LOW PRIORITY

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

16/2

CP 309/95

BETWEEN THE FARMERS CO-OPERATIVE ORGANISATION SOCIETY OF NEW ZEALAND LIMITED

Plaintiff

A N D WRIGHTSON LIMITED

First Defendant

A N D JOHN F JONES CO LIMITED

Second Defendant

Hearing: 29 January 1996

Counsel: P J H Jenkin QC for Plaintiff
J E Hodder for First Defendant
H B Rennie QC for Second Defendant

Judgment: 31 JAN 1996

RESERVED JUDGMENT OF HERON J

Solicitors:

P J H Jenkin, Wellington for Plaintiff
Chapman Tripp Sheffield Young, Wellington for First Defendant
H B Rennie, Wellington for Second Defendant

This is an application for an interim injunction requiring the second defendant to comply with the provisions of a licence agreement relating to three stock yards entered into on the 21st April 1995. The proceedings were commenced against two defendants but the first defendant (Wrightson) has now acknowledged that the plaintiff is entitled to exercise its rights under the licence agreement in respect of which Wrightson is a direct contracting party and therefore no orders are sought against Wrightson. The second defendant John F Jones Co Limited (Jones) is however not a direct contracting party to the licence agreement and comes into the proceedings by virtue of being a purchaser from an original party to the agreement, namely Elders Pastoral NZ Limited (Elders).

Pursuant to a livestock agency sale agreement entered into on the 14th June 1995 some two months only after the licensing agreement earlier referred to, Jones acquired part of the business of Elders, described as a "livestock agency" in the mid northern region of the North Island. Pursuant to that agreement, Jones agreed to purchase the business and "all rights and obligations in respect thereof". Critical to this case are the sale yards which had previously been owned as to one third by Elders, at Pio Pio and Te Kuiti. A number of other sale yards were included in the livestock agency agreement with Elders including one at Taumarunui in respect of which the second defendant has offered no opposition to the plaintiff exercising its rights under the licence agreement.

The licence agreement under scrutiny in this case is an agreement which covers three saleyards and is for a term of three years commencing from 1 April 1995. By the agreement Wrightson and Elders granted to the plaintiff, a non-exclusive licence to use the three saleyards for the sale of stock, chattels and plant in accordance with the agreement. The licensors may also use the saleyards for the same purposes. Provision applied for notice to be given to the licensors of the times when the licence could be exercised, but in the event the entitlement that the plaintiff had under the agreement in respect of the Te Kuiti and Pio Pio stock yards was not attempted to be exercised until 24 November 1995. It seems to be common ground that the plaintiff made it clear shortly after execution of the licensing agreement in April, that it was its intention to take up entry to the Taumarunui saleyards only at that time, indicating it would seem, the possibility of taking up entry into the other yards at some later time. There is nothing in the evidence that suggests that that opportunity was in some way waived. Following business developments and expansion, the plaintiff attempted to exercise its rights to the two yards in November and was rebuffed by John F Jones, initially supported by Wrightsons but

later Wrightsons removed their objection. I am informed however, that nonetheless, the second defendant has within its power the ability to prohibit exercise of entry to the sale yards and has done so. Effectively the plaintiff has been precluded from the use of the yards by the single action of the second defendant notwithstanding Wrightsons willingness to comply with the agreement.

Consequently this case will turn on the question as to whether the rights that the plaintiff clearly had against Elders in respect of these sale yards can be enforced against a subsequent purchaser of the yards, or whether the rights and obligations were restricted only to parties to the licensing agreement and came to an end on disposal by Elders of their interest in the sale yards. On that central question the plaintiff must show it has an arguable case and then satisfy the Court that on the balance of convenience it is appropriate to grant what will in effect be a mandatory injunction ordering compliance with the terms of an agreement in the meantime and until trial of the substantive action. In the course of a consideration of the balance of convenience an enquiry will be required as to whether damages for any breach of the agreement by the second defendant, might not in the end be an appropriate remedy without any intervention by the Court at this time. See *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries* 1985 2NZLR 129.

It was common ground between counsel for the parties that whether the agreement was binding on a subsequent purchaser for value would likely turn on the terms of the agreement and the surrounding circumstances. Jones position is that it had no notice of the existence of the April agreement and was unaware that Elders had entered into these arrangements. That position is supported by a director of Elders in an affidavit but in circumstances where that director acknowledged that the second defendant was aware of the arrangements which Elders and Wrightsons had entered into with the Commerce Commission undertaking to allow established livestock agents access to saleyards in which they had an interest. It was a matter of concern to me that if those general arrangements had been notified to Jones, that an arrangement entered into in accordance with the agreement with the Commerce Commission two months earlier had not come to the notice of the second defendant. That is of course a matter for evidence and at the moment the Court is faced with a complete rejection of the proposition that the second defendant knew of the existence of this agreement in relation to these three saleyards, and in particular the Taumarunui and Pio Pio yards.

Of more importance however, are the terms of the sale and purchase agreement between Elders and Jones, not originally exhibited on the grounds of confidentiality but produced by counsel at the hearing. As already referred to, the agreement was to purchase the business "and all rights and obligations in respect thereof". So far as sale yards, included in the agreement was concerned, they were defined as:

> 1.15 "Saleyards" means Elders interest (whether freehold, leasehold or in shares of landowning companies and including partial interests held with other persons) in saleyards as described in Appendix II together with and subject to all rights, obligations and agreements attaching thereto but subject to clause 3.2. (my emphasis).

Clearly the licensing agreement comes within the terms of this provision and having regard to the disclosure of agreements made apparently at the behest of the Commerce Commission, there must be a strongly arguable case that not only has the second defendant taken with notice but has expressly agreed to take these assets subject to the rights, obligations and agreements attaching thereto. I would have thought, and of course I am not deciding this finally, that the second defendant would be hardput to argue that in fact he did not have notice of a specific agreement, although apparently willing to accept a transfer of the assets described in the way they were. If I am right in this view of it, the plaintiff has a relatively easy road to establish that there was an assignment of the licensing agreement to the second defendant.

There is no doubt that the licensing agreement was one which contemplated that the licensors might assign their interests. Clause 1.2(c) of the licensing agreement says:

> "reference to the Licensors includes their successors and assigns and where not repugnant to the context will extend to the Licensors' servants, agents, contractors, workpersons and invitees;"

However (6.3) of the agreement reads as follows:

> 6.3 If the Licensor decides to:
>
> (a) sell or dispose of the Saleyards (or if there are more than one any Saleyard);
>
> (b) conduct major upgrading work in respect of the Saleyards or any of them; or
>
> (c) close or cease to operate the Saleyards (or if more than one any Saleyard);
>
> the Licensor may upon giving three months notice in writing to the Licensee terminate this Agreement. Where notice is given in respect of one of the Saleyards

> described in the Schedule the notice will be effective to terminate this Agreement in respect of the particular Saleyard mentioned in the notice.

Clearly it is open to the licensor to give such a notice or not but by letter of the 8th of December 1995 Elders purported to terminate the interest under Clause 6.1. Whether Elders remained a licensor on the 8th of December 1995, notwithstanding their agency sale agreement dated 14th June 1995, is clearly arguable, but a greater difficulty for Jones in the construction of this clause, is whether it requires the concerted actions of both licensors. It would seem unusual to have an agreement whereby Elders holding one third share only could simply on the sale of their share in the saleyards terminate the agreement overall. "Licensor" in this clause is expressed in the singular but I do not think a great deal turns on that having regard to the way in which the word has been used interchangeably throughout the agreement. In addition the agreement itself provides that the singular number includes the plural and vice versa. Furthermore, licensor is not defined whereas licensors is suggesting to me that the reference in clause 6 should be to "licensors'". In considering an arguable case I need to give commercial realism to the entitlement to terminate the licence which I would have thought would require the consent of both licensors. All these matters can only be looked at in the round but I am of the view that the plaintiff maintains in respect of this clause as well, a strongly arguable case that Elders are unable to terminate the agreement. I leave aside at the moment the status of Elders to give any such notice belatedly as they have purported to do.

A further argument raised by the second defendant is the provision of clause 9.1:

> "Notwithstanding anything elsewhere herein contained the granting of this Licence by Wrightson Limited and Elders Pastoral NZ Limited as Licensors to The Farmers' Co-Operative Organisation Society of New Zealand Limited as Licensee is conditional upon Wrightson Limited and The Farmers' Co-Operative Organisation Society of New Zealand Limited as Licensors granting to Elders Pastoral NZ Limited as Licensee a reciprocal licence to use the saleyards at Waverley, Hawera, Inglewood, Stratford on the same and similar terms and conditions and for the same term as this Licence."

It appears that the entitlement of Elders to the benefits of this clause have not been exercised. It was suggested by Mr Rennie that in some way this clause was a condition precedent to the licence agreement itself coming into effect. The agreement has been partly performed to the extent that the Taumarunui yards have been used pursuant to the agreement, and no dispute is involved there, although it is accepted that those yards are not the freehold property of the licensors but are simply leased. I do not see that as a material difference in the circumstances of this case. This clause in my view, looking at it from the stand point of arguable case,

simply gives Elders the right to take up this position if they wanted to. It is argued by Mr Rennie that such a right as licensee may clearly not be assignable if it is on the same terms and conditions as the present agreement. This matter was not developed a great deal in argument and nor need it be in my view. I think it is very much an arguable matter that the second defendant may have the benefit of this clause by virtue of the assets it has purchased, namely rights, obligations and agreements attaching to the saleyards. I do not have to decide this finally, but it seems to me the plaintiff has an arguable case that this clause is no impediment to the operation of the licensing agreement overall. If it is confined only to Elders and Elders have not exercised it during the time that they were a licensor, then it seems to me that that does not impinge on the plaintiffs right to insist on the other provisions in the agreement being met. It does not have either in its wording or by its nature, the character of a condition precedent.

It will be clear from what I have said that in my view the plaintiff has an arguable case and I am prepared to categorise that as a reasonably strong case. If that is so, one goes to the question of whether damages would be an adequate remedy without the need for an injunction. I accept that on both sides there will be difficulties in the calculation of damages. The plaintiff is in a position where it is commencing business in this area and its prospects of success can only be measured once it has traded for some time. If it is excluded it will be difficult for it to calculate the business it would have lost. If it is allowed in, it will at least have a turn-over referable to the use of the two yards and some measuring stick by which the second defendants losses could be calculated if it succeeds at trial. I think there is a greater difficulty for the plaintiff in the calculation of damages than for the second defendant and as a factor I find in favour of the plaintiff in that regard. I realise that the granting of this injunction will compel the parties to co-operate, sometimes a difficult situation for the Courts to oversee, and often a very good reason for refusing a mandatory injunction. Against this however, is the well established protocols which go to the running of saleyards. That is plain from the documentation that I have seen and I have no difficulty in reaching the view that with the Courts firm direction in that regard, that any management committee in respect of these two saleyards will ensure that they are properly run and the rights and obligations of all parties are respected in the meantime. It is true that as a background to this, the second defendant has lost key staff to the plaintiff and there are allegations of wrongful business practices in that regard. If those amount to more than just commercial competition, then no doubt the second defendant has its remedy. If not there is some overall public interest in providing the users of the

saleyards, namely the farming community, with as much competition as is appropriate and which in my view is probably why the Commerce Commission (only briefly explored in argument) have taken an interest in the use of these key facilities in order to promote competition and not to restrict it.

The second defendant listed no less than 15 grounds for opposition and I have dealt with most of them. I do not see anything in the conduct of the parties at this stage which would preclude the plaintiff from obtaining relief for the reasons I have given and having regard to the strength of the plaintiffs case I think mandatory injunctive relief is appropriate.

Another consideration in this case is that the first defendant does not suggest that the plaintiff has become disentitled to exercise the terms of the licensing agreement in respect of these two yards. That defendant owns two thirds of the subject yards. The co-operation of the majority interest in the yards should make the implementation of this agreement less difficult than might otherwise be the case and is a further reason for granting a mandatory injunction in all the circumstances.

In the course of argument I have been referred to *Dowling v Dalgety Australia Limited* 34 FCR 109 a decision of Lockhart J in the Federal Court of Australia. That case is one of general interest but is not a case involving the assignment of an existing agreement. There it was a question of whether shutting out the plaintiff as a member of the association constituted a substantial lessening of competition. On the facts the Judge held that it did not but it seems to me it is a different case entirely from this one which has to be decided on contractual law rather than Trade Practices legislation.

Mr Rennie sought to argue also that the plaintiff was seeking a very unusual arrangement namely to use the business of the first and second defendants operated by them from freehold premises as a place for the plaintiff to transact its own business. I do not see that as so unusual. The agreement under consideration granted that very right and has to be paid for and the owners of the freehold receive a return on their investment in the form of yard fees and facility fees which, depending on the turnover could be substantial.

On one view of it the lack of use of the yards up until this time, might constitute a situation where the status quo was as the second defendant claims it to be with the

plaintiff not exercising any rights to these yards. On the other hand the status quo might well be the situation where the plaintiff had rights which it had reserved at the time the agreement was entered indicating then that at that time only the Taumarunui yards would be used.

In this case having regard to my views about the strength of the plaintiffs case the status quo argument is not a great deal of assistance in resolving this matter on an interim basis. This agreement runs for three years . If the agreement has been properly assigned the rights to determine it have probably gone unless there is a subsequent sale. I am told that the season is now reaching its peak and not to grant relief would deprive the plaintiff of business available to it at the moment.

1. There will be an order that the second defendant take no steps to prevent the plaintiff from exercising its rights under the licence agreement dated 21 April 1995 to the saleyards at Pio Pio and Te Kuiti.

2. Leave is reserved to the plaintiff to apply for precise orders if the same are required.

3. The plaintiff is entitled to costs which I will fix on the filing of memoranda.