IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 74/96

BETWEEN JOHN HALFORD

First Plaintiff

A N D STOCKWAYS HOLDINGS LIMITED

Second Plaintiff

A N D THE CARING CARD COMPANY LIMITED

Defendant

Date of Hearing: 3 April 1996

Counsel: B Rooney for Plaintiffs
D K Wilson for Defendant

Date of Judgment: 3 April 1996

ORAL JUDGMENT OF MORRIS J

Solicitors: Callaghan & Co., DX CP24032, Auckland
Whaley & Garnett, DX 6952, Auckland

The plaintiffs seek a number of interim injunctions as follows:

1. Until further order of this court, an order restraining the defendant from declining to supply the plaintiffs with greeting cards or wrapping paper manufactured by the defendant upon terms set out in contracts between the parties.
2. Until further order of this court, an order restraining the defendant from directly or indirectly selling or attempting to sell greeting cards or wrapping paper to any retailers or other traders carrying on business in various areas defined in agreements made between the parties, and
3. Until further order of this court, an order restraining the defendant from displaying or continuing to display greeting cards and wrapping paper on the premises of any retailer or any other traders carrying on business in areas defined as I have already mentioned.

By notice of opposition dated 14 March 1996 the defendant opposes the making of these orders on the grounds:

1. The evidence before me does not establish a serious case to be tried and any agreements entered into between the parties have been validly terminated;
2. The balance of convenience as against the plaintiffs, and
3. Such other grounds as appear from the affidavit of the defendant's managing director who has filed an affidavit.

Affidavits have been filed by the first plaintiff and by Mr Leake, the director of the defendant company and also a Mrs Mackres, the sales manager employed by the defendant.

The plaintiffs have filed a Statement of Claim in which they seek orders, in effect, asking for any agreements made between the parties to be upheld and orders for specific performance accordingly and for damages in the alternative. Damages are sought, not only for breach of contract but under the Fair Trading Act and for misrepresentation.

The background to the litigation can be briefly stated as follows. In 1993 the plaintiffs entered into three distribution agreements with the defendant. Under the agreements, the plaintiffs acquired exclusive rights to distribute to retailers, in effect throughout the Auckland area, greeting cards and wrapping paper manufactured by the defendant. As I understand it, the plaintiffs would purchase the cards and wrapping papers, and then sell them on to retailers with an added mark-up. The plaintiffs supplied a display stand to each of the retailer sites and these were replenished approximately once a month with stock obtained from the defendant.

The initial cost to the plaintiffs for this exercise appears to have been in excess of $200,000. To obtain this sum the plaintiffs borrowed substantially and mortgaged their family home.

I have heard submissions as to the effect of the terms of the distribution agreements and perused copies of them. Each agreement is for the duration of five years from April 1993 with a right of renewal at the option of the plaintiffs for a further five years. The plaintiffs were given exclusive rights to distribute the defendant's products. Initially the agreements required the plaintiffs to purchase a stated minimum number of units from the defendants, this number to increase each year. The reason for this is understandable. Such a clause was really a carrot to the plaintiffs to sell as great a volume of the defendant's products as possible. Various provisions in the agreement relate to termination, some of which require notice and the right of the plaintiff to remedy the default.

The affidavits disclose what I will describe as a variation of the minimum purchase provisions but what is plain from the affidavits is the relationship between the plaintiffs and the defendant deteriorated markedly during 1995 and indeed, before that. Put simply, the defendant felt the plaintiffs were not performing as they were required to or indeed should do under the provisions of the agreements.

As a result, on 20 December 1995, the defendant served on the plaintiffs a default notice claiming the plaintiffs were in default under the agreements and nominating the nature of the alleged defaults. The notice demanded remedy of the defaults. On 15 January 1996 the defendant, through its solicitors, gave notice of cancellation of the distribution agreement and subsequently has refused to supply cards to the plaintiffs and has taken steps to deal directly with the plaintiffs' customers by selling cards to the customers, moving the plaintiffs' card stands from premises occupied by customers and by placing and stocking its own stand in such premises. In effect, it has treated the contract as being terminated.

I understand from counsel and it seems to be confirmed by the affidavits, at the start of the dealings between the parties there were 750 outlets. As of today, this number has shrunk to 604 and it appears the defendant, subsequent to the termination of the contract by them, is now supplying direct to 485 approximately of that number. I gather from counsel the plaintiffs are endeavouring to supply the remaining approximately 120.

The plaintiffs substantive proceedings and these proceedings for interim injunctions were issued in the first week of March this year but between January and that date, there had been ongoing discussions between the solicitors for both parties.

Mr Wilson has submitted the plaintiffs are, in effect, seeking mandatory injunctions in that the first injunction sought requires his clients to supply goods to the plaintiffs. He further submits the second and third orders are of an almost similar nature because the effect of an injunction would be to terminate the present arrangements over the 400 odd outlets to which I have earlier made reference. In this regard he has drawn my attention to the judgment in the English Court of Appeal ***Lockabail International Finance Ltd v Agroexport and others The Sea Hawk*** [1986] 1 All ER, page 901 and in particular, the headnote which states

> "Mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

The plaintiffs in reply, submit all that is being sought is an injunction to maintain the status quo, that is to maintain the position as envisaged by the agreements and as it was before the notice of termination.

I propose to deal with this matter in accordance with the principles as enunciated by the Court of Appeal in ***Klissers v Harvest Bakeries*** [1985] 2 NZLR at page 129 and having regard to the remarks present at page 142 lines 20-25, where the test now accepted in New Zealand is stated thus:

> "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."

The plaintiff has submitted there is a strong arguable case and the balance of convenience and overall justice favour his position and the making of the orders sought.

Mr Wilson submits there is no arguable case. The contract has been validly terminated and the balance of convenience favours his client.

In view of the clear view I have reached on the overall situation I am prepared to accept, for the purposes of my judgment, the plaintiffs have established an arguable case. I am however satisfied that the balance of convenience favours the refusal of this application and I am strengthened in that view because, in my opinion, damages provide the plaintiff with a sufficient remedy in any event.

Damages are reasonably easily calculable in the event of the plaintiffs succeeding in their substantive action. It is plain from the affidavits the defendant is doing its utmost to ensure the business prospers. If it does prosper, and the plaintiffs succeed in their substantive action, they should have no difficulty whatsoever in assessing what damages are payable to them. It would be a simple counting exercise. In the event however, of the injunction being granted in the plaintiffs' favour in their substantive action, the defendant, in my view, would have considerable difficulty in establishing the damages to which they were entitled. It is plain to me from the affidavits the plaintiffs are in some financial difficulty. They have not run the business satisfactorily to date. This is plain from the comments made by customers and referred to in the affidavits filed by the defendant, and in the event of their being unable to carry it on successfully, I see all manner of difficulty for the defendant in establishing what damages should be payable to it. Furthermore it is plain from the affidavits, not only of the defendant but of the plaintiffs themselves, the plaintiffs have little by way of assets to meet a claim for damages. Paragraph 31 of the defendant's affidavits refers to the financial stability of the first plaintiff and the essence of this present application is that he should be allowed to carry on contracts as he is very short of money.

In coming to the conclusion I do, I take into account that this is not a case where the decision on this application would in ruling against the plaintiffs, effectively end his chances to litigate. Indeed, to the contrary as it is perfectly plain from the extensive and expansive nature of his pleadings, he intends to continue with this litigation on many fronts. A further factor which, in my opinion, counts against this present application, is the delay in the making of this application. It must have been very plain to the plaintiffs by mid January of this year, the intentions of the defendant to terminate the contracts. I allow for the fact there was correspondence and discussions between the various solicitors but these proceedings were not issued until March. As a result, the defendant, as I have already pointed out, established fresh links with 485 of the outlets. If I were to grant the injunctions sought, it would mean undoing these links and endeavouring to have these

outlets re-accept the plaintiffs' links. A number plainly would not do so as can be seen from the material annexed to the affidavit of Mrs Mackres. Any such course can only lead to further disruption and the very real likelihood of further loss of business to the detriment of both parties.

It has been suggested I should grant the orders sought in respect of approximately 120 sites which the defendant has not yet approached. The plaintiffs through their counsel, have indicated they are endeavouring to serve those outlets and will continue to do so. I have no information as to the position of these sites or the nature thereof. Frankly I think it is an unreal proposal and fraught with all manner of difficulty, not only with regard to the supply and maintenance to these customers. I am not prepared to accede to this request.

To conclude, even assuming in the plaintiffs' favour they have an arguable case, I am satisfied the balance of convenience, having regard to the matters which I have indicated, is strongly against granting the application and I am satisfied that the overall justice of this position requires me to refuse the application. It is accordingly refused with costs to the defendant of $1500.00 together with disbursements.

ADDENDUM

In view of the matters raised by the affidavits it is imperative the substantive action be given an early date of hearing. I therefore request the Registrar to set an early date for the first conference so that a timetable with this in mind can be set.