IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.498/83
A. 12/84

BETWEEN SCOTT PEARCE RITCHIE of Auckland, Secretary/Treasurer

First Applicant/Plaintiff

AND WILLIAM BARBER of Auckland, Waterfront Worker

Second Applicant/Plaintiff

AND THE AUCKLAND WATERSIDE WORKERS INDUSTRIAL UNION OF WORKERS an Industrial Union of Workers registered pursuant to the provisions of the Industrial Relations Act 1973 and the Waterfront Industry Act 1969 and having its registered office at Auckland

Third Applicant/Plaintiff

AND VINCENT BURKE of Auckland, Waterside Worker

Fourth Applicant/Plaintiff

AND VIVIAN PERCY ~~BLAKELY~~ Blakeley, BRUCE ANTHONY MALCOLM, SAMUEL PATRICK JENNINGS, JOSEPH LAUGHLIN HARKNESS, JOSEPH MURRAY, DENNIS GEORGE PELLS, DAVID WILLIAM YOUNG, and CYRIL MAURICE SMITH together being the Trustees of the Waterfront Industry Superannuation Fund, being a Superannuation Scheme approved by virtue of the provisions of the Superannuation Scheme and having its registered office at Wellington

First Respondents/Defendants

AND THE GOVERNMENT ACTUARY an Officer of the Department of State known as The Treasury of Wellington

Second Respondent/Defendant

Hearing 15 February 1984

Counsel C M Nicholson Q.C. and G L Colgan for Applicants and Plaintiffs

J D Dalgety and D J Turley for First Respondents and First Defendants

J R F Fardell for Second Respondent and Second Defendant

(ORAL) JUDGMENT OF DAVISON C.J.

The first, second and fourth plaintiffs are members of the Waterfront Industry Superannuation Fund (which I shall refer to as "the Fund"). The first defendants are the trustees of the Fund; and the second defendant is the Government Actuary charged with the duty of approving Superannuation Schemes pursuant to the provisions of the Superannuation Schemes Act 1976.

The existing Trust Deed is dated 9 December 1981. It provides for retiring members to be paid lump sum benefits tax free. The Superannuation Schemes Amendment Acts (Nos. 1 and 2) 1982 changed that and in effect taxed lump sum schemes as they accrued from a period of time in 1983. The Amendment Acts provide for classification of two types of schemes - lump sum schemes and pension schemes. Section 4 of the Superannuation Schemes Amendment Act (No 2) 1982 provides power for the Government Actuary to classify schemes as -

> "(a) An employee pension superannuation scheme; or
> (b) A personal pension superannuation scheme; or
> (c) An employee lump sum superannuation scheme; or
> (d) A personal lump sum superannuation scheme. "

The trustees of the existing scheme and other existing schemes in force throughout the country were given till 31 March 1984 to comply with the amendments which had been made to the Act and Regulations and a phasing-in period for the re-classification of existing schemes was operative from 31 March 1983 and continues up till 31 March 1984.

In essence, the legislative changes provided that whilst lump sum benefits under schemes such as the Waterfront Industry Scheme would retain their tax free status for contributions made before 31 March 1983 and for contributions thereafter at the same dollar level, all contributions made after that date at more than the then

existing dollar levels would be available to be taken upon retirement in the proportions of 75 per cent as a pension and 25 per cent as a lump sum.

The trustees of the Fund took advice and formed the view that a pension scheme would be preferable. They sought the wishes of members to the scheme at the various ports. Members at all ports other than Auckland opted for the pension scheme. A number of Auckland members, however, were concerned that the lump sum scheme they had joined was likely to be changed to a pension scheme and made representations to the trustees accordingly.

At a meeting on 30 March 1983 the trustees decided that they should apply for dual registration of a lump sum scheme and a pension scheme but requested the Auckland members to hold a plebiscite (as they called it) to determine the preferences of the individual Auckland members. The result of that plebiscite was that of the 1186 members whose views were sought, some 88 per cent favoured a lump sum scheme and 12 per cent a pension scheme. The result was conveyed to the trustees who met on 13 June 1983. At that meeting the trustees passed a resolution unanimously in these terms:

> " That approval be sought of the Government Actuary for classification of the entire Fund as an employee pension superannuation scheme, and for the identification of those contributions to and funds of the Fund that are or will form Class A funds. "

Although earlier the trustees had applied for approval of dual schemes to the Government Actuary, application for dual schemes was not proceeded with.

The plaintiffs through their solicitors expressed their concern at the trustees' decision. They expressed that concern both to the trustees and in a letter to the Government Actuary. On 7 September 1983 the trustees posted to all members of the Fund a report in which they

set out various information regarding this scheme and its investments and said:

> " Acting on the advice of the Actuary, the Trustees have applied for classification of the Fund as an employee superannuation pension fund. The application has been made to the Government Actuary who is the legal watchdog of members' rights and interests. The decision to apply for pension fund classification was taken after considering detailed comparative figures between pension and lump sum benefits which satisfied the Trustees that a pension fund was in the best interests of members. "

The trustees met in Wellington on 6 December 1983. The major item of business before them was the amended trust deed to implement their decision to have the Fund converted to a pension scheme. There was considerable discussion at which a Mr Smith advanced the Auckland case strongly but, after what appears to have been quite a lengthy meeting, the trustees resolved :

> " That pursuant to the unanimous resolution of 13 June 1983, to apply for classification of the Fund as an employee pension superannuation scheme, the Trust Deed prepared by the solicitors and the Actuary, and certified by the former, be and is hereby adopted and shall be signed by all Trustees. "

The new Trust Deed was thereupon executed and is dated 6 December 1983. It was forwarded to the Government Actuary for approval shortly thereafter. To date it has not yet been approved although I was advised from the bar, and Mr Prisk the Government Actuary in his affidavit has confirmed, that he has not yet approved the new Deed or made any classification of the scheme.

On 19 December the plaintiffs made application to this Court pursuant to the Judicature Amendment Act 1972 for a judicial review of the decision of the trustees

on 13 June 1983 to seek approval for classification of the scheme as an employees' pension scheme. At the same time they filed an application in accordance with that Act for an interim order to prevent the trustees from applying to the Government Actuary for approval and re-classification and prohibiting the Government Actuary from approving and classifying the scheme.

On 26 January 1984 the plaintiffs issued a writ of summons based on the same facts but seeking by way of relief declarations. The plaintiffs at the same time filed an application for an interim injunction directed at preventing the trustees from applying for and the Government Actuary from approving and classifying the amended scheme.

Those being the basic facts in the matter, I now turn to my decision.

THE REVIEW PROCEEDINGS

At an early stage of the hearing I asked Mr Nicholson to indicate to me how he could support the application for orders under the Judicature Amendment Act 1972 when the trustees had not acted pursuant to any statutory power or exercised any statutory power of decision but had merely acted pursuant to the terms of the Deed of Trust of 9 June 1981. Mr Nicholson very properly acknowledged that he could not support that application and he indicated it was for that reason that the action had been filed by the plaintiffs in January of this year seeking declarations as an alternative to the injunction which had been sought in the application for review. I do not need to deal any further with the review proceedings.

THE INTERIM INJUNCTION APPLICATION ON THE WRIT

A problem appears to exist so far as the plaintiffs are concerned with this application also in

respect of a matter which was not specifically argued before me but which is fundamental to the grant or refusal of interlocutory relief in circumstances such as these. On reading through the papers and considering the relief sought in the statement of claim it became apparent that the only relief sought was in the form of declarations. No injunction relief at all was sought in the substantive action although there was the usual prayer for general relief which is contained in most pleadings. So far as a prayer for general relief is concerned, that is not regarded as an opportunity for widespread deviation from the prayer actually contained in the proceedings. Rule 116 of the Code and the cases of Dillon v Macdonald [1902] 21 NZLR 375; and Auckland Automobile Assn. Inc v Palmer and Mahood Ltd [1930] GLR 359 indicate that a plaintiff might be entitled to minor alterations but nothing that would impose on the defendant any serious burden in addition to the relief specifically asked for. The grant of a declaration is one thing but the grant of an injunction may impose a greatly increased burden on the trustees and cause them to fail to meet the deadline of 31 March 1984 and be left with a scheme which incurs taxation liability of considerable magnitude to the detriment of thousands of members of the scheme. The application for general relief cannot in my view be used so as to expand the relief sought to injunction.

But there is a far more fundamental problem than that. The authorities which I have consulted appear to indicate that before a Court will grant an interlocutory injunction such as the plaintiffs seek here, the action as framed must be capable of supporting a claim for a perpetual injunction. The fact that the case for a perpetual injunction is a weak one, however, will not necessarily be fatal. I refer to Gouriet v Union of Post Office Workers [1977] QB 729; and on appeal in the House of Lords [1978] AC 435.

In the present case although injunction relief may be sought in a substantive action against the Trustees,

such relief is certainly not available against the second defendant who is the Government Actuary. I need say no more in that regard than to refer to the Crown Proceedings Act 1950 s 2(2) which defines what is meant by the Crown, and s 17 which, after having set out the nature of relief which can be granted against the Crown, provides in subs. (1)(a):

> " Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties. "

The only person against whom relief would be of any use to the plaintiffs would be the second defendant where an application for approval to the new Trust Deed is in the hands of the Actuary to be dealt with and the second defendant being an officer of the Crown as defined in the Crown Proceedings Act s 2(2)cannot have an order made against him. At best the plaintiffs can only obtain against him a declaration.

The result therefore is that the plaintiffs cannot obtain an injunction against the second defendant, the Government Actuary.

In so far as interim injunction is concerned, R 473 of our Code indicates that the right to claim an interim injunction is dependent on the existence of an action in which a permanent injunction is claimed. The position as it exists in New Zealand at the present time was very clearly put by Lord Diplock Siskina (Cargo Owners) v Distos S.A. [1979] AC 210. At p 256 Lord Diplock explains the position about interlocutory or interim injunctions in this way:

> " A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a

> pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.
>
> Since the transfer to the Supreme Court of Judicature of all the jurisdiction previously exercised by the court of chancery and the courts of common law, the power of the High Court to grant interlocutory injunctions has been regulated by statute. That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton L.J. in North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30, 39-40, which has been consistently followed ever since. "

This morning I have had brought to my attention a very helpful analysis of the law relating to interim injunctions as it exists in New Zealand by Eichelbaum J. in a case recently decided by him: Ansell v N.Z.Insurance Finance Ltd (High Court, Wellington, A.434/83, 30 November 1983).

In my view, an action against the Crown such as the present one where one of the parties against whom an injunction is sought is a Crown Officer, the Government Actuary, can never satisfy the requisite requirements for the grant of an interim injunction because injunctive relief cannot ever be sought against the Crown in a substantive action. The papers filed by the plaintiffs refer to an order being sought prohibiting the second defendant from carrying out certain acts. That cannot, of course, be regarded as reference

to a writ of prohibition which is quite inappropriate to these circumstances and is not available. I merely refer to R 462 of the Code.

What the plaintiffs are seeking is an interim injunction. An interim injunction cannot stand alone in its own right in New Zealand however convenient it may be for that power to be available to the Courts in appropriate cases. It must always be associated with a substantive claim in which the grant of a permanent injunction is at least a possibility.

Were I to be required to consider the application for interim injunction on its merits, I would in the exercise of my discretion refuse the order. The question to be tried arises from the interpretation by the Trustees of cl.20 of the existing Trust Deed of 9 June 1981.

> " Clause 20. Alterations of Trust Deed
>
> The Trustees by unanimous decision may at any time or times by instrument in writing alter rescind or add to all or any of the provision of this Trust Deed provided that such alteration, rescission or addition is not in conflict with the provisions of the General Principal Order or an appropriate Principal Order, and provided also that no such amendment shall be made which will reduce or adversely affect a Member's interest in the Fund as established at the date of such amendment without the written consent of that individual Member and provided further that no such amendment shall be made until the Government Actuary has notified the Trustees in writing that the Deed as proposed to be amended will retain his approval. "

In the interpretation of that clause the Trustees, however, are required to proceed in accordance with clause 17 which provides:

> " Clause 17. Disputes
>
> The Trustees shall determine any question arising as to the interpretation or application of this Deed or any modification thereof and their decision shall be final and binding upon all parties concerned provided that any such determination or decision shall not contravene or be repugnant to the provisions of the Superannuation Schemes Act 1976. "

The plaintiffs claim that the Trustees' decision to amend the deed to provide for a pension scheme was invalid -

(1) Because the Trustees were not unanimous in their decision.

(2) Because the amendments to the existing Deed to produce the new scheme adversely affect members' interests in the Fund.

These claims involve an issue of fact as to whether the Trustees were unanimous and an issue of construction of clause 20 itself as to the meaning of the words -

> " and provided also that no such amendment shall be made which will reduce or adversely affect a Member's interest in the Fund as established at the date of such amendment. "

It also involves the power of the Court to intervene in the matter and to review or consider the decision of the Trustees when in clause 17 the Trustees were given power of the nature of what has come to be known as a privative clause making all questions of interpretation or application of the deed etc. their own decision and their decision to be final and binding on all parties.

Mr Dalgety in a comprehensive argument endeavoured to persuade me that there was no serious question or questions to be tried as the Trustees were so obviously correct in their decisions they made. A decision that there is a serious question to be tried will not be lightly brushed over and for reference to the approach to be made I refer to Eng Mee Yong v Letchumanan [1980] AC 331 and to a passage from the judgment delivered by Lord Diplock at p 341.

Having looked at the issues which are raised here I think there is a serious question to be tried and that the plaintiffs at least would pass the threshold of that question. As to the balance of convenience, however,

if necessary I would find that this lies heavily in favour of refusing an injunction. Matters leading to that conclusion are these:

1. Damages could provide the plaintiffs with an adequate remedy and the Trustees are well able to pay such damages.

2. Damages would not be an adequate remedy for the Trustees and could not be paid by the plaintiffs because of the large amount which is likely to be involved.

3. A tax liability of some $4.5 million is likely to be incurred by the Trustees if the new Deed is not approved by 31 March 1984 and no order should be made which might imperil the granting of the second defendant's approval of that new Deed by that date.

4. The uncertainty of having the injunction in effect would be likely to delay certain investment decisions which might be vital to the Trustees to make at this time.

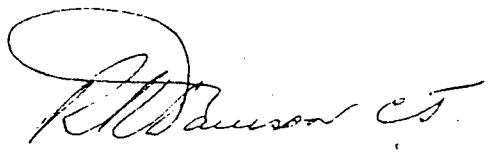
5. An injunction would produce a situation contrary to the wishes of the great majority of members of the Fund.

I have already indicated for the legal reasons which I have given that the plaintiffs cannot obtain an interim injunction. I have indicated that were I to proceed to deal with the matter on the basis of the normal approach of the Court to interim injunctions I would in the exercise of my discretion have refused the interim injunction, but I have this to add. It will be recalled that during the hearing I indicated to counsel that they should be ready to take a fixture for the substantive proceedings at an early date because it was

in my mind then that there were problems involving any interim order. I have directed an urgent hearing of the substantive matter for 1 March next and I understand that date is suitable to counsel.

I can make no order as to what might happen in the interim but the second defendant, the Government Actuary, might well consider it appropriate in the circumstances to delay giving his approval to the new Trust Deed until the substantive proceedings are heard and determined in the expectation that the judgment will be delivered shortly after the hearing and that may resolve the matter. However, the Government Actuary will certainly be in a position where he can take whatever steps as are necessary to enable him to deal with the classification and approval of the amended Deed by 31 March 1984 so as to ensure that no losses are incurred by reason of having the old Trust Deed deemed by virtue of the Amending Act still to be in operation with the consequences that may ensue.

The effect is there is no interim injunction. The hearing will take place on 1 March next and in the interim the Government Actuary may well delay his decision if that be a view which is amenable to him.



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