IN THE COURT OF APPEAL OF NEW ZEALAND CA. 68/87

BETWEEN W.S. ALLAN & OTHERS

Appellants

A N D NEW ZEALAND COURIERS LIMITED

Respondent

Coram McMullin J (presiding)
Somers J
Bisson J

Hearing 29 April 1987

Counsel M.E. Casey for appellants
G.V. Hubble for respondent

Judgment 29 April 1987

ORAL JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

The appellants are 14 persons who have contracts with the respondent, New Zealand Couriers Limited, in the Auckland area. They operate services or runs and deal with various customers from whom they pick up or to whom they deliver various items for a consideration. The courier services provided by the appellants are covered by contractual arrangements made between the parties. The respondent proposes to restructure its business and to reallocate the runs operated by the appellants and, effectively, also those operated by the many other couriers engaged by it in the Auckland area. The proposed reallocation is to come into force on 4 May next. The appellants object to the proposed

reallocation of their courier runs and have instituted proceedings in the High Court in which they seek an injunction to stop the respondent from proceeding with the reallocation. They allege that the reallocation is in breach of contractual arrangements which they have with the respondent.

Any hearing of the substantive proceedings will be lengthy and is unlikely to take place before July of this year at the earliest. For that reason the appellants sought an interim injunction pending the substantive hearing of the case to stop the respondent from proceeding with the reallocation on 4 May next. Their application for the interim remedy was heard on 16, 22 and 23 April 1987 by Smellie J. On 24 April the Judge gave a lengthy oral judgment in which he held that there were serious questions to be tried but that damages would be an adequate remedy for the appellants should they ultimately be proved to be right in their contentions. On that ground alone he would have refused an interim injunction. But he also held that the balance of convenience lay in the respondent's favour. Finally he held that the overall justice of the case required him to exercise his discretion against the grant of the injunction.

The appellants have appealed from that judgment and a fixture for the hearing of the appeal has been made for 13 May next. On 28 April Mr Casey, counsel for the appellants, applied to Smellie J in chambers for orders in terms of the statement of claim or application for interim injunction

pending the disposal in this Court of the appeal from the judgment of 24 April; alternatively for such other orders as might be necessary to preserve the status quo. Smellie J dismissed that application and in a short judgment delivered later that day, yesterday, gave his reasons for doing so.

Mr Casey now seeks orders from this Court which would preserve the courier service as it has been operated, any such orders to be limited in their operation until the resolution of the appeal to be heard in this Court on 13 May. He has sought to pray in aid R.35 of the Court of appeal Rules, clause 1 of which provides that where an appeal is brought direct from a Court of first instance that Court and the Court of Appeal shall each have power to order a stay of execution or a stay of proceedings under the decision appealed from.

Mr Hubble submits that R.35 has no application to the present case because there is no execution or proceedings to be stayed in terms of the Rule. We express no conclusions on the scope of the Rule or its application to this case. Any jurisdictional problems which the construction of the rule may raise can be overcome by treating the present hearing as if it were an appeal from the refusal of Smellie J on 28 April to grant relief pending the hearing of the appeal from the refusal of the interim injunction.

The litigation between the parties is likely to be

lengthy; proceedings so far have occupied over three days in the High Court; and the case on appeal is contained in a volume which consists of no less than 400 pages. The application for the interim injunction occupied three days and Smellie J has obviously acquired a much more detailed knowledge of the facts and the relevant issues than we have been able to obtain in the limited time available for the hearing in this Court, which was granted at short notice and fitted in between two other cases already allocated fixtures for today. In this Court Mr Casey submits that the appellants have, at the very least, an arguable case for an interim injunction and indeed that the judgment of 24 April is wrong. He submits that, in denying the appellants interim relief in the judgment of 24 April, the Judge has determined for all time the appellants' rights to a permanent injunction, and that in his judgment of 28 April he had failed to direct his mind to the fact that any appeal had been rendered nugatory. He says that there were no compelling reasons disclosed in the evidence as to why the restructuring of the couriers' runs must take effect on 4 May, and that any additional costs caused by the postponement could be met by undertakings from the appellants or the terms of any order.

Mr Hubble emphasises three factors. First that the Judge has found that the appellants have no contractual rights to their existing runs; secondly that he has also found that the respondent has a specific right to reallocate the runs; thirdly that the Judge considered that damages

will be an adequate remedy should the appellants eventually prove their entitlement under the contractual arrangements between the parties. Mr Hubble said that there were a number of reasons why the restructuring could not be postponed beyond 4 May - that many other operators whose interests also had to be considered were involved; that the restructuring was geared to take place on 4 May and the respondent's many customers (he calculated that there were at least 6,000 of these) had been informed by post of this fact and large sums of money spent on publicising the changes and educating the operators on their implementation. He also submits that any postponement of the changes will be likely to result in the loss of goodwill to the respondent to the benefit of its competitors.

In the end we think that we must decline the appellants' relief in today's proceedings whatever their exact nature. There may be validity in some of Mr Casey's points but, on the material available to us, neither of the judgments of 24 April or 28 April contains any manifestly incorrect statement of principle or fact. The Judge does not seem to have overlooked any of the factors which Mr Casey has urged on us as reasons for postponing the restructuring pending the hearing of the appeal. Whether he has given them proper weighting we are unable to say in the limited time we have been able to give to this matter and, that being the case, we are unable to say that he was wrong in the decision which he reached.

We therefore refuse the application made to us today for interim orders to secure the appellants' position pending the hearing of the appeal on the 13th May. The application is therefore dismissed. Costs are reserved.

Solicitors

Kensington Swan, Auckland for appellants
Holmden, Horrocks & Co, Auckland for respondent