

WELLINGTON REGISTRY

IN THE MATTER of Part I of the Judicature
Amendment Act 1972

AND

IN THE MATTER of Part VII of the Transport
Act 1962

BETWEEN NEW ZEALAND RAILWAYS CORPORATION
Plaintiff

AND THE DEPUTY TRANSPORT LICENSING APPEAL
AUTHORITY
First Defendant

AND THE NO. 2 TRANSPORT LICENSING
AUTHORITY
Second Defendant

AND CAR HAULWAYS LIMITED (IN
RECEIVERSHIP)
Third Defendant

Hearing: 10 February 1984

Counsel: C T Young for Plaintiff
J O Upton for First and Second Defendants
R A Houston, QC, for Third Defendant

Judgment: 15 February 1984

JUDGMENT OF JEFFRIES J

The court has before it a motion to strike out the plaintiff's proceedings for want of expeditious prosecution, and because of supervening fundamental changes in the law of transport licensing. Because this is an interlocutory motion, which the court dismisses permitting the substantive matter to proceed, the references to issues will be kept to the minimum necessary to dispose of the motion. It is

convenient to deal with want of prosecution and legislative changes as two separate issues, which reflects defence counsel's approach. The protagonists are the plaintiff and Car Haulways Limited (In Receivership) which for simplicity will be referred throughout as the defendant. The first and second defendants, as is customary, appeared through counsel to inform the court its decision would be abided.

Delay

The first task when a court is moved on grounds of delay is to examine the chronology of events.

1. After mid 1980 defendant made application to amend its licence by enlarging the services.
2. In November and December 1980 hearings took place at which defendant supported and plaintiff opposed. On 17 December 1980 Licensing Authority in an oral decision largely granted defendant's requests which were opposed by plaintiff.
3. Plaintiff appealed on 24 December 1980.
4. Appeal to Appeal Authority dealt with by written submissions and for reasons that are not strictly relevant to the motion was not disposed of until 26 May 1982 by dismissal of plaintiff's appeal.
5. Less than 4 months later in September 1982 plaintiff filed in High Court motion for review and statement of claim.

6. Next step by plaintiff was application for judicial conference filed on 8 November 1983.
7. Defendant's motion to strike out filed on 30 November 1983.

Defendant's counsel in argument submitted there were two periods of delay which were relevant to his argument for dismissal on this ground. The first was delay between 26 May 1982 and 20 September 1982 which was a matter of about four months. The second period was from September 1982 to November 1983, a period of 14 months. Defendant's counsel from the bar conceded that during this latter period parliament had the question of transport licensing changes, with its possible effects upon the fortunes of the plaintiff, before it in a very public and controversial way. The Transport Amendment Act (No. 2) 1983 received the Royal Assent on 26 October 1983 and Part I came into force on 1 November 1983. The court considers the plaintiff was entitled to hesitate in any actions it had before the courts on licensing matters until parliament had settled the law. Immediately it was settled the plaintiff took steps.

Counsel was unable to point to any New Zealand case which decided the court should strike out, rather than refuse a remedy, on account of delay in an administrative law case.

Risking an allegation of bluntness this court believes there is no merit at all in the argument to strike out for delay. Admittedly time is passing and it is now over 3 years since the original decision. Defendant has,

as it is statutorily and commercially entitled to do, used the extended licences but it did so with full knowledge of possible consequences as a result of appellate and cognate procedures. These parties have faced each other across courtrooms for a very long time now. See Car Haulways (N.Z.) Ltd and Another v Attorney-General (Unreported, Wellington Registry, 118/73, 8 August 1973 - Cooke J) and in the sixth line of the judgment read "two decades" for "a decade". This ground fails.

Legislative Changes

The court acknowledges this ground might have more substance but not sufficient to obtain an order to strike out. Until its abolition by the Amendment Act of 1983 the plaintiff had the protection of regulation 24 of the Transport Licensing Regulations 1963 also known as "Railway Restriction Regulation". In 1977 the restriction was relaxed and from then on the railway system faced increased competition. However it is important to emphasise, but absenting for a moment the permit provisions, and the matter of controversy about "route licences" referred to in New Zealand Railways Corporation v Deputy Transport Licensing Authority and C & G Thurston (Unreported, Wellington Registry, A.129/83, 21 September 1983, Eichelbaum J) there is still retained in s 123 of the Transport Act 1962 legislative protection for the railways and the section was subject to amendment by s 7 of the Amendment Act 1983. Part II of the Amendment Act containing the new Qualitative Transport Licensing system does not come into effect before 1 June 1984. See s 1 of the Amendment Act. The plaintiff cannot be denied its right to have its case determined on the law as it presently exists. Section 109 of the Act continues to provide protection.

It is true, as Mr Houston submitted, by s 8 of the Amendment Act any person may apply for and be granted a permit on payment of fees which are not commercially insignificant, to say the least. Therefore even if the defendant were entirely defeated in the substantive hearing it could take out permits on payment of fees. That such fees do not redound to the plaintiff's benefit is irrelevant to a judicial decision, and that there exist alternatives to the conventional licensing system, likewise.

This ground also fails and the motion is dismissed.
Costs are reserved.



Solicitors for Plaintiff: Crown Law Office, Wellington

Solicitors for First and Second Defendants: Rainey Collins Armour & Boock

Solicitors for Third Defendant: Buddle Weir & Co, Auckland