IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY C.P. No.76/92

BETWEEN RUBY JENKINS

Plaintiff

A N D MCCAW LEWIS CHAPMAN

First Defendants

A N D DONALD MATTHEW SHIRLEY

Second Defendant

Hearing: 21 May 1996

Counsel: A.L. Hassall, Q.C. for Plaintiff to oppose
B.T. Cullen for Defendants in support

Judgment: 21 May 1996

ORAL JUDGMENT OF TIPPING, J.

This is an application by the Defendants for leave to pay into Court after setting down. The matter is governed by Rule 348. The primary position is that a payment into Court, in order to be made as of right, has to be made prior to the proceeding being set down for trial. If that does not occur or if a payment in so made is to be increased, it is necessary for the defendant to apply for what the Rule describes as the special leave of the Court.

Various tests have been posited for a defendant seeking this sort of leave. Mr Hassall has referred to my own judgment in Stiassny v. Bank of New Zealand (1991) 4 P.R.N.Z. 436 in which I said that the applicant for leave must demonstrate some convincing reason why leave should be given. Also mentioned was a decision of Robertson, J. in Wendell v. Club Mediterranee (NZ) (1990) 4 P.R.N.Z. 432 where His Honour said that it was necessary for material of a weighty and substantial kind to be put forward. In addition counsel have

referred to the decision of the Chief Justice in O'Loughlin v Healing Industries Ltd (1990) 2 P.R.N.Z. 464 and several citations have been made from that decision.

If I may respectfully say so, I adopt entirely the learned Chief Justice's observations whereby he said that early payments in are conducive to early settlements and thus are to be encouraged and that is why the Rules are framed as they are. I bear in mind, however, a passage drawn to my attention by Mr Cullen where the learned Chief Justice at page 467, immediately following a passage cited by Mr Hassall, referred to it as being a counsel of perfection to pay in prior to setting down if there is likely to be a long lead in time before the actual fixture is reached. At that stage in his judgment His Honour the Chief Justice made reference to the fact that plaintiffs were not likely to be unduly prejudiced if an application to pay in or to increase a payment in is made a reasonable time before the hearing.

In saying that, however, I doubt that His Honour intended to resile to any significant extent from what I might respectfully call his procedural reason, namely the desirability of promoting early settlements. The point is that the Rule expressly says that someone who wants to pay in after setting down must have special leave and there is a body of authority now building up which suggests that the person seeking the leave has the onus, as he obviously has, of persuading the Judge that the circumstances are such that leave should be granted. It is a discretionary decision which one must exercise bearing in mind all the circumstances of the particular case against the intention of the Rule.

Mr Cullen, acting on instructions from principals elsewhere, was given what I regard as a fairly difficult task. The circumstances of this case are that the proceeding was set down unilaterally on the Plaintiff's application after the Defendants had not signed a praecipe tendered to them. The unilateral setting down took place in September 1995. It was not until nearly three months later, right at the end of November 1995, that the Defendants made their first

offer. That offer arrived with only one day for the Plaintiff to consider it. There has been some complaint by the Defendants, indeed quite substantial complaint, that the Plaintiff has failed or refused to enter into settlement negotiations. The circumstances there are explained to some extent by the affidavit of Catherine Bailey. It must be said immediately, however, that I do not think that this Court can lend any support to the view that a defendant can gamble on being able to settle and offer that as a reason for not paying in at the time which the rules prescribe.

The convincing reason put forward in this case as to why the Defendants should have leave to pay in is couched in paragraphs 5 and 6 of the memorandum in support of the application as follows:

> "5. The convincing reason why leave should be granted to allow a payment in is that despite continuous efforts from the defendants and the urging of a judicial officer the plaintiffs have simply refused to enter into settlement negotiations. The defendants have been frustrated and prejudiced by the plaintiff's failure to respond. A payment into court would promote settlement negotiations which otherwise, given the plaintiff's attitude, may never take place. This is a convincing reason why leave should be granted to make a payment into court.
>
> 6. If leave is granted a payment into court will be made and this will certainly encourage the plaintiff to respond to attempts to negotiate a settlement. Settlement negotiations will necessarily promote the just speedy and expeditious resolution of the dispute."

The nub of this matter seems to me to be that the Defendants, who now must realise that they could well be taken to trial, want to get the costs and tactical advantage of a payment in. They pray in aid their so-called continuous efforts to try and settle and they also pray in aid the urging of my brother Hammond. That urging was no doubt appropriate and is the sort of encouragement which any Judge would give to parties to try and settle. The plain fact here, however, is that the Defendants should have made their payment in before setting down. If that is what the learned Chief Justice described as a counsel of perfection then, on any view of it, I consider that the application to

pay in should have been made quite some time ago when it became obvious, even on the Defendants' own showing, that they were having these so-called difficulties in trying to negotiate a settlement with the Plaintiff.

I propose to decline the application. In essence I regard the submissions made by Mr Hassall on behalf of the Plaintiff in opposition to the application as more persuasive than the submissions which Mr Cullen was invited to make by his principals in support of the application. I do not consider that the Defendants have put forward, in all the circumstances of this case, a sufficiently compelling reason why the discretion of the Court should be exercised in their favour. After all they can still make their offer and they can still amend their offer if they wish. All I am depriving them of, in essence, is the tactical and costs advantage of a payment in, at a stage which, although it cannot be said to be immediately before the fixture, is, in relative terms, quite close to the fixture when one bears in mind that the case was put on the ready list in September of last year.

In my judgment a decision in favour of the Defendants in this case would introduce some sort of encouragement to defendants to be rather lax in relation to their obligations under the Rules in relation to payment in. I do not think, either as a matter of justice between these parties or in that wider context, the discretion of the Court should be exercised in favour of the Defendants and the application is refused. In terms of his obligations Mr Hassall has asked for an order for costs. I do not propose to grant one at this stage but I will simply reserve the question of costs noting that the matter has taken about an hour and a half to consider.

I will simply add this to the earlier part of my judgment lest it be thought that the point has been overlooked. Mr Hassall properly drew to my attention at the end of his submissions that the Plaintiff is legally aided. Because of the consequences for the fund I do not consider that, at least in present circumstances, the fact that a plaintiff is legally aided is a particularly weighty or

indeed material consideration in relation to a request for leave to pay in late. My reasoning is that the consequences for the fund are largely identical, I would have thought, to the consequences for an unaided plaintiff in relation to whether or not a successful plaintiff exceeds the amount paid in or gets under the amount paid in. Mr Hassall mentioned the matter to me and it is proper for me to make some reference to it in the judgment.