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N.Z.L. Reports

(J) FWJ

A.19/84

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

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BETWEEN DALLIMORE GROUNDWORKS LIMITED a duly incorporated company having its registered office at Napier

Plaintiff

AND HAWKE'S BAY ROAD TRANSPORT AND MOTOR AND HORSE DRIVERS' AND THEIR ASSISTANTS' INDUSTRIAL UNION OF WORKERS a body corporate under the Industrial Relations Act 1973

First Defendant

AND JAMES NEWMAN of Wellington, Industrial Mediator

Second Defendant

Hearing: 16 August 1984

Counsel: G.R.J. Thornton for Plaintiff
E.R. Fairbrother for First Defendant
G.A. Rea for Second Defendant

Judgment: 16 August 1984

ORAL JUDGMENT OF EICHELBAUM J

Last year McConnell Dowell Constructors Ltd (the contractor) was engaged in the construction of a gas pipeline from Hastings to Whirinaki. On or about 6 July 1983 the first defendant (the Union) entered into a collective agreement (the agreement) with the contractor under s 66 of the Industrial Relations Act 1973 (the Act). The agreement provided for special terms and conditions for workers intended to be subject to it and in particular for higher wages than provided under the then current award. The agreement stated

that it was to be applicable as follows :

> " (i) That the agreement shall apply to Labourers and Drivers employed by McConnell Dowell Constructors Limited and other sub-contractors on the construction of the Hastings to Whirinaki natural gas pipeline project but shall exclude clerical workers. "

The plaintiff carried on business as a plant hire operator. It alleges that in or about the month of March 1983 it orally agreed with the contractor to supply operators and machines, heavy vehicles and other earthmoving plant and equipment upon an agreed hourly rate in respect of the machines to be used upon the construction of the pipeline. The plaintiff further alleges that between March and June 1983 the plaintiff in that way hired out a considerable number of machines, some of which were operated by employees of the contractor, but most of which were operated by the plaintiff's own employees. The plaintiff says that it did not pay its employees the rates of remuneration provided for in the agreement. The plaintiff maintains that the agreement was not published to it until 22 July 1983. It goes on to contend that it was unaware of the exact terms and conditions of the agreement until in or about the month of December 1983. The plaintiff maintains that the agreement was not intended by the signatories to it to apply to and bind the plaintiff or any other plant hire operator, and that such agreement did not apply to the plaintiff. Referring to the fact that one W J McGuire purported to sign the agreement on behalf of the contractor "and their sub-contractors", the plaintiff says

it did not authorise Mr McGuire to sign the agreement on its behalf. The plaintiff alleges that it had no agreement of any kind with the contractor entitling the latter to negotiate different terms and conditions of remuneration to apply to employees of the plaintiff engaged upon the construction of the pipeline from those being paid by the plaintiff to its employees.

The Union has demanded that the plaintiff reimburse its employees in respect of the higher rates of remuneration provided for in the agreement. The agreement contains a disputes procedure and the plaintiff says that the Union has purported to invoke that procedure against the plaintiff and has purported to have the second defendant nominated as the chairman of the committee (presumably a disputes committee) provided for in the agreement.

On 5 April 1984 the plaintiff commenced this action in which it seeks an injunction restraining the defendants from proceeding further to invoke the provisions of the agreement against the plaintiff. The Union through the agency of the New Zealand Road Transport and Motor and Horse Drivers' and their Assistants' Industrial Association of Workers referred the dispute to the Arbitration Court pursuant to s 115(4) of the Act.

The point at issue in the writ in this Court is whether the agreement is binding on the plaintiff. The same issue arises or can be raised in the proceedings in the Arbitration Court or at any rate, as I will elaborate later, I will assume that that is so. At first it appeared that the parties would await the outcome of the High Court proceedings, but more recently the Union appears to have sought a hearing in the Arbitration Court. That Court has stated that unless an injunction is issued it will allocate

a fixture. That response is understandable and with respect it appears to me to be correct. Accordingly the plaintiff has moved in this Court for an interim injunction to restrain the defendants from proceeding further to invoke the provisions of the agreement against the plaintiff.

The principles upon which interim injunctions are granted are too well known to require to be set out in detail. In their modern form they originated in the decision of the House of Lords in American Cyanamid Co v Ethicon Ltd 1975 AC 396, were discussed in Fellowes & Son v Fisher 1976 QB 122, approved by the Privy Council in Eng Mee Yong v Letchumanan 1979 3 WLR 373, and accepted by the New Zealand Court of Appeal in Consolidated Traders Ltd v Downes 1981 2 NZLR 247.

The first issue of course is whether there is a serious question to be tried. As to that the basic facts are not in dispute. The plaintiff has not yet provided any evidence as to the allegation that the contractor had no authority to commit him to a collective agreement. However, the Union's pleading in reply is in the form of putting the plaintiff to proof rather than an explicit denial. The Union pleads that the agreement was intended to apply "to people like the plaintiff". The critical issue will be the authority of the contractor and to some extent the interpretation of the agreement. The existence of a serious question to be tried did not form the basis of any serious challenge at the present hearing. There can be no doubt that what I have described as the critical issues are matters that are within the jurisdiction of this Court. Mr Fairbrother did not contend otherwise, while Mr Rea's submission was that both courts had jurisdiction. I will assume, although counsel for the plaintiff contended otherwise, that the Arbitration Court would likewise have jurisdiction to determine whether the plaintiff was a party

to or bound by the agreement. Accordingly we have the situation, by no means unique, that two courts have jurisdiction over the same matter. There is some reference to that situation in Halsbury :

> " Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court. An objection to the jurisdiction of one of the superior courts of general jurisdiction must show what other court has jurisdiction, so as to make it clear that the exercise by the superior court of its general jurisdiction is unnecessary. The High Court, for example, is a court of universal jurisdiction and superintendency in certain classes of actions, and cannot be deprived of its ascendency by showing that some other court could have entertained the particular action. "
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> (10 Halsbury 4th Edn para 713 pp 321, 322.)

Accepting then that there is a serious question to be tried, I turn to matters relevant to the balance of

convenience. From the progress of the dispute so far and the respective attitudes of the parties at this hearing, it is evident that whereas the plaintiff prefers to have the issues decided by this Court, the Union would rather they were dealt with by the Arbitration Court. If there is no injunction therefore it is reasonable to infer that each party will be doing what it can to have the case dealt with by the forum of its choice as soon as possible and before the other court can do so. If the Arbitration Court should decide the matter first and do so adversely to the plaintiff then no doubt the question will arise whether the issue can be argued again in this Court or whether the plaintiff is estopped by finding of the Arbitration Court. The plaintiff may be faced with a decision whether to take part in the Arbitration Court proceedings at all.

When considering the balance of convenience normally the first question is whether in the event of refusal of an injunction the plaintiff can adequately be compensated by an award of damages. It is apparent that if an injunction is refused the plaintiff may be deprived for all time of the opportunity of having the issue regarding the applicability of the agreement decided by this Court. The question of damages being an appropriate remedy really does not arise. The next question normally asked is whether in the event that an injunction is granted the defendants would be adequately protected by the plaintiff's undertaking as to damages, should the plaintiff ultimately fail. If the plaintiff fails the Union will be free to enforce the agreement. Again there is really no question of damages. The Union will not have lost anything except possibly a degree of delay. On these considerations alone the balance of convenience strongly favours the plaintiff.

The principal thrust of the arguments for the defendants was that here there was a specialist tribunal set up by statute to deal with industrial matters and it should be allowed to resolve the issue. I say immediately that I would hesitate to make a ruling that would have the effect of depriving the Arbitration Court of jurisdiction in a matter that truly involved an industrial issue or where the specialist expertise of the Arbitration Court would be an important consideration. However, the matter that the plaintiff wishes to argue is a contractual question based as I see it on ordinary common law principles which this Court is no less competent to try than is the Arbitration Court. There is no question of what is commonly described as an industrial situation, since I have been informed that work under the agreement has been completed and essentially the dispute is centred on the recovery of wages allegedly unpaid. Mr Thornton assured me that no question of interpretation of the agreement arose in relation to the rates payable nor any question of interpretation of the Act. If what I have described as the critical issue, namely the applicability of the agreement to the plaintiff, is decided against the plaintiff then Mr Thornton says it will abide by that decision and meet its obligations. In summary on this aspect, it seems to me this Court has jurisdiction and so far as matters discussed to this point are concerned there is no reason why that jurisdiction should not be exercised.

Broader considerations point in the same direction. I have already referred to the situation that is likely to arise if no injunction is granted. It does not seem altogether dignified that there should as it were be a competition to see which of the two courts can deal with the issue first. That course would duplicate expense and leave room for a battle of tactics rather than a concentration

upon the merits. Further, depending on the outcome, for the reasons given earlier the dispute may become complicated by additional factors such as issue estoppel. Generally speaking a party should not have to conduct litigation in two courts simultaneously where either action would determine the issues between the parties. The situation is analogous to that where a plaintiff brings simultaneous actions against the same defendant in two courts, where usually one would be stayed. The decision in Clifford v Commissioner of Inland Revenue 1966 NZLR 201 cited by Mr Fairbrother is distinguishable in that it was not a case of concurrent jurisdiction.

The plaintiff having indicated its desire to have the issue decided in the superior court, this Court has to consider whether there are any circumstances why it should be deprived of that right. In my opinion all factors that I have considered are in favour of allowing the litigation in this Court to proceed and in effect for there to be a stay of the proceedings in the Arbitration Court in the meantime, although as has been pointed out that is not precisely the way the motion for interim injunction is worded. What I have said is subject always to the avoidance of any undue delay. Certainly the Union is entitled to be protected against the possibility that having obtained an interim injunction the plaintiff will rest on that position. The terms of the order that I propose to make will safeguard the Union against any risk in that regard.

Finally, I should refer to Mr Fairbrother's submission that the plaintiff's delay should as a matter of discretion preclude it from obtaining the present remedy. There is no sufficient material before the Court to establish that there has been any undue delay on the plaintiff's part.

Accordingly I make the following orders :

1. That until further order of this Court an interim injunction issue against the first and second defendants to restrain them or their agents or the servants of the first defendant or any of them from proceeding further to invoke the provisions of the agreement of 6 July 1983 against the plaintiff;

2. The plaintiff is directed to bring this action to a hearing with all due speed including, if this course may reasonably lead to a speedier determination, the making of an application for the transfer of the hearing to another Registry;

3. Leave is reserved to the defendants to move to rescind the injunction on grounds of breach of the conditions under order No (2);

4. Leave is reserved to all parties to apply further with reference to the terms of the order. In regard to the last matter, by way of explanation I add that during the hearing this morning some comment was made as to the terms of the interim order sought, although the defendants did not make any specific point against the issue of an injunction on that ground alone.

Costs are reserved.

Solicitors :
Dowling & Co (Napier) for Plaintiffs
Fairbrother Lloyd & Wheeler (Napier) for First Defendant
Willis Toomey Robinson & Co (Napier) for Second Defendant