen and all of the available evidence evaluated.

As a result of the argument I have heard today I am satisfied that there are serious questions to be tried. In reaching this conclusion I have had regard to the points made by Counsel for the First Defendant in relation to the pleadings and to the differences between the Statement of Claim and Amended Statement of Claim already filed and the extent of the allegations made in the affidavits filed on behalf of the Plaintiff. In my view it is appropriate at this stage not only to give weight to those matters but also for the Court to endeavour to look at the substance of the dispute between the parties. Counsel for the Plaintiff has indicated that a further Amended Statement of Claim is to be filed and in any event that step must now be taken pursuant to an order made today to join the real estate agents Gillman Real Estate Limited as a Second Defendant and the order to strike out from the proceedings the previous Second Defendants who are the First Defendant's solicitors.

BALANCE OF CONVENIENCE

The balance of convenience in this case is very difficult to ascertain. Quite clearly, and this is frankly acknowledged by Counsel for

the First Defendant, both Plaintiff and Defendant are in difficult financial positions. Delay in hearing these proceedings must inevitably cause inconvenience, if that is the right word, to both of them. The Plaintiff claims to be losing money each week with the ultimate result that the shareholders, Mr and Mrs Foster, may lose their family home. The First Defendant is unable to start a new business or pay existing debts. Without making a decision as to the points at issue it is, of course, almost impossible for a Judge to say where the balance lies or which party will suffer most.

OVERALL JUSTICE

In the case of *Klissers* it was said that in such a situation the Court or Judge has to stand back and ask himself the question as to where the overall justice lies. That is such a broad test that to make a diligent application of it would require an exhaustive review of the substantial affidavits before me. I do not intend to do that in this case because I am conscious that the most important step is for a substantive hearing to be held as soon as possible. For me to reserve this matter and give a decision at length on all of the individual matters of argument on an interim application would be counter-productive to the principal concern.

Accordingly, having read the material in the affidavits and having heard the respective arguments of both parties, I have determined that there is sufficient strength in the case for the Plaintiff for this Court to continue the injunction but with alterations. The injunction will restrain the First Defendant from instructing his solicitors to make payments of the money from the trust account other than for the payment of the GST and PAYE amounts that are payable. As Counsel has said, these amounts are ones to which priority would attach even on insolvency. In making this decision I am doing so on the facts available to me at present. If those

6.

facts were to alter because of other matters, then clearly either party must be able to make further application in relation to the injunction. For that reason, leave will be expressly provided.

The costs of this application and hearing are reserved.

A handwritten signature in black ink, appearing to read "William J.", with a long, sweeping underline that extends across the width of the signature.

Solicitors:

Loughnan Jarman & Co., Christchurch, for Plaintiff
White, Fox & Jones, Christchurch, for Defendants