IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

C.P. 580/87

BETWEEN: P.E. JONES and A.K. TOZER

Plaintiffs

A N D: M.L. CHATFIELD, P.H.C. HANSON, R.E. YATES and W.G. MATHIESON

Defendants

HEARING: 1 December 1989

COUNSEL: L. McEntegart and D.G. Collecutt for Plaintiffs
F.J. Handy for Defendants

JUDGMENT: 1 December 1989

JUDGMENT OF FISHER J

Of the four defendants, Messrs Chatfield, Hanson and Yates have appealed against my Judgment in the substantive proceedings. In consequence, those three defendants apply today for a stay of execution.

No such appeal or application is made by the fourth of the four defendants, W.G. Mathieson. In consequence, no stay of execution needs to be considered further in his case and

the plaintiffs are free to proceed with execution of their Judgment against him if they see fit.

As to the application brought by the first three of the defendants today, the overriding consideration is of course the general justice of the situation. There are no inflexible rules as to how my discretion should be exercised. However, Counsel have helpfully drawn my attention to four criteria which are summarised in McGechan On Procedure under Rule 35 of the Court of Appeal Rules as an analysis of King v V Merchants Association of N.Z. (No. 2) [1912] 32 N.Z.L.R. 173, 174; and Thompson v Commissioner of Enquiry [1983] N.Z.L.R. 98, 115. Those cases support the four criteria which follow.

The first question is whether, if no stay is granted, the applicant's right of appeal may be rendered nugatory. In that respect in the present case it is clear that a substantial proportion of the funds to which the plaintiffs would be entitled under their existing Judgment would, on receipt, be forthwith applied in reduction of the plaintiff Jones' pressing liability to the Bank of New Zealand. The result is that if the appeal were to succeed, the defendants would have extreme difficulty in recovering their money. It is clear from the evidence given during the trial that the principal plaintiff, Mr Jones, would, apart from this Judgment, be on the verge of bankruptcy. I therefore find that under this criteria there are powerful reasons for a stay.

The second criterion is whether the existing successful party would be injuriously affected by a stay. Undoubtedly

Mr Jones is suffering significant adverse consequences from lack of satisfaction of his Judgment. He is liable to the Bank of New Zealand for very substantial interest which is presently running against him. That interest is significantly higher than the 11% to which he would be entitled on his Judgment under the Judicature Act. As I have said, he is on the verge of bankruptcy. He will therefore suffer if I grant a stay.

The third criterion is the bona fides of the applicants as to prosecution of the appeal. I am satisfied that this is a bona fide appeal. I also have no reason to question the applicants' indication that they are pressing on with the appeal with all due speed and hope to have it heard very early in the new year. I find in favour of the applicants under this heading.

The fourth and final consideration suggested in this list is the novelty and importance of the question involved. I consider that the legal question which the applicants have raised does involve a serious question of law. Although I have my own views as to the likely outcome of that question, it certainly seems a matter responsibly advanced by the defendants.

Having surveyed those criteria, I must then return to the overall justice of the situation with due consideration to the balance of convenience, the status quo and the prima facie right of a litigant to enjoy the fruits of his judgment without due delay. Taking all of these factors into account, I consider that a stay would be justified if quite far-reaching

conditions were to be imposed upon the defendants to try, so far as possible, to minimise the penalty to the plaintiffs.

Having indicated that prima facie position to Counsel, I am indebted to them for their industry in arriving at the detailed terms of an order which is intended to give the plaintiffs security (by virtue of a payment into Court) and protect against financial loss in the long term (by rendering the defendants liable for the difference between Judicature Act interest and the actual interest for which the plaintiff Jones will himself become liable until he receives the Judgment funds and can pass them on to the bank).

The result is that I now make an order staying execution of the Judgment as against the defendants Chatfield, Hanson and Yates on the following conditions:

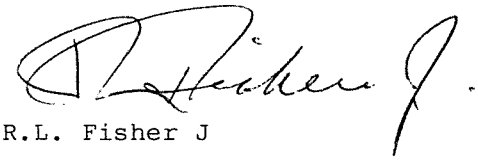
(a) That the three named defendants are each to pay, not later than 18 December 1989, the amount due by each of them under the Judgment sealed on 18 October 1989 into the Court at Auckland. The Registrar is directed to invest all such funds in an interest-bearing account with a trading bank at the best interest rates available at the date of lodgement. The parties have leave to agree to alternative deposit arrangements through a Solicitor's Trust Account, provided such agreement can be reached by 18 December 1989.

(b) Each of the named defendants is to file a written and signed undertaking not later than 18 December 1989 that he will be jointly and severally liable to pay the difference between the amount of interest liable to be

paid by the plaintiff Jones to the Bank of New Zealand between 1 December 1989 and the date on which the amount of the Judgment is available to that plaintiff (if the appeal fails) and any interest actually earned in that same period on such part of the funds as is equal to the amount of principal (including any compounded interest) due to the Bank of New Zealand as at 1 December 1989.

Any funds received by the plaintiffs from any defendant in or towards satisfaction of the Judgment must be first applied by the plaintiffs in reduction of the liability of the plaintiff Jones to the Bank of New Zealand with consequent reduction in any liability of the defendants under their written undertakings referred to above.

Leave is reserved to all parties to apply to the Court at any time to vary the above terms.



R.L. Fisher J