IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 219/95

NOT RECOMMENDED

BETWEEN D F and D A HURLE

First Plaintiffs

A N D WHITEHORSE FOODS LIMITED

Second Plaintiffs

A N D J C EDER

First Defendant

A N D L R EDER

Second Defendant

A N D N P BURTON

Third Defendant

Hearing: 29 April 1996

Judgment: 29 April 1996

Counsel: I G Hunt for Plaintiffs
A J Woodhouse for Defendants

ORAL JUDGMENT OF MASTER VENNING

This is an application by the Plaintiff for leave to cross-examine a witness in summary judgment proceedings.

The Plaintiffs seek summary judgment against the Defendant. The Plaintiffs' claim losses on the resale of land and chattels pursuant to the breach of an agreement made between the First Plaintiffs and the First Defendant or his nominee entered on 7 September 1992. The Defendants oppose the application for summary judgment. The Defendants deny the Plaintiffs disclosed outstanding Christchurch City Council requisitions or the non-existence of building permits prior to the First Defendant entering the agreement for sale and purchase. The Defendants also plead in opposition to the summary judgment application that the Plaintiffs were in breach of warranties under the standard form Real Estate Institute/New Zealand Law Society agreement. The Defendants also raise issues as to the liability of the Second and Third Defendants as nominees under the contract, and finally put in issue quantum and issues of mitigation by the Plaintiffs.

The information relating to the requisitions issued by the Council was held by a Council officer, George William Marsh, who is a senior building information officer employed by the Council. He has sworn an affidavit in the proceedings in support of the Plaintiffs' application for summary judgment, deposing that a person identifying himself as John Eder, came into his office in August 1992, before the contract was signed. He deposes that he, Mr Marsh, showed Mr Eder the file relating to the various requisitions. He says he subsequently made a note of Mr Eder's appointment with him. The note is recorded in his diary as at 28 August, but I understand from Mr Marsh's affidavit that he is not definite about which particular date during August Mr Eder attended the office. He thinks he made the file note on 31 August, but the visit could have predated that day.

In his affidavit in opposition to the summary judgment application Mr Eder denies the visit to the City Council offices and denies meeting Mr Marsh.

He accepts that he discussed certain matters relating to the property before entering the agreement but says they related to planning matters that he discussed with Erica Sefton, a planner from the Council and the senior planner, Mr John Gibson. There is correspondence annexed to his affidavit which is consistent with him discussing those matters and issues with those Council officers. He says that at no time was the fact of the requisitions or the lack of building permits advised to him before the contract was entered on 7 September 1992. Mr Eder further denies that he was in Christchurch in the period between 21 and 31 August and produced copies of travel tickets confirming his travel arrangements at that time in support of his denial.

There is other evidence filed by the Defendants which puts in issue whether or not Mr Eder could have been the person referred to by Mr Marsh. That evidence is supplied by a private investigator who was employed by the Defendant at a relatively early stage, Mr Van Beek. Some of what Mr Van Beek says is of a hearsay nature, but nevertheless there are matters raised in his affidavit which raise issues as to whether or not Mr Marsh's recollection, and particularly his description of Mr Eder is correct.

Against that background the Plaintiff has sought leave of the Court for an order that Mr Eder be required to attend for cross-examination. It is the Plaintiff's case that if Mr Eder is cross-examined and the Court comes to the view that Mr Marsh's evidence is to be preferred to Mr Eder's then the case can be dealt with appropriately as a summary judgment proceeding. Clearly an important issue will be the conflict between Mr Eder and Mr Marsh. The Plaintiff says that resolution of that conflict will not require extensive viva voce evidence and it is a direct conflict which is only resolvable by cross-examination.

At the present time the application for summary judgment stands adjourned pending the outcome of this particular application.

The starting point is Rule 254 which provides:

> "The Court may on the application of any party order the attendance for cross-examination of any person making any affidavit in support of or in opposition to any interlocutory application but such an order shall be made only in special circumstances."

Mr Hunt emphasised that the Rule referred to "special circumstances" and that cases including summary judgment applications still had to be considered on their particular facts and in the circumstances of those particular cases.

The leading authority in New Zealand is the case of _Ian Buckeridge Transport Ltd v Paku_ (1987) 1 PRNZ 80. In that case, towards the conclusion of the judgment, McMullin J noted in relation to a summary judgment application:

> "We do not think that on the short argument we have had on this we should do more than observe that in the very nature of summary proceedings cross-examination is likely to be allowed in only the most exceptional cases. If there is no material on the papers to raise an arguable defence then cross-examination is not likely to put one in existence, and a defendant should not be allowed to raise by cross-examination what he has been unable to do or has neglected to do by affidavits sworn for that purpose. Conversely if a defence is apparent on the papers, there will be no need for cross-examination at all. We note that in England the practice in summary judgment cases is that the examination of parties is only to be exercised in exceptional cases." (p 82)

As noted, Mr Hunt correctly drew my attention to the fact that Rule 254 refers to special circumstances rather than exceptional circumstances, but nevertheless in another case in which the phrase special circumstances was considered, _Cortez Investments Ltd v Olphert & Collins_ [1984] 2 NZLR 434 (Court of Appeal) it was stated:

> "What are 'special circumstances' must be considered against the statutory background in which they are used." per McMullin J (p 441)

And later:

> "All that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary. They may be extraordinary but they do not require to be given the extra emphasis which that word sometimes carries." (p 441)

In this case having considered the submissions of both counsel I do not consider there are circumstances special or exceptional enough to justify or warrant leave to cross-examine being granted to the Plaintiff.

In summary, my reasons for that are:

1. To allow cross-examination of Mr Eder would not present the Court with the full picture and enable the Court to determine the matter finally. It would be essential to compare Mr Eder's evidence with the evidence of Mr Marsh and for that reason cross-examination of Mr Marsh would also be required by the Court. Those two parties would give evidence which would effectively amount to a mini trial on at least the issues identified to date.
2. A number of relevant documents would be involved in the cross-examination of both Mr Marsh and Mr Eder. Before cross-examination takes place I consider it is appropriate to ensure that both parties have the opportunity to undertake discovery, interrogatories and other interlocutory steps so that all issues can be fully identified and canvassed.
3. It also appears on the information and submissions presented that the cross-examination of Mr Eder would not necessarily allow the Court to finally determine issues which would enable the summary judgment application to be finally dealt with. There are other issues before the Court which would still require determination before the summary judgment application can be disposed of. Those issues are identified by Mr Woodhouse in his submissions. In summary they are:
   (a) issues as to whether the Plaintiffs are able to satisfy other clauses in the contract, including clause 6.1(2)(a) as the Second Plaintiffs were not a party to the contract;
   (b) issues arising out of clause 6.1(10) in the contract, although those matters may possibly be dealt with in the cross-examination of Mr Eder; but in any event

(c) issues of quantum and the steps taken by the Plaintiffs in mitigation will be in issue.

4. While I accept Mr Hunt's point that denying the application will mean the Plaintiff is unable to proceed with their application for summary judgment and there will be an inevitable delay, I do not accept Mr Hunt's submission that an injustice will necessarily follow. Considering the matter in context, in my view injustice is more likely to arise if cross-examination on a limited basis is permitted at this stage.

The Court must balance the Plaintiffs' natural desire to deal with their claim promptly at a reduced cost against the possible injustice or prejudice of dealing with the matter without both parties having the benefit of full preparation. Balancing those matters leads to the firm conclusion that leave should not be granted in the present case.

I note that in the decision of _Sullivan v Henderson_ [1973] 1 All ER 48 Megarry J made the point that such a course of action can lead to difficulties because:

> "The summary process under RS Ord 86 is one thing and the trial of an action is another: a hearing under RSC Ord 86 with oral evidence is liable to become neither one nor the other and to share the disadvantages of each. The hearing ceases to be summary and the absence of pleadings and discovery for example prevents the hearing from achieving the exhaustiveness of a trial." (p 51)

I accept that in certain limited and exceptional cases cross-examination may be appropriate in summary judgment cases, and the authority of _Carta Pava Goldmining Co Ltd v Fastnedge_ (1882) 30 WR 880 CA is an example of such a case. However, the issue in that case was particularly limited and I consider that the issue identified in the present case has the possibility of expanding into a much more detailed canvassing of the facts if cross-examination were permitted.

For all of the above reasons leave will not be granted to cross-examine in the present case.

COSTS

The First Plaintiffs are legally aided.

Having heard counsel on the issue of costs I am satisfied that this is not a case where costs should be ordered against the First Plaintiffs personally over and above their contribution. While the application has failed it was not without merit and involved considerable argument before me.

The Defendants are however entitled to an order for costs on the application in the sum of $500 together with disbursements, including counsel's reasonable travel expenses. I make an order that that is the figure I would have awarded against the First Defendants were it not for the fact they are legally aided.

In relation to the withdrawal of the summary judgment application, I consider that on the information available to the Plaintiff, and particularly the information deposed to by Mr Marsh, it was an entirely appropriate application to be filed and brought by the Plaintiff and I reserve costs on the withdrawal of the summary judgment application.

Counsel are to file a memorandum within 14 days relating to timetabling of the substantive proceedings.

MASTER G J VENNING

Solicitors:
Young Hunter, Christchurch for Plaintiffs
McAlister Mazengarb Perry Castle, Wellington for Defendants