IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No 1066/92

BETWEEN CARTER HOLT HARVEY TIMBERS LIMITED

Plaintiff

A N D PACIFICO TIMBER IMPORTERS PTY LTD

Defendant

Hearing: 21 June 1993

Counsel: Mr G.M. Illingworth for Defendant Applicant
Ms S. Poffley for Plaintiff Respondent

Judgment: 21 June 1993

(ORAL) JUDGMENT OF WILLIAMS J.

This is an application by the defendant Pacifico for leave to appeal to the Court of Appeal against the judgment I gave on 25 May 1993 discussing an application for review of a Master's decision. Leave is required because Rule 61C(6) provides that except by leave of a Judge no appeal shall lie from a decision of a Judge which involves a review of a Master's decision under s 61C.

The decision of the Master and my own decision involved a challenge by Pacifico to the jurisdiction of the New Zealand Courts in respect of Carter Holt's claim for summary judgment. Pacifico also advanced the related

argument that, even if the High Court of New Zealand possessed jurisdiction, on forum non conveniens principles the Court should exercise its discretion and prevent Carter Holt from litigating its claim in New Zealand.

I have been referred to the relevant authorities, including Bambury v. Thames Coromandel District Council (1989) 1 PRNZ 705, Green v. Commissioner of Inland Revenue (1990) 3 PRNZ 628, Telesis Corporation v Reed in December 1991 and Eveready New Zealand Limited in August 1992. These authorities establish that, in relation to what is essentially a second appeal, the normal approach will be that there should be no second appeal. Leave will be granted only if there are difficult questions of law, or possibly fact, capable of bona fide and serious argument and sufficiently affecting the applicant's interest to justify the delay and cost of a further appeal.

Turning to the grounds advanced in support, it is said that my decision, if there is no appeal permitted from it, would otherwise constitute a final and binding determination on the fundamental issue of jurisdiction. It was submitted that the matter was therefore in a different category from the usual situation involving appeals from interlocutory decisions. It was argued that this issue did not have the character of an interlocutory ruling because it determined in a final way the question of whether the plaintiff's claim could be brought in the New Zealand Courts. It would have that effect but, in my view, it is not correct to analogise that situation with one which truly involves a final and binding determination on the merits of a case. This issue is simply a procedural issue as to whether the litigation should be conducted in New Zealand rather than Australia. Because there are no significant differences in the rules of law or procedure in the two countries and communications between them are simple it seems to me that the decision is not one of overwhelming significance. Thus, in my view, this kind of case does have the character of an interlocutory application.

Be that as it may, I turn to examine what are the important issues which are said to justify a second appeal. First, it was contended that an important issue of law was involved, namely the question of the proper

interpretation of Rule 219(b)(iii) of the High Court Rules and the applicability of that rule to the particular facts of this case. However, Mr Illingworth properly conceded that on the question of interpretation I upheld the Pacifico interpretation. Thus it cannot be said that there is an unresolved question of interpretation of the Rule which might improve Pacifico's overall position.

The second part of the submission speaks of the applicability of Rule 219(b)(iii) to the particular contracts in issue. That by definition involves an assessment of facts and not a determination of questions of law. The way in which Rule 219(b)(iii) was to be applied to the evidence before the Court involved simply an assessment of the facts, or at least the undisputed facts, coupled the exercise of a discretion on the forum non convenience issue.

Neither the Master nor myself were faced with any uncertainty as to the law concerning jurisdiction or as to the tests which apply in cases where a party argues forum non conveniens. There is therefore no sufficient justification for another appeal. As Mr Justice Hay said in **Adams Bruce, Limited v. Frozen Products, Limited (No. 2)** [1953] NZLR 310 at 312:

> **"I fail, therefore, to see how the matter can be deemed to be one of public importance, when all that has been done by the Court is to apply an established principle of law to the facts of the particular case."**

Barker J in the **Bambury** case (supra) held that the would be appellant must show good cause that leave should be given. In my view Pacifico has not met that test.

It has also been said that the ultimate guiding principle must be the overall requirements of justice. There is no injustice in refusing to leave. If anything, it would be an injustice to Carter Holt to delay a hearing on the merits in its summary judgment application. This is particularly so when there is evidence in this case to suggest that the Pacifico arguments to date have been advanced, not so much from a genuine wish to have a trial conducted in Australia, but rather to gain a tactical advantage by delay. For all those reasons I refuse the application for leave.

It is necessary to alter the timetable which appears on page 19 of my judgment. Pacifico must file any further affidavits in opposition to the plaintiff's claim for summary judgment no later than 4 pm on 28 June and Carter Holt will have the usual right to reply with a further 7 days thereafter to matters which may be raised in any of the Pacifico affidavits.

As for a hearing of the summary judgment, the parties are agreed that, contrary to my indication that the matter should go into the ordinary summary judgment list, it is appropriate for it to be granted a special fixture for half a day. I therefore request that the Registrar provide the parties with a half day special fixture at the earliest available opportunity.

As to the matter of costs on the application for leave, I think it is appropriate to award Carter Holt $500 costs which shall be paid in any event.

Solicitors:

Buddle Finlay, Auckland for Plaintiff
Duncan Cotterill, Auckland for Defendant

NZLR

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