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MEDIUM PRIORITY

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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 174/89

BETWEEN DANCORP DEVELOPERS LIMITED a duly incorporated company having its registered office at Whangaroa and carrying on business as property developers

Appellant

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A N D HICKSON TIMBER PROTECTION (NZ) LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as timber protection specialists

First Respondent

AND WILLIAM NELSON TAYLOR of Auckland, Managing Director

Second Respondent

Coram: Cooke P.
Casey J.
Bisson J.

Hearing: 26 September 1989

Counsel: M.R. Camp and N.J. Archer for Appellant
S.C. Dench for Respondents

Judgment: 26 September 1989

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal against a refusal of Barker J. in the High Court in Auckland to make an order for a priority fixture for a civil case under Rule 436 of the current High

Court Rules. The Judge made a timetable order but at the stage when the case was before him, 17 August 1989, took the view that it was not ready for the allocation of a fixture, whether priority or otherwise, adding:

> It transpired from the discussion with counsel that further parties are to be joined; one cannot determine the length of trial unless other parties are joined and their views obtained.

The application by the defendants for joining third parties has in fact not been filed and is marginally out of time. It appears from what counsel have told us this morning that as to one of the suggested third parties, the Onehunga Borough Council, the application is likely to be opposed.

Very obviously this is the kind of matter in which this Court would be most reluctant to interfere with the discretionary decision of a High Court Judge sitting in Auckland and familiar with the state of the Auckland lists and the pressures upon the High Court. It was suggested that there may have been some error of principle in that Rule 436 contemplates that in an appropriate case a fixture for trial thereunder may be made before interlocutory matters are completed and indeed before statements of defence have been filed, but we are not by any means satisfied that Barker J. did misunderstand the rule. Likewise the practice note issued by the Executive Judge, Auckland, dated 18 December 1987 and approved by all

Auckland High Court Judges, does not go further than saying that applications for priority fixtures should not normally be made whilst there are any interlocutory matters outstanding. It does not purport to lay down any rigid rule on that subject, which would of course have been inconsistent with Rule 436. We can well understand the conclusion reached by the Judge at the stage when he was considering the case. There is no ground on which we could properly disturb his decision; indeed it was thoroughly justified as matters then stood.

Since then, however, the case has progressed and it may well be that either now or in the immediate future it will be appropriate for the plaintiff to take advantage of paragraphs (i) and (j) of the orders made on 17 August 1989 whereby liberty to apply was reserved to all parties and it was directed that the dismissal of the application was without prejudice to a proper application being made at the proper time to the Executive Judge.

It is apparent that the plaintiff is in a position of no inconsiderable financial difficulty. Since the High Court hearing he has sworn a further affidavit, dated 23 August 1989, giving relevant particulars. Although there has been a period in the history of the case when the proceedings were not being pursued with any particular expedition on behalf of the plaintiff, that has not been so within recent months. Mr Camp, who appeared in support of

the appeal this morning, suggested that a tentative pencilling-in of a fixture for the trial towards the end of November this year might be feasible on the footing that it could then proceed if the Borough Council is not joined as a third party. In the alternative he referred to the possibility of a firm fixture early next year and Mr Dench for the respondents indicated that he agreed with at least that alternative suggestion. However, those are not suggestions upon which it would be appropriate for this Court to comment. They raise matters essentially for the Executive Judge or other Judge dealing with the matter in Auckland and, having drawn attention to the possibility of the plaintiff making application on the lines to which we have referred, we think that the only course we can take is to dismiss the appeal.

Costs are reserved.

R B Cooke P.

Solicitors:
Phillips Nicholson, Wellington and Auckland, for Appellant
Bell Gully Buddle Weir, Wellington and Auckland, for Respondents