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N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

2/6

HC.205/94

NOT RECOMMENDED

S69

BETWEEN JOHNSTON'S BLUE MOTORS LIMITED

Appellant

AND BRIAN DOUGLAS CURRIE-ROBSON AND JANET ELIZABETH CURRIE-ROBSON

Respondents

Hearing: 8 May 1995

Counsel: *Phillipa Cunningham* for Appellant
*Chris LaHatte* for Respondents

Judgment: 8 May 1995

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**ORAL JUDGMENT OF TOMPKINS J**

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Solicitors for Appellant: Cairns Slane, Auckland
Solicitors for Respondents: Wadsworth Norton, Auckland

The appellant, the defendant in the court below, Johnston's Blue Motors Limited ("Johnston's) has appealed against the judgment of Kerr DCJ delivered on 17 October 1994 following a three day hearing on 20, 21, and 22 September 1994. The appeal is against the Judge's finding on liability and on the assessment of damages. The respondents, the plaintiffs in the court below, Mr and Mrs Currie-Robson, have cross appealed against the non-allowance of one head of damages.

**Background**

On 1 August 1989 Johnston's and Mr and Mrs Currie-Robson signed an agreement pursuant to which Mr and Mrs Currie-Robson agreed to provide transport services between two hotels, Leisure Port and Auckland Airport Hotel Limited (referred to in the contract and in this judgment as "the clients") and the airport. The contract was for a term of one year from 1 August 1989. The price for the provision of the service was $130,000 per annum plus GST. The contract was to continue for 12 months from the commencement date being 1 August 1989. Relevant to Mr and Mrs Currie-Robson's claim are clauses 1(b) and 1(c) of the contract. They provide:

> "(b) JOHNSTON'S will use its best endeavours to arrange for renewal of the clients contract by the clients and it will notify the Contractor as soon as it has confirmation concerning renewal or non-renewal. If Johnston's is able to arrange renewal of the clients contract then (provided that the Contractor has not been in substantial breach of any of the terms of this Agreement) Johnston's will give the Contractor a first option to renew this Agreement upon such terms and conditions as those which Johnston's is then prepared to offer to any other party.
>
> (c) JOHNSTON'S will notify the contractor no later than three months prior to expiry of this agreement whether or not the Clients desire to have the services continued."

Mr and Mrs Currie-Robson performed the contract. There were allegations made at the hearing in the District Court that in a number of respects they had failed to do so in accordance with the contract terms, but in those respects the Judge found against Johnston's. There is no appeal against those findings.

When the contract expired on 31 July 1990 a renewal of the contract had not by then been arranged nor had there been a notification by Johnston's under clause 1(c).

In the negotiations that were taking place during August 1990, the clients sought to obtain a reduction in the price that they were paying Johnston's for the transport services. Mr Trethewey, the manager of Johnston's, endeavoured unsuccessfully to have them agree to renew their contract with Johnston's on the same terms. Mr and Mrs Currie-Robson had by this time entered into an agreement to purchase a new bus that they proposed to use if and when the contract was renewed. On 17 August 1990 they met with Mr Trethewey to discuss possible terms of a renewal. He asked them to put their proposal in writing. They did later that day in the following terms.

"B D & J E CURRIE-ROBSON
RE CONTRACT, ALL PRICES QUOTED
PLUS GST

1. We need $140,000 to continue the contract as it stands now.

2. If the current price is to stand then the schedule will be altered to 1/2 hour timetable to 10 A.M only, thereafter "as required" basis.

3. Regardless of vehicle size running costs are not going to go down to any great extent I.E. wages, fuel, tyres, parts, etc, traditionaly (sic) only increase.

4. However if the current price is to stand, the clients can supply & maintain radio (LEISUREPORT) also uniforms on later model bus, to be purchased A.S.A.P.

5. If the clients can not (sic) accept these conditions, then the service will be withdrawn forthwith as we can not (sic) operate a 16 hour day 365 days a year service on less than above.

[*B D Currie-Robson*]

PS. No reduction in price will be accepted."

Mr Trethewey took the intimation in this memorandum to be an unchangeable, take it or leave it stand. He entered into negotiations with some other possible contractors. The outcome was that on or about 27 August 1990 he reached an agreement with Mr Flowers whereby he undertook to provide the services at a cost of $120,000 on terms that were, as far as the nature of the

service itself was concerned, slightly more onerous than the terms in the Currie-Robson contract. On 27 August Mr Tretheway told Mr and Mrs Currie-Robson that their contract would not be renewed. On the following day, 28 August, he wrote to them confirming this, stating that their application to renew their contract had been declined because the price of $140,000 plus GST for the 12 month period was excessive, and not all conditions of the contract had been adhered to in the past 12 months.

The contract with Flowers is dated 1 October 1990 although the terms of the contract had been agreed about 27 August.

The plaintiffs brought their claim on two causes of action, namely, first that Johnston's had breached the contract in failing to give Mr and Mrs Currie-Robson the first option to renew the agreement on the same terms and conditions as those which the defendant offered to the third party, and secondly, based on an estoppel claimed to have arisen out of the negotiations for renewal. The plaintiffs claimed $53,285 for income lost during the 1990/1991 year and $26,896.41 for consequential loss resulting from the forced sale of the bus they had agreed to buy. An issue on this appeal is the defence advanced on behalf of Johnston's that Mr and Mrs Currie-Robson had waived compliance with clause 1(b) of the contract relating to Mr and Mrs Currie-Robson having the first option to renew the agreement upon terms Johnston's were prepared to offer to any party.

In his decision, as I have said, the Judge found in favour of Mr and Mrs Currie-Robson on the allegations of breach of the terms of the contract. He found that there had been no waiver of the obligation under clause 1(b). He also found that there had been no estoppel arising out of the conduct of the parties. He awarded the plaintiffs damages of $12,945, that being his assessment of the loss of earnings for the 1990/1991 year. He made no allowance for the claim for the consequential loss relating to the forced sale of the bus.

Johnston's appeal against the finding that there had been no waiver and against the award of damages for loss of earnings of $12,945. Mr and Mrs Currie-Robson's cross appeal relates to the Judge declining to allow their claim for consequential loss resulting from the forced sale of the bus.

**Waiver**

It was the submission on behalf of Johnston's that the Judge was wrong to conclude that there had been no waiver of the term in the contract. In the context of this case there was no difference between counsel concerning the principles to be applied. To establish waiver the party relying upon it must establish by evidence that is clear and unequivocal that the other party had waived his or her legal rights: *Mardorf Peach v Attica Sea Carriers* [1]. In *Connor v Pukerau Store Ltd*[2] Cooke J adopted the following passage from the judgment of Lord Denning MR in *W J Alan & Co Ltd v El Nasr Export Co*[3]:

> "The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: ..."

Translated into the circumstances of this case, what Johnston's are required to establish by clear and unequivocal evidence is that Mr and Mrs Currie-Robson led Johnston's to believe that the strict rights arising from clause 1(b) of the contract would not be insisted upon and that they intended Johnston's to act on that belief and that Johnston's did act on it. The test is objective. It is not a matter of what each party actually thought. The test, rather is whether a reasonable person in the situation of Mr Trethewey would have believed that Mr and Mrs Currie-Robson no longer required Johnston's to give them a first option to renew their agreement upon the terms Johnston's were prepared to offer to Flowers.

The Judge's finding on this issue at page 22 of his judgment is shortly expressed. Having referred to the memorandum I have set out above and described it as "a firm stance to take", he went on to express his conclusion in this way:

> "It may well be that [Mr and Mrs Currie-Robson] said they would accept no reduction in price, but because no contract was in existence as at 14 August, until the contract was obtained (if it could be) and offered to [Mr and Mrs Currie-Robson], in my view no waiver took place, and

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1 [1977] 1 All ER 545, Lord Wilberforce at 551.

2 [1981] 1 NZLR.384.

3 [1972] 2 QB 189, 213.

> notwithstanding, the strong stance taken by [Mr and Mrs Currie-Robson], they were not estopped from subsequently relying on the breach of Clause 1(b). Adapting Lord Fraser's words in [the Currie-Robson memorandum] was not an unambiguous representation that [Mr and Mrs Currie-Robson] were treating Clause 1(b) of the contract as no longer applying."

In support of her submission that that finding of the Judge was wrong, Mrs Cunningham relied particularly on the Currie-Robson memorandum. It was her submission that when that memorandum was taken in the context of the negotiations as they were at that stage, particularly with the postscript that "no reduction in price will be accepted", Mr Trethewey was justified in concluding that Mr and Mrs Currie-Robson did not require the Flowers offer to be put to them. In support, she referred to evidence of Mr Trethewey when he referred not only to the clients' insistence of a reduced price but also to the allegations of breach of terms of the agreement, saying that he did not believe that either client would have accepted Mr and Mrs Currie-Robson for a further term even if they would have been prepared to accept the lower price and for these reasons there was no purpose in offering the terms to them.

On the other hand Mrs Currie-Robson in her evidence said that when they framed the memorandum, it was so that Johnston's would at least come back with some indication of the price or terms on which they could do the contract. She clearly regarded the memorandum as a negotiating move. The submission on their behalf is that there was not the clear and unequivocal evidence of waiver.

It is my conclusion that there was certainly evidence to support the Judge's finding. In my view the important consideration was that right up to 27 August when Johnston's advised that there would be no renewal of the contract, Mr and Mrs Currie-Robson did not know that another tenderer was on the scene. Mr Trethewey had not told them that he was negotiating with others. Had they known that, and had they, in the face of that knowledge, steadfastly adhered to their view that they would not be interested in any contract at less than $140,000 a year, that may well have amounted to waiver. But those are not the circumstances. In the absence of knowledge of that kind, a reasonable person would not assume that they had waived their right to be offered the contract on the Flowers terms. It may well be that they would not have accepted, but they had the contractual right to be offered those terms and for the reasons I have expressed, they had not waived those rights. It follows

that, as the Judge found, Johnstone's failure to give the Currie-Robsons the option of taking the contract on the Flowers terms was a breach of contract.

**Damages**

The contention advanced on behalf of Johnston's is that Mr and Mrs Currie-Robson had failed to establish that they suffered any loss. This was on the basis that they had failed to prove that had they been offered the contract on the Flowers terms they would have accepted. The Judge, in that part of his decision dealing with the estoppel issue, made the following finding:

> "[Johnston's'] inaction, was failing to offer [Mr and Mrs Currie-Robson] the new contract. However, I have doubt, whether [Mr and Mrs Currie-Robson] would have renewed the contract at a price of $120,000. Certainly it seems unlikely that the clients would have agreed to the altered terms, proposed by [Mr and Mrs Currie-Robson]. So whilst there was a failure to act in the sense I have described, even if [Johnston's] had acted as the contract required, I doubt that would have meant [Mr and Mrs Currie-Robson] would have renewed the contract."

However, when the Judge came to deal with damages for breach of contract, he said:

> "In assessing damages, it seems to me, I must assume [Mr and Mrs Currie-Robson] would have accepted the new contract price of $120,000."

The damages were claimed on the basis that loss of earnings and the loss on the sale of the bus were losses that the Currie-Robsons suffered as a result of the breach. They would have suffered that loss through the breach only if, had the contract been offered to them on the Flowers terms, they would have accepted. They would also be required to prove that, had they accepted a contract on those terms, they would have made a profit, that being the measure of their loss under that heading.

I, therefore, with respect, cannot accept the Judge's conclusion that he "must assume" that the Currie-Robsons would have accepted the new contract at $120,000. He gives no reason for considering that he was required to make such an assumption. It does seem directly contrary to the doubts he had expressed shortly before, which I have set out. I can only conclude that in that earlier passage he was in effect holding that the Currie-Robsons had

failed to prove on the balance of probabilities that they would have renewed their contract at a price of $120,000 and on the other Flower terms. There was certainly ample evidence to support that conclusion.

On 14 September 1990 solicitors then instructed to act for Mr and Mrs Currie-Robson had written to Johnston's alleging that they were in breach of their contract. Included in that letter is the following assertion:

> "Our instructions are that Mr and Mrs Currie-Robson have heard that you are to offer a new contract to somebody else at $125,00.00 per annum. Our clients say that it is altogether impossible for the contract to be operated profitably at that price."

The solicitors go on to express their belief, correctly, that the contractor was going to be allowed to use a smaller bus, but they were apparently unaware that apart from that the Flowers contract was on terms somewhat more onerous than the Currie-Robsons' contract. They do go on in their letter to say that the Currie-Robsons would be prepared to undertake the contract for less than $140,000 per annum (they did not say they would do it for $125,000 per annum) if the bus is allowed to be on standby during certain inactive periods rather than be obliged to operate every half hour with no passengers on board. That is not the case under the Flowers contract.

When those assertions are considered in the light of the Flowers contract they are, in my view, a clear indication that had they been offered the Flowers terms they would have declined. Indeed the Judge's finding that had they undertaken the contract for the 1990/1991 year on the Flowers terms, they would have had a surplus of $12,945 for the year before any payments to them for their work on the contract, and before any deduction for depreciation, provides confirmation for what in my view would clearly have been the Currie-Robsons attitude, namely that a contract on the Flowers terms would have been unprofitable. Further, as Mrs Cunningham has pointed out, nowhere in their evidence did either Mr or Mrs Currie-Robson expressly state that they would have accepted a contract on the Flowers terms. The furtherest that their evidence goes is in the evidence of Mrs Currie-Robson where she said that they were not offered the replacement contract at $120,000 and if they had been, they would have tried to negotiate or at the worst match the figure "so that we could keep up the payments for the bus".

In the light of the Judge's finding that he doubts that they would have renewed the contract on those terms, which finding, as I have indicated, is clearly justified on the evidence, it follows that no award for damages for loss of profits should have been made.

## The cross appeal

Mr LaHatte submitted that the Judge was wrong to disallow the consequential loss claim arising from the forced sale of the bus. The Judge dealt with this issue only in dealing with the estoppel contention. Mr LaHatte accepted that that may have been because of the manner in which he advanced his submissions in the District Court. But it is clear from the statement of claim that the consequential loss claim is advanced under both causes of action.

However, it is my view that the consequential loss claim must suffer the same fate as the loss of profit claim, that is, it will only arise if the Currie-Robsons had established that they would have renewed the contract on the Flowers terms. There were good grounds, as advanced by Mrs Cunningham, why that consequential loss could not have been said to have flowed from the breach in any event, principally because they had ordered the new bus in May or June 1990 at a time when they had no more than an expectation or perhaps even a hope that the contract would be renewed. Certainly the bus was not ordered in reliance on any undertaking to renew. Further, there did seem to me to be an element of duplication in these two claims. If the contract had been renewed on the Flowers terms and the Currie-Robsons had earned whatever they could on those terms, the bus would have depreciated so that at the end of 12 months its value would have been much the same as it was when sold, except that there could, under those circumstances, be some allowance for the difference between a fire sale, as apparently occurred, and a sale following the ultimate ending of the contract. But broadly, the cross appeal fails for the same reason as the loss of profits.

## Costs

The Judge held that the Currie-Robsons would be entitled to costs as fixed by the registrar and to disbursements as fixed by the registrar. Mrs Cunningham appealed against that order on the grounds that there had been several adjournments of the hearing in the District Court caused through the

failure of the Currie-Robsons to be ready to proceed and due to a failure to make full discovery. Costs were also sought in relation to an application to strike out. The Judge made no costs orders in relation to these pretrial matters.

I express no views on whether a costs order in favour of Johnston's on those pre-trial matters is appropriate. It is Mrs Cunningham's submission that the Judge should have dealt with them in dealing with the costs, after hearing the parties.

## Conclusion

The appeal will be allowed. The judgment in favour of Mr and Mrs Currie-Robson will be set aside and in lieu thereof there will be judgment for the defendant on its claim.

Johnston's will be entitled to costs in the District Court according to scale to be fixed by the registrar together with disbursements and witnesses expenses to be fixed by the registrar. Johnston's are entitled to costs on the hearing of the appeal which I fix at $800.

The cross appeal is dismissed.

On the issue of pre-trial costs, I direct that the matter be referred back to the Judge for him to hear the parties and fix costs on the pre-trial matters to which Mrs Cunningham referred.