

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. CP231/87

BETWEEN ANTHONY JOHN HUGHES

Plaintiff

A N D MICHAEL CLARENCE WALKER

Defendant

**NOT
RECOMMENDED**

In Chambers: 6 July 1987

Counsel: G.J. Toebes for Plaintiff
D.I. Jones for Defendant

Judgment: 6 July 1987

ORAL JUDGMENT OF HOLLAND, J.

The plaintiff seeks an interlocutory injunction to restrain the defendant from commencing or proceeding with an application to this Court by way of interpleader in respect of the sum of approximately \$115,000 paid by the plaintiff to the defendant as his solicitor. The plaintiff alleges that the moneys were paid into the defendant's trust account by the plaintiff and for the credit of the plaintiff. He has sought repayment of the moneys because the proposed transaction for which the moneys were provided has not proceeded.

The defendant has declined to pay the plaintiff these moneys because a company of which the plaintiff was intended to be a shareholder has claimed that the moneys should be paid to them. That company has alleged in a letter that the moneys were lent by the company to the plaintiff for the purpose of carrying out the transaction which has been abandoned. The company also claims that the moneys were repayable on demand and

that despite demand on the plaintiff they have not been paid. The defendant decided that he might have some fiduciary duty to this company and has commenced interpleader proceedings. Those proceedings were commenced in this Court by filing the appropriate papers on Thursday last, 2 July. Counsel now seeks an order staying those proceedings and an order that the defendant pay the moneys to the plaintiff.

Counsel for the defendant has submitted that the plaintiff is not entitled to a stay because interpleader proceedings have been commenced. That submission cannot be upheld. If in fact grounds existed to justify the Court making an order restraining the defendant from applying to the Court then the defendant cannot improve his position by in the meantime applying to the Court. I am not suggesting that the defendant purported to do so because it appears that the defendant probably commenced the interpleader proceedings before this application for an interim injunction was served upon him, but the principle remains the same. If the proceedings were to be an abuse of Court and restrained on that account they are no less an abuse of Court if they are commenced.

Counsel for the plaintiff referred me to the relevant authorities in relation to interim injunctions. The law in this regard is clear, but I doubt if the principles necessarily apply to an injunction where the relief sought is to restrain a person from applying to the Court. I am satisfied that in those circumstances an applicant has to satisfy the Court that the intended application to the Court by the defendant is an abuse of the Court process or is the act of a

frivolous or vexatious litigant. In the particular circumstances of this case it may be possible to establish that the proposed interpleader proceedings was an abuse of the Court process if it were established that the defendant had commenced interpleader proceedings when one person was undoubtedly entitled to the money and the other claimant could not possibly have any claim to that money. In those circumstances the plaintiff in these proceedings should be regarded in the same situation as a defendant applying to strike out proceedings in limine.

It is difficult to detect from the evidence produced in support of the application for an injunction what legal duty the defendant might have owed to this claimant company justifying the commencement of interpleader proceedings. The defendant has, however, taken the advice of counsel and interpleader proceedings have been brought on the advice of counsel. I am satisfied that there is insufficient information before the Court to enable the Court to state with certainty that the plaintiff must be entitled to this money and that the claimant company cannot possibly have any claim to it. I have accordingly examined the interpleader proceedings which have not yet been served.

There are problems there because the first defendant's registered office is in Rarotonga in the Cook Islands. It is nevertheless apparent from the correspondence that the first defendant is represented by solicitors in Auckland. As a condition of declining the relief sought in these proceedings by the plaintiff I propose to make

ex parte orders under Rule 437 of the High Court Rules in the interpleader proceedings, No. 235/87 in which the defendant is plaintiff and the plaintiff is second defendant and the claimant company Pacific Management Ltd is first defendant.

I make the following orders:-

- (1) The interpleader proceedings are to be served on the first defendant by serving the first defendant's solicitor in New Zealand, Mr Ross Holmes, 73 Anzac Street, Takapuna, Auckland.
- (2) The second defendant is to be served by serving the solicitors for the second defendant Messrs Rainey Collins & Olphert, Solicitors, Wellington.
- (3) Both defendants are to be served before 4 p.m. on Friday next, 10 July.
- (4) The interpleader proceedings are to be heard in the Christchurch Court at 10 a.m. on Friday 31 July 1987.
- (5) The defendants are to file and serve any affidavits that they propose to file in interpleader proceedings and a statement of defence on or before Wednesday 22 July 1987.
- (6) Any affidavits to be filed in reply which presumably will be between the two defendants rather than by the plaintiff are to be filed and served before 4 p.m. on Wednesday 29 July.

- (7) The plaintiff is to pay the appropriate setting down fee as if the proceedings had been set down in the normal way.
- (8) Leave is reserved to any party to apply.
- (9) This order is to be served with the other papers.

In so far as the present application for an injunction is concerned, although as I have already indicated that it is declined, it should be regarded as merely a temporal order and the application should be adjourned sine die. Costs in respect of the application are reserved.

A D Holland