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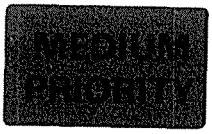
IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY



CP 146/87

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LR 420

IN THE MATTER	of Part 1 of the Judicature Amendment Act 1972
BETWEEN	EFFEM FOODS PTY LIMITED First Applicant
AND	EFFEM FOODS LIMITED Second Applicant
AND	THE ATTORNEY-GENERAL FOR NEW ZEALAND First Respondent
AND	DAVID CAYGILL Second Respondent

Hearing: 17 & 18 August 1987

Counsel: J.A. Farmer Q.C. for the Applicants
Kristy McDonald and Mary Schoulton for the Respondents

Judgment: 1/9/87

JUDGMENT OF HERON J.

This is a notice of motion to strike out the amended statement of claim in these proceedings on the grounds that it is frivolous and/or vexatious or an abuse of procedures of the Court, in that the proceedings are based on an ulterior and improper purpose on the part of the applicants and that the relief sought is contradictory or inappropriate.

In the course of argument I have been taken into the merits of the respective cases for applicant and respondent, but in my view I do not have to go anything like the distance I was taken. It seems to me the matter can be resolved by recourse to first principles. The striking out procedure is to be sparingly used, and only in the clearest possible case, particularly on grounds that the proceedings are vexatious or frivolous. See Takaro Properties v. Rowling [1983] 2 NZLR 314, 316; Lucas & Son (Nelson Mail) Limited v. O'Brien [1978] 2 NZLR 289.

At the heart of the respondent's application was the inherent jurisdiction of the Court to strike out proceedings where considerations of the kind which applied in Goldsmith v. Spearings Limited [1979] 2 All E.R. 566 applied. In this case Miss McDonald relies, not on the application of the principles in that case by virtue of the fact that the proceedings are similar to this case, but in general terms. I think I should go straight to that case and consider the general statement of principle recorded there.

In the course of defamation proceedings initiated by Goldsmith, he insisted as a term of settlement of numerous actions, where the defendants were small distributors of magazines and periodicals, that they at no time in the future distribute the magazine "Private Eye". It was this term which it was alleged tainted the proceedings overall and gave to them such an improper motivation as to require the intervention of the Courts in their inherent jurisdiction to strike out on the grounds of abuse of process. The Court of Appeal in the event did not strike out.

Scarman L.J. at p.581 said:

> "The history of the matter is complex but the question can be shortly put and answered. If the plaintiffs' purpose in initiating or pursuing his actions against secondary distributors be to destroy "Private Eye" i.e. to use his wealth so as to suppress it, he is abusing the process of the Court. Neither wealth nor power entitles a man to censor the press. If however his purpose be to vindicate and protect his reputation the use of and the remedies afforded him by the law for that purpse cannot be an abuse of the Court's process. ..... It is right therefore that to obtain before trial the summary arrest of a plaintiff's proceedings as an abuse of the process of the Court the task of satisfying the Court that a stay should be imposed is and should be seen to be, a heavy one. (My emphasis.)
>
> In the instant proceedings the defendant has to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is

> really out "to effect an object not within the scope of the process.""

Lord Bridge said at p.586:

> "In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that s an abuse of process. These two cases are plain, but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation. Can he on that ground be debarred from proceeding? I very much doubt it."

Wallersteiner v. Moir [1974] 3 All E.R. 217 is a case of abuse of process by the use of a "gagging writ". It is a long distance from the facts in this case. In Castanho v. Brown & Root (U.K.) Limited [1981] A.C. 557 the Court looked behind the motivation of filing a notice of discontinuance and upheld the action of striking out the notice in order to prevent the duplication of proceedings in other jurisdictions. Each case will, as is obvious from those referred to, depend on the superstructure of circumstances that prevail and against which each case must be decided. The cases referred to are helpful as to principle only but the pleadings and the surrounding circumstances of this case are required to be examined.

The applicants refer to the import licence tender scheme authorised by Section 16(B)(3)(a) of the Trade and Industries Act 1956 and regulations made pursuant to that Act. In particular regulation 9A(5) of the Import Control Regulations 1973 which authorise a guide to the import licence tender scheme (I.L.T.S.) and its gazetting.

That tendering scheme has as its stated objectives the allocation of licences on an open and competitive basis, the

introduction of more competition and the widening of the base of information on competition so that a move away from import licensing to tariff, as the main means of protection, is advanced.

The tenderer has to satisfy the question of ability and intention to import the goods bid for. Depending on the amount of the premium of each tender, and the percentage it represents of the value of the goods imported, goods may be subsequently imported on demand. Tender licences are not extended beyond expiry date except in exceptional circumstances and then not for more than 60 days.

Tenderers are expected to fully use the licence. Less than 75% use of a licence is likely to be criticised and the Minister may bar wrong users of tendered licences from tendering for two years.

The pleadings disclose that the applicants are respectively manufacturers and exporters of canned pet food and importers and distributors of pet food. Briefly put the applicants allege that the Watties Group through its various companies caused to effect a rise in the average tender cost of canned pet food from 1.8% to 23%. Having secured that degree of licence it is alleged Watties did not use it within the appropriate licensing year and then obtained from the first or second respondent a 90 day extension to 31 March 1987, which was not authorised in law.

A number of statutory decisions, or the exercise of statutory powers, are alleged to have been taken or were required to be taken. The applicants claim that the extension of the licence by 90 days is unlawful. They wrote to the Minister asking that Waties' licence be revoked, but the respondents failed to do anything. The applicants, on the assumption that Watties had acted contrary to the scheme, insisted that licences for pet food now be on demand. This demand was made on the assumption

that, but for the unlawful activity, that state of affairs would have been reached in terms of the scheme. The applicants also seek the debarring of Watties for two years, again on the assumptions made above. The applicants seek to disentitle Watties to continuity licences which arise as an incidental entitlement following tendering.

The applicants have plainly pointed to situations where the decisions were made or powers exercised which were statutory in nature. The grounds allege ultra vires (the 90 day question) failure to take into account relevant facts or taking into account irrelevant considerations, in particular the scheme. It is alleged also that the Minister failed to take into account the fact that Watties were frustrating the aim of the import licence tender scheme.

The applicants consider that they have been severely disadvantaged by the way in which one tenderer has been treated. If it could be categorised one would have to say that this case, from an administrative law point of view, has little that is novel or surprising proceeding as I must on the basis that the applicants can make out the allegations in the amended statement of claim. Nevertheless the Crown wish to have it dismissed here and now.

The respondents' case is that the proceedings are based on an ulterior and improper purpose, namely the bringing into court of a private law matter (the applicant's commercial dispute with Watties). I do not follow the basis of this submission. There is in fact no commercial dispute with Watties in the sense of litigation between the two, but there is of course commercial competition in the marketplace. Affecting that competition, so the applicants assert, is their wrongful treatment at the hands of the Minister by preferring Watties or failing to administer the scheme properly, thereby disadvantaging the applicants. That must be a matter of public law. The import licence tender scheme is a public matter and

governed by public law. It contains the power to discriminate unfairly against competitors in the marketplace and if misused as claimed (but not yet proved) then public law rights must be available to those affected.

It is submitted that very wide powers are being exercised pursuant to I.L.T.S. and being largely matters of policy should be outside the scope of judicial review. The scheme itself is a carefully worded statement of that policy and parties subject to the regime it imposes are entitled to expect it to be enforced against all.

At this stage the particularity of the scheme lies awkwardly against a suggestion that broad policy considerations apply and the Judicial review procedure is unquestionably ousted. I reject the submission that that point is so clear as to require striking out. It should await further argument.

The second submission concerns the lessening of competition. The submission is that:

> "The applicant is attempting to substantially lessen competition in the market for ANZCERT tender exclusive Australian licences for canned pet food and also in the market for canned pet food by attempting to exclude Watties from those markets."

At the heart of this submission is a construction placed on two letters in similar terms written by the applicants' agents for the purpose of having the department scrutinise bids for the right to import canned pet food in the 1987-1988 licence round. This is a particular entitlement to import Australian origin pet food.

It is suggested that the letters suggest an agreement restricting competition in breach of Section 27(2) Commerce Act 1986. An improper motivation is claimed which it is said taints

these proceedings also. Mr Farmer says that the letter has been explained in subsequent correspondence. I think far too much is being read into it. It falls very short of fixing the applicants with an illegal agreement. Furthermore it would seem that any intended purpose to restrict competition may have been largely achieved by the action of Watties by virtue of under utilisation of licence on the facts so far. The whole issue needs further inquiry and it is inappropriate to contemplate the striking out on tenuous assumptions.

I should also say that the letters are capable of being construed as applying to exclusive distribution arrangements and may not constitute a refusal to sell. Mr Farmer correctly says that illegality of the Commerce Act kind is an inappropriate topic for an application for judicial review at the best of times, but to suggest one can arrive at any important conclusion in this area on a striking out matter is fanciful.

A further ground is relied on as to the nature of the remedies sought by the applicant. Real issues arise as to whether the import licence decision will have consequential implications for continuity licences. The applicants may well be able to establish a state of affairs which require a decision as to the status quo, and if so the ongoing effect of what that should be.

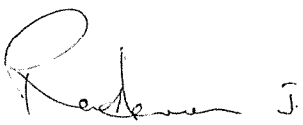
On the question of public law and private action Miss McDonald cited two cases which go to support her general proposition that judicial review proceedings are inappropriate where private actions are available. O'Reilly v. Mackinnon [1982] 3 All E.R. 680; R. v. Epping and Harlow General Commissioners Ex Parte Goldstraw [1983] 3 All E.R. 257.

The first case if of course authority for striking out if the private law remedy is sought when the public law remedy is available. But it does not address the question as to whether

there is in this case any so called private right of action. I cannot see one and I think this case is essentially about public law.

The next case can only be a proposition for the same principle. The private right having gone by virtue of a time limit imposed under the Taxes Management Act 1970, the public right could not be availed of, notwithstanding a residual discretion in the Court to grant review. But there is no discernible private right in the present case which has gone by effluxion of time or gone for any other reason. I return to the very public nature of the Import Licencing Tendering Scheme which is of importance to the participants in it, who are entitled to be treated in terms of the scheme, and I might say to the public, whose interest is to be preserved by virtue of overriding considerations such as the balance of payments.

The application to strike out fails, and the case must proceed. The applicants are entitled to costs which I fix at $750 together with all proved disbursements.



Solicitors
McElroy Milne for the Applicants
Crown Law Office for the Respondents