NZLR CA659

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 21/1
AUCKLAND REGISTRY

CP 1338/93

2399

BETWEEN L N PLANK

Plaintiff

A N D SECURITY & GENERAL INSURANCE COMPANY (NZ) LTD

First Defendant

A N D ELLISON ASSOCIATES (1985) LTD

Second Defendant

Hearing: 2 December 1993

Counsel: G S Millar for Plaintiff
No Appearance for Defendants

Judgment: 2 December 1993

ORAL JUDGMENT OF ROBERTSON J

This is an application to review an order made by a Master on 2 November 1993 which I intend to deal with on the basis of pragmatism rather than a rigorous application of the legal framework. I am satisfied that the justice of the matter requires this course and it appears inevitable that if

I were to put the parties through a set of procedural steps there is a certainty about the outcome.

The plaintiff commenced these proceedings in 1989. He has not been vigilant in their prosecution. Such was the degree of inaction that the file became subject to the provisions of r 426A of the High Court Rules which came into force on 1 January 1993. There was the need for leave to continue because there had been more than a year since any steps had been taken.

The application for leave was opposed before the learned Master. There was no substantial evidence available as to the merits of the matter at that time. Most importantly, there was not drawn to the attention of the Master the decision of Barker ACJ in ***Redoubt Farm Ltd v McAnulty*** (M 2153/90, Auckland Registry, 27 September 1993) (in receivership and liquidation). This is the first interpretation of the new rule by a Judge.

The application for review came before this Court on 18 November. It was adjourned to enable the applicant to file an affidavit as to the merits. That was said to be without prejudice to any objection which could properly be made to that by the defendants. The affidavit has now been filed. There is available to the Court a memorandum from the first defendant indicating consent in the following terms :

> *"1. An order vacating the decision of Master Gambrill dated 2 November 1993 insofar as it refused leave to the plaintiff under Rule 426A but leaving the order as to costs.*
>
> *2. Giving leave to the plaintiff to proceed under Rule 426A.*

3. Transferring the proceeding to the District Court at Auckland."

The amount in dispute is about $120,000 hence the application to transfer the matter to the District Court. I raised with counsel whether it would be more strictly correct for the plaintiff to apply for a rehearing on the r 426A application before the Master. That could have been done by consent and then on the basis that the first defendant would raise no opposition to leave being granted under the rule an order could be made and the matter then transferred. When the parties all agree, I am unwilling to put them to that degree of expense in a matter such as this when the result is inevitable because of the parties attitude towards it.

I note however that a matter which involves an exercise of judicial discretion, the consent of the parties is not necessarily determinative to the issue. But it does appear that the present situation has developed at a time when the force and effect of a new rule was emerging and there is justification in the particular circumstances for this course of action to be followed.

There will accordingly be an order vacating the decision of the learned Master dated 2 November 1993 herein pursuant to which leave was refused to the plaintiff under r 426A but the order for costs in favour of the first defendant made on 2 November 1993 shall remain in full force and effect.

Secondly, the plaintiff is now granted leave to proceed under r 426A.

Thirdly, the proceedings are transferred to the District Court at Auckland.

This case needs to reach finality with speed and despatch. It is in no-one's interest when litigation runs on as long as this has.

Solicitors

Short and Co, Auckland for Plaintiff