IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

13/12

C.L. 53/91

2394

BETWEEN	TRACKERS COMMUNICATIONS LIMITED Plaintiff
AND	TAXI NORTH SHORE SOCIETY LIMITED First Defendant
AND	G.D. PUNNETT, G.D. ROGERS and G.R. RANSOM Second Defendants

Hearing: 1 November 1991 (In Chambers)

Counsel: G.M.Illingworth for defendant in support
S.C. Munro for the plaintiff to oppose

Judgment: 1 November 1991

(ORAL) JUDGMENT OF BARKER J

This is an application to strike out certain causes of action in the plaintiff's amended statement of claim; alternatively, if that application is not successful, to remove the proceedings from the Commercial List.

The plaintiff's cause of action against the first defendant alleges wrongful repudiation of a contract for the plaintiff to supply communications services for the first defendant which is a taxi-operating company on the

North Shore, Auckland. The second defendants are officers and/or servants of the first defendant.

In general terms, the causes of action under attack allege that these three second defendants unlawfully induced the alleged breach of contract between the plaintiff and the first defendant; they are sued in tort, both for the tort of inducing breach of contract and for the tort of conspiracy.

This is the third attempt that the plaintiff has made in articulating its allegations against the second defendant. On the last call on the List, Henry J gave the plaintiff further time to consider its position. Mr Illingworth, for the defendants, with some considerable justification submits that "enough is enough" and that the Court should now determine the application. However, as against that, the Court will always strain not to strike out a pleading where with any reasonable amendment, the pleading is sustainable.

The principles relating to the tort of unlawful interference with contractual relations, in circumstances not unlike the present, were discussed by McGregor J in Official Assignee v Dowling [1964] NZLR 578. There, the plaintiff builder sued the first defendant owner for breach of contract and alternatively sued the second defendants (who were the architects of the first defendant) for unlawful interference with the contractual

relations between the plaintiff and the first defendant. McGregor J quoted from Thomson & Co Ltd v Deakin [1952] Ch. 646, 702 concerning the essentials of the tort; Morris LJ (as he then was) had said -

> "The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break a contract or the intentional bringing about of a breach by indirect methods involving wrongdoing."

McGregor J then went on to consider whether an employee or agent of the party alleged to have broken the contract is able to be sued in tort for inducing breach of contract, citing Said v Butt [1920] 3 KB 497 where it was said -

> "If a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken."

However, in Thomson v Deakin the Master of the Rolls said, after referring to Said v Butt at 681 -

> "If the servant does not act bona fide, presumably he is liable on the ground that he has ceased to be his 'employer's alter ego'."

McGregor J said in the context of the case before him -

> "No particulars of malice are given, but it may be that if such malice can be proved the acts so actuated may have been beyond the scope of the architect's authority, that he may not have acted in good faith, and therefore he is no longer the alter ego of his employer. If the other essentials are proved it seems to me to be still a question of fact in issue whether the acts of the person inducing the

> breach of contract were within the scope of his authority as servant or agent."

He therefore considered it premature to strike out the proceedings alleging no cause of action.

The particulars to which Mr Illingworth objects allege broadly, that the second defendants as officers of the first defendant did not act in pursuance of the objects and interests of the first defendant in a number of specific ways and that they furthered their own interests in particularised ways and that they failed to act bona fide.

If there is a possibility of the pleadings being brought to a state where a viable cause of action can be articulated (although the present pleadings do not seem to accord with the prescriptions in Official Assignee v Dowling) then they must be allowed to survive. It might be possible for the plaintiff to allege the intentional bringing about of a breach of the contract by the named individuals using methods involving wrongdoing; such wrongdoing would have to be pleaded as breach of good faith, breach of fiduciary duty etc. If these matters are able to be positively stated by the plaintiff, then one could not say, just as McGregor J could not say in the Dowling case, that the matter can be struck out; rather it should await the trial of the proceedings.

Accordingly, it seems to me that the plaintiff has to be given one more opportunity to amend its statement of claim; it must, however, bear some award of costs regardless of the ultimate result.

So far as the application to remove from the Commercial List is concerned, Mr Illingworth acknowledges that, if there is only the cause of action between the plaintiff and the first defendant, then there is sufficient "commercial flavour" to justify retention in the List. However, I agree with his subsequent submission that, if those tortious allegations are to remain, then it is not a suitable case in the exercise of the discretion for me to allow to remain on the List. I follow the same reasoning as that in a somewhat dissimilar fact situation where Henry J refused to allow RSL Life Insurance Ltd (In Liquidation) and Ors v Samuel & Anor (CL.29/91, 19 July 1991) to stay on the List.

Accordingly, the plaintiff is given a further 7 days within which to attempt to refine its pleadings. If the defendants still consider that the new amended pleading discloses no cause of action, then arrangements can be made to bring the matter on before me at short notice in Chambers. I shall be happy to receive a memorandum from counsel so that in accordance with the indications I have given, an order can be made on the application both to strike out and to remove from the List.

I think the second defendants should have costs from the plaintiff in any event in the sum of $400 in respect of today's argument. I consider the plaintiff was given an indulgence by Henry J; the pleading does not at this stage seem sufficient to justify the unusual course of making the officers of a company alleged to have breached a contract liable as tortfeasors for unlawfully inducing breach of contract. The costs are to be paid within 14 days.

R.D Barker J.

Solicitors: Cairns Slane, Auckland, for plaintiff
C. Hankins, Auckland, for defendants

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