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NOT RECOMMENDED

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

3/11

CP.616/93

BETWEEN	JOFTAA HOLDINGS LIMITED formerly PRESTIGE CARPETS LIMITED	
	Plaintiff	
AND	CAVALIER BREMWORTH LIMITED	
	Defendant	

1462

Hearing: 12 October 1995

Counsel: G. Bogiatto for Plaintiff
L. Herzog for Defendant

Judgment: 12 October 1995

ORAL JUDGMENT OF BLANCHARD, J.

Solicitors: G. Bogiatto, Auckland for Plaintiff

Kay & Dillon, Orewa for Defendant

The plaintiff, whom I will again call Prestige, has moved the Court for an order that it be granted leave to adduce further evidence "on the question whether the plaintiff effected any sales in June and July 1993 in Bulls of Cavalier Bremworth residential woollen carpet". The application is made pursuant to directions given by the Court of Appeal in a judgment of 3 August 1995 and the Court's general discretion to admit further evidence. Reliance is placed upon the well known decision in ***Montego Motors Ltd v Horn*** [1974] 2 NZLR 21.

My judgment on 11 April turned on my finding that Mr McAllen of Prestige had admitted several times in giving evidence that there had been supplies of Cavalier Bremworth carpet to Rangitikei Floorings Ltd in Bulls in June and July 1993, that is, after a meeting with Mr Phillipe of Cavalier Bremworth on 19 May.

I found that the defendant had proved that this had occurred. That there was nothing in the evidence to suggest that what was admitted to have been so sold was carpet other than residential woollen carpet falling within the prohibition of on-selling to wholesalers. Therefore I found that Prestige had deliberately breached an essential term of the dealership and that Cavalier Bremworth was entitled on the basis of that breach to cancel the contract. Accordingly, I held that the plaintiff's action failed and judgment was entered against it.

The judgment of the Court of Appeal of 3 August, delivered by the learned President, recorded that I was entitled to find as I did on the evidence before me. But in the course of the hearing before the Court of

Appeal there had been an application by Prestige for leave to call further evidence. I quote what the Court said about the nature of that application:

> "Contrary to the original impression conveyed to this Court that the matter concerned alleged commercial carpet, it emerged that the available evidence is said to be that the relevant Bulls sales were two sales of non-running lines, one of which sales is said to have been of carpet to Mr McAllen's sister. Mr Bogiatto explained that it was not until after Mr McAllen had given evidence that he as counsel came to appreciate the importance of the limited scope of the prohibition. He said that he was first put on the track by some evidence given by Mr Martens (who was called for the plaintiff) and that further material evidence came from the defendant's witnesses Mr Philippe and Mr Ball."

I pause to say that in one of the affidavits now sought to be tendered Mr McAllen makes the statement that after the reserved judgment of this Court had been delivered he perused with care the plaintiff's records. One could therefore be forgiven for thinking that instructions given to his counsel during the Court of Appeal hearing would have been carefully based on the facts revealed by that examination.

The Court of Appeal referred in its judgment to the fact that the application was very belated and should have been made to me on the day which had been fixed for the making of final submissions. The judgment said that for obvious reasons "this Court must have considerable hesitation in granting an application of somewhat suspect genesis". The judgment went on:

> "In the end we are moved by the consideration that there is a risk of injustice if the plaintiff is not allowed to call evidence on the strictly limited issue as to the subject matter of the relevant sales."

The Court recorded Mr McAllen's very plain admission that there had been sales in Bulls after 19 May 1993. A passage of his evidence was set out in the judgment. The Court of Appeal concluded that justice would be best assured by granting what it described as "an opportunity for

clarification". That plainly referred back to what Mr Bogiatto had told the Court, upon instructions, about the nature of the carpet which had been the subject of two sales. On my reading of the reasons of the Court of Appeal my judgment was set aside for that reason only and remitted to this Court for determination of "the question whether the sales by Prestige to Rangitikei in Bulls in June and July 1993 were of carpet within the scope of the relevant prohibition".

Let me put what had occurred in my own words. The Court of Appeal had been told that if further evidence about the sales which admittedly had occurred could be given by way of clarification, Prestige would be able to prove its existing assertion, which had been strongly relied on in Mr Bogiatto's closing submissions in this Court on 4 April, that the sales were of non-running lines. New evidence could close a gap in its case, but would do so entirely consistently with the evidence given for the plaintiff at trial. That is all I believe that the Court of Appeal envisaged. But that is not what is now proposed in the present application, which is opposed by Cavalier Bremworth on the basis that it is outside the leave granted by the Court of Appeal and is an abuse of process.

In the material which the plaintiff now seeks to submit there are statements by Mr McAllen that, contrary to what he told the Court in giving evidence, there were in fact no sales effected by the plaintiff through Rangitikei Flooring in Bulls of Cavalier Bremworth carpet during the period in question. He is unable to produce Prestige's records save to a very limited extent because of a fire which occurred in the premises of Prestige on 6 June 1995, which was just under two months after the date of delivery of my judgment. There is, however, an affidavit from a Mr Connelly, a director of Rangitikei, who records being told by Mr McAllen in May 1993

that Cavalier Bremworth had directed the plaintiff against making future sales in the Bulls area and was told also that the plaintiff could therefore no longer make such sales through Rangitikei Flooring. He deposes that Rangitikei Flooring did not thereafter purchase from the plaintiff Cavalier Bremworth carpet products. He says that he has checked his company's records and can find no transaction in June and July of 1993. I record the content of those affidavits but note also that Cavalier Bremworth, because of its opposition to their being received, has not filed any affidavits sworn on its behalf nor cross-examined the plaintiff's deponents.

I take the view that it is inappropriate and not in accordance with principle that an unsuccessful party in litigation which has suffered a judgment against it should be permitted to re-open the case for the purpose, not of supplementing its evidence by noncontradictory material which fills a gap in the case already presented but, rather, for the purpose of producing evidence which directly contradicts what was said on its behalf at trial and in effect makes a new and different case. I do not accept that this is what is contemplated in cases such as ***Montego Motors***, nor do I detect from careful reading of the judgment of the Court of Appeal that this is what that Court contemplated would occur when it remitted the matter back to this Court. Indeed, I would go so far as to say that the Court of Appeal has been placed in a false position as a result of its reliance upon what Mr Bogiatto, acting on express instructions, advised the Court about the nature of the evidence sought to be given.

I must, however, record that I intend no criticism of Mr Bogiatto. I accept that he relied upon the advice as to factual matters given to him by his client and acted in good faith on his instructions.

For these reasons I am dismissing the application but I anticipate that Prestige will wish to appeal my present ruling. To give it that opportunity I will not proceed to enter judgment again in this matter for 28 days, which is the period within which an interlocutory appeal may be brought. I also reserve the question of costs in relation to today's hearing.

There are separate proceedings, M.759/94, for the winding up of Prestige brought by Cavalier Bremworth. They have been stayed until today and I now extend that stay pending the further order of this Court.