22/11

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

C.L. 85/87

1777

IN THE MATTER of the Contractual Remedies Act 1979

AND

IN THE MATTER of an action

BETWEEN	JAGWAR HOLDINGS LIMITED
	First Plaintiff
AND	JAGWAR INVESTMENTS LIMITED
	Second Plaintiff
AND	FULLERS CORPORATION LIMITED
	First Defendant
AND	H.L.H. JULIAN & ORS
	Second Defendant
AND	PRICE WATERHOUSE
	Third Defendant

Hearing: 10 November, 1989 (In Chambers)

Counsel: P.J.P. Grace for all defendants in support
R.J. Craddock Q.C. and G.L. Wong for plaintiffs to oppose

Judgment: 10 November, 1989

(ORAL) JUDGMENT OF BARKER J

On 7 September 1989 I delivered an oral judgment in which I (a) dismissed an application by all defendants to remove

the proceedings from the Commercial List; and (b) I dismissed the application by the defendants against the plaintiffs for security for costs.

On 11 October 1989 the first three second defendants applied for -

(a) Leave under S.24G(1) of the Judicature Act 1908 to extend the time for applying for leave to appeal against my decision of 7 September 1989, and;

(b) Leave to appeal that decision. The applications are now brought on behalf of all defendants.

The application for leave to appeal did not include my decision on the question of security for costs but merely my decision in removing the proceedings from the Commercial List. There is no affidavit filed as to why there had been a delay in applying for leave. S.24G specifies 7 days. The application to extend time was not filed until almost 5 weeks after the decision had been given.

A memorandum, which is not evidence, stated in effect (a) that the application was being made on behalf of all defendants; (b) that all counsel had to obtain instructions from clients and/or their indemnifiers; (c) that arrangements had to be made as to the grounds for the

appeal and for meeting of the costs involved.

However, I should not have thought that there existed sufficient excuse in these matters for the application to have been filed so greatly out of time.

The whole point of a requirement for leave to appeal in interlocutory matters on the Commercial List and for a limited time period is (a) to stop frivolous appeals which would de inimical the philosophy of the List; and (b) to ensure that even meritorious applications for leave to appeal are filed properly.

I do not think that there is any justification for the matter having been filed as late as it was. It could have been filed by the second and third defendants initially. Other defendants would then have been forced to indicate whether they agreed with the application or not.

I therefore refuse under S.24G(1) the application to extend time to apply for leave to appeal out of time.

Since this is the first defended application under S.24G it is proper that I express my view on the substantive application. Even if an application for leave is filed within time the Court of Appeal's practice seems often to consider together the merits of both the application for leave and of the proposed appeal.

These proceedings are speedily approaching the time when they will leave the 'fast-track' discipline of the Commercial List. As the report filed on behalf of the plaintiffs today shows, discovery has been, or is about to be completed. Whilst there may be a few minor difficulties over discovery by the fourth, fifth and eighth second defendants, and some problems (which will hopefully be resolved) concerning particulars with those defendants and the plaintiffs, the proceedings should be in the position by 1 December 1989 to be placed on the list ready for hearing.

When that situation occurs, a Commercial List Judge will give final directions as to hearing, covering such matters as mode of presenting evidence, agreement as to facts, agreed bundles of documents, exchange of expert's reports and the like. Once the case leaves the hands of the Commercial List Judge, in the absence of any particular directive from the Executive Judge, it will go into the general pool of cases to be heard substantively by any Judge, not necessarily a Commercial List Judge.

I make this point because the effect of an order, should the Court of Appeal ever make it, that the matter be removed from the Commercial List would be nugatory. By the time the appeal were to reach the Court of Appeal, after consequent expense and delay to all parties, the Commercial List would have done what it could for this litigation which would just be awaiting a substantive

fixture. Clearly there is no purpose served by an appeal and the concomitant unnecessary expense to all parties.

Next, I can see no issue of principle involved which would justify the matter going to the Court of Appeal. Neither Henry J nor myself has, to my knowledge, placed any obstacle in the way of interlocutory appeals under S.24G where there has been some real detriment placed on a party by a first instance decision of a Commercial List Judge.

For example, I recently gave leave to appeal in the case of Meates & Ors v Equiticorp (C.L. 70/88); I had varied the term of an injunction which had clearly a detrimental effect on the proposed appellant.

There is also the consideration that a Commercial List Judge has a very wide discretion as to what cases enter the List and what cases are removed from the List. The breadth of this discretion is exemplified by Rule 446K which entitles a Judge to remove matters from the List on his own motion as well as on application.

I note also that English authority is such that, whilst there is in that country a right to appeal against an order transferring or removing from the List, the author of the standard textbook, Colman, The Practice and Procedure of the Commercial Court (2nd ed), states at page 31 -

> "In practice, appeals from a decision of the commercial judge as to whether an action ought to be tried in the Commercial Court are virtually unknown in modern times. The parties are almost always content to accept the decision of the commercial judge as conclusive."

The author also notes the dictum of Bankes L.J. in Hudson's Bay Co v Byrne (1920) 2 Ll.L.Rep.192 -

> "The question of whether permission should be given to enter an action in the Commercial List is a question entirely for the discretion of the Learned Judge for the time being in charge of that List. I can hardly imagine a case in which it would be the duty of the Court of Appeal to interfere with the exercise of the Learned Judge's discretion."

Although of course that dictum is not binding in New Zealand, one would expect that the Court of Appeal might pay some regard to it since the New Zealand Commercial List owes much of its genesis to the Commercial List operating in London.

Counsel were not able to quote any case where a Commercial List Judge' decision to remove or not remove from the List had been the subject of a successful appeal in Australia, though there may have been cases there for all I know.

Mr Grace submitted that the judgment appealed from did not deal with the submission that the case lacked urgency and therefore should not remain on the Commercial List.

There seems to be some misconception that decisions made in individual cases, where fact situations can differ

infinitely, should be taken as necessarily applying in other cases. It is essentially a matter of discretion which cases go on the List and which cases remain. Urgency is but one of the matters to be considered.

As I noted in Coopers Animal Health (NZ) Limited & Ors v Ancar Distributors Ltd & Anor (judgment 20 May 1988, C.L. 55/88) the question of urgency is relative. That was a intellectual property dispute concerning patents for animal remedies; the case was anticipated to take a long time, in the manner of all patent disputes. The Legislature clearly intended that intellectual property cases of a commercial nature (such as this clearly was) should be permitted on the List; that meant not just short intellectual property cases but long and complex ones should be entertained.

I noted in the Cooper's case, whilst cases on the List should be dealt with speedily, speed is relative; the speed at which a complex case should be processed is quite different from the speed in which a less complex case should be processed.

I have held that this present case is one which is entitled to be on the List and speed is relative here too. The case should be processed at a relatively speedy way and indeed is now ready for trial.

The fact too that, in the exercise of a discretion, every

submission of counsel is not traversed does not necessarily mean to say that every submission was not considered. In my oral decision of 7 September 1989 I considered all the matters that had been raised before me. As the decision will show, much of the time spent was dealing with what seemed to me the more substantial and more difficult question concerning the security for costs.

One might have understood the defendants' application a bit more clearly if they had applied for leave to appeal from that part of the decision. However, they have chosen not to; they merely wish to undergo what I see as an exercise in futility in applying for leave to appeal on the narrow discretionary question whether the case should remain in the Commercial List.

The application, as I indicated earlier, is dismissed. I make an order for costs in favour of the plaintiffs, to be costs in any event in the sum of $750. The defendants may have some arrangement as to who is to pay; the order will have to be against the first, second and third second defendants who are the ones who have filed the application.

I note also that counsel for the other defendants were present for the mentions hearing but left the argument on this point to Mr Grace, though I was told that all supported it.

Mr Brown for the third defendant indicates that he wishes to file an application, on behalf of his client, Price Waterhouse, to join, as a third defendant, the former solicitors of the first defendants. I am not clear as to the exact basis of this application, since these solicitors were not acting for the third defendants. I require that any application for leave by any defendant to issue a third party notice be filed within 7 days, together with affidavits in support.

Any affidavits in opposition should be filed within a further 7 days. The applications can be heard before me on 1 December 1989 at 11.45.a.m.

Mr Gray's application by the first defendant for leave to withdraw will also be considered at 11.45.a.m. on 1 December 1989.

Any further interlocutory application concerning discovery and inspection is also to be filed within 7 days.

Solicitors: Chapman Tripp, Auckland, for plaintiffs
Bell Gully Buddle Weir, Auckland, for first defendant
Duthie Whyte, Auckland, for first, second and third second defendants
Simpson Grierson Butler White, Auckland, for fourth, fifth and eighth second defendants
Mervyn Schamroth & Partners, Auckland, for seventh second defendant
Morrison Morpeth, Auckland, for third defendant
Peak Rogers, Auckland, for sixth and ninth second defendant