Earthquake War Damage Comm v Apteryx Ins. 9.5.89

SDW, RM SET 3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 259/88

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IN THE MATTER of the Earthquake & War Damage Act, 1944

BETWEEN THE EARTHQUAKE AND WAR DAMAGE COMMISSIION

Plaintiff

AND

AND APTERYX INSURANCE COMPANY LIMITED

Defendant

Hearing: 9 May 1989

Counsel: Mr K. Robinson for Plaintiff
Mr G.B. Chapman for defendant

Judgment: 9 May 1989

(ORAL) JUDGMENT OF HILLYER J

This is an application for what is commonly known as a Mareva injunction. The plaintiff seeks an order restraining the defendant until judgment or further order from removing from the jurisdiction of the court, or otherwise transferring, dealing with or disposing of assets the defendant may have within the jurisdiction of the court, save insofar as they exceed the sum of $325,000, and more particularly to refrain from drawing on any account in its name at the Landmark House Branch of Westpac Banking Corporation below the said amount.

The defendant set up in business in New Zealand as an

insurance company. It has a branch office in the Cayman Islands, and it was intended either on a direct basis from New Zealand, or by its Cayman Island branch, to insure the industrial special risk (fire, earthquake and special perils) and engineering risk (machinery breakdown) of the Caxton group of companies.

There is a dispute between the parties which both counsel accept is a genuine one, as to whether in the particular circumstances of the way in which the insurance has been set up in New Zealand, the defendant is bound to contribute to the Earthquake and War Damage Commission funds. The amount involved is about $292,000 plus interest. That dispute has apparently been hanging fire for a period, but Mr Robinson for the plaintiff gives an undertaking that it will be pursued with all due diligence from now on.

The application has been, it seems, substantially prompted by a visit paid by the Chief Executive of the defendant to the General Manager of the plaintiff on 3 May 1989. During that visit the Chief Executive of the defendant, Mr Yates, handed the General Manager, Mr Allwood, a letter dated 26 April 1989. That letter is as follows:

> "The General Manager
> Earthquake & War Damage Commission
> P.O. Box 31-342
> Lower Hutt
> WELLINGTON
>
> Attention Mr M. Allwood

Dear Milton,

In view of the continuing deterioration of market conditions and the lack of any medium term prospects of improvement in those conditions, we regret to announce that APTERYX Insurance Company Limited will be withdrawing from the insurance market.

The directors of Apteryx have decided to cease acceptance of new business as from today's date. Existing unexpired risks will be run off and we will be contacting clients through their brokers or agents with the view to locating alternative insurers. Over the next few months our Earthquake and War Damage levy returns will mainly consist of credits as the unexpired premiums are returned to the brokers and/or clients. We seek your co-operation and assistance in the disposal of our commitments in this area.

Yours faithfully

'T.F. Yates'

Chief Executive"

Mr Allwood said that Mr Yates advised that the principal reason for the defendant's proposed closure was that the Caxton business had been sold to other interests and there was therefore little point in the defendant continuing to operate.

Mr Allwood deposes that his belief is that unless the defendant is restrained by such an order as is sought, the defendants proposed cessation of business is liable to render nugatory any judgment that the plaintiff may obtain in the action I have referred to.

Mr Chapman submitted that just because the defendant was proposing to cease business, it did not mean that the

plaintiff might not be able to obtain the fruits of any judgment it might get. He says there is no evidence that the defendant is proposing to dissipate its assets and that there is a heavy obligation on the plaintiff to establish a real risk. He quoted from Ninemia Corp v Trave Schiffahrts [1984] 1 All ER 398/ At 404 the decision of Mustill J:

> "Nevertheless, certain themes can be seen to run through the cases. It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there. Mere proof that the company is incorporated abroad, accompanied by the allegation that there are no reachable assets in the United Kingdom apart from those which it is sought to enjoin, will not be enough."

He said that the orders sought were very serious and that there was no suggestion that the defendant was anything other than an honourable company, worthy of belief.

Mr Robinson on the other hand said it was not a question of want of honesty, and pointed to P.419 of Ninemia's case, where the Court of Appeal, considering Mustill J's decision said:

> "In our view the test is whether, on the assumption that the plaintiff has shown at least 'a good arguable case', the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied."

Here in my view, there is admitted evidence that the defendant is going out of business. There is no evidence it will continue to operate in any other way. It does have a branch in the Cayman Islands and it would be quite easy for it to transfer any assets it has to that branch. There would be no need for it to retain assets in New Zealand if it did not want to if it no longer conducted business in New Zealand. Indeed, it is reasonable to believe that a company going out of business would no longer continue to hold funds.

There is a real risk, in my view, if no injunction of the nature sought is granted, any judgment the plaintiff might obtain could be unsatisfied.

There is some suggestion in the letter of 26 April 1989 that over the next few months there would be credits as far as the Earthquake & War Damage Commission was concerned from expired premiums, but there is no indication that those amounts would anywhere near approach the sum stated to be due in this case.

There will therefore be orders in terms of the application.

I reserve leave to the defendant to move on 14 days notice to set aside the order.

Any interlocutory application by the plaintiff is to be made within 28 days and thereafter the action is to be set down unless the defendant makes further application for interlocutory relief.

Costs are reserved.

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P.G. Hillyer J

Solicitors
Crown Law Office Wellington for plaintiff
Russell McVeigh McKenzie Bartleet & Co for defendant

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