G3914

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

3/9

M No 661/93

UNDER The Companies Act 1955, section 218

NOT RECOMMENDED

1427

BETWEEN PETER JAMES FREDRICSON of Hong Kong, Finance Director

Plaintiff

A N D CAULTON HOLDINGS LIMIITED a company incorporated in Auckland, carrying on business there and elsewhere as a car hirer

Defendant

Hearing: 9 July 1993

Counsel: Ms .R.P. Harley for Plaintiff
Mr K.F. Gould for Defendant

Judgment: 9 July 1993

(ORAL) JUDGMENT OF WILLIAMS J.

The plaintiff applies for a review of a decision made by Master Feenstra on 8 June 1993. The application for review is out of time and under Rule 61C(2) leave is required before the review can proceed. The cases demonstrate that the seven day time limit must be strictly complied with

and leave to bring a review out of time will only be granted if first there is a sound explanation for the delay, and second the delay itself has not been unduly extensive. The Courts will also consider the substance or merit of the application.

Here there is no supporting affidavit providing an evidentiary basis for the application to proceed with a review out of time. Such an affidavit is customary in these cases. All that is before the Court is a paragraph or two in a written submission stating that neither the plaintiff's counsel nor his solicitor were available to consider the Master's decision until the day the time expired and claiming that the plaintiff, who resides in Hong Kong, was travelling away from Hong Kong at the time and there was insufficient time to obtain instructions. Neither of these reasons, even if they had been supported by evidence, would carry weight with me. Nor do I think, except in one respect to be mentioned, that there is any merit in the application for review. But for one reason I would not have entertained granting leave to bring the review out of time.

The reason that persuades me to grant leave is that, having been taken through the judgment in question, it seems to me that in one respect there has been an error. Here something of a runaway case has developed, as the Master and the Court of Appeal have already said. The case has "gone off the rails". The sole respect in which I think the Master's judgment is in error relates to an order for costs. It sometimes happens in cases like this that matters escalate to the point where one or other or both of the parties lose sight of the original dispute and there is engendered, the more the matter develops, a feeling of injustice whether or not there is any basis for such a feeling. I am granting leave simply to correct the error on costs because I do not wish that error to become a festering sore, making what is already a mess into a bigger mess.

At this stage I give an abbreviated summary of the circumstances. The plaintiff obtained summary judgment from the Master in February 1993. An appeal was lodged to the Court of Appeal by the defendant in February. The appeal procedures were not strictly followed so it became a matter where special leave to appeal was needed and, to jump ahead a little, leave was recently granted. On 13 April 1993 the plaintiff served a s 218 notice on the defendant requiring payment of the amount of the judgment. On 6

May, the day before the allocated hearing date for the stay application, the plaintiff launched winding-up proceedings relying upon non-compliance with the s 218 notice.

The next important phase involved an application made to stay execution pending the appeal. I do not propose to discuss the grounds but they were found to be meritorious and after a defended hearing on 7 May 1993 the Master granted a stay on condition that the defendant pay the amount of the demand plus costs and interest into the Court, with the requirement that the Registrar invest the funds so that the plaintiff would not lose anything by delay in obtaining the fruits of the judgment. As the Master said in the judgment under review at page 4:

> **"Once the order for stay of execution was made and accepted by the plaintiff everything else had to come to a stop".**

The plaintiff, in short, had secured the maximum possible protection in the circumstances. Nevertheless, as the Master correctly said, once the stay had been granted it was quite wrong for the plaintiff to take any further steps or threaten to take any further steps until the appeal had been determined and I agree whole heartedly with the Master p 4 of his judgment that:

> **"all subsequent attendances have been irrelevant, unnecessary and fruitless because after 7 May 1993 the plaintiff's position was or could have been protected in terms of that order."**

I reproduce from the Master's decision the subsequent history relating to the conduct of the plaintiff:

> **"When counsel for the defendant, after the stay order, in correspondence sought the withdrawal of the winding up proceeding he was met with the extraordinary response on 10 May 1993 that the plaintiff would withdraw the winding up proceedings if the appeal were withdrawn. As it was obvious that the plaintiff was not prepared to accept that the winding up proceeding could not proceed and there was a risk of advertising at any time, the defendant filed and obtained ex parte orders on 13 May 1993 to restrain publication of any advertisement, a stay of the winding up proceedings and an order for solicitor/client costs. There then followed the filing of these applications, in respect of which there have now been three special hearings in this Court. It seems to me that Mr Harley, who remarked that these proceedings were gaining a life of their own is quite correct but I consider that he and/or counsel for the plaintiff are entirely responsible for that. In my view the filing of winding up proceedings the day before the hearing of an application for stay of execution of the judgment suggests unreasonable haste when nothing could be**

> **gained by doing that at that time. Then, after accepting the order for stay of execution with full protection to the plaintiff, it seems to me quite wrong to use those proceedings as a negotiating point because at that stage there was in the circumstances of this case absolutely no chance whatever of the plaintiff being entitled to proceed with his petition as the full amount of the judgment, which was earning interest, was being held for him in Court.**
> **Once the order for stay of execution was made and accepted by the plaintiff everything else had to come to a stop and I consider that all subsequent attendances have been irrelevant, unnecessary and fruitless because after 7 May 1993 the plaintiff's position was or could have been protected in terms of that order".**

Thus the position was reached where the defendant, having in its favour the stay, could not secure an undertaking from the plaintiff not to proceed with the winding up proceedings. I have examined the exchanges between the parties dated 10, 11 and 12 May which make it quite clear that the plaintiff would not give an undertaking that the winding up proceedings would not be pursued. In my view the defendant was left with no alternative but to apply for a stay. This was done on an ex parte basis and granted by the Master. At that point the Master, as well as granting the order restraining the advertisement of the winding up petition, made an order that the plaintiff pay solicitor and client costs.

The next event was that on 14 May the plaintiff applied for an order rescinding that ex parte order for payment of solicitor client costs. On 14 May the Master rescinded that order and ordered that the costs question be argued on an inter parties basis when the plaintiff's application to rescind the restraining orders was heard.

The result of that rehearing is the judgment that is sought to be reviewed here. The Master, in my view, quite correctly refused to rescind the restraining orders. Having heard argument on the appropriate order for costs on the original ex parte orders, he decided that the sum of $500 should be paid by the plaintiff. Then he said:

> **The two present applications to rescind the orders are dismissed with costs of $500 each in favour of the defendant, together with disbursements (if any) as fixed by the Registrar. The statement of claim in the winding up proceedings is also dismissed with costs of $300."**

The complaint is made that there were not in truth two applications to rescind at that stage because the application to rescind the order for solicitor and client costs had already been granted on 21 May 1993. I am

not sure that that is right because the precise notation by the Master on that first application says:

> **"adjourned to 26-6-93 to be heard at the same time as fixture for other application, costs reserved"**

Thus there is room for debate as to whether there were two applications extant on 8 June. If the Master's notation is accurate, and that is what must guide me, there were two applications under consideration. If in fact that order had already been granted there was only one. A pertinent point is that whatever be the position, it was inappropriate to order the plaintiff to pay two sets of costs at $500 each on the basis that $500 went to the costs of the application to rescind the order as to costs and the other $500 as to the application to rescind restraining orders. Indeed since the first application to rescind the ex parte solicitor client costs order had succeeded, it could hardly be right to order $500 costs against the plaintiff as the successful applicant. Indeed it was argued by Ms Harley that there should have been an award of costs in favour of the plaintiff since the plaintiff had succeeded in getting rescinded the ex parte order for solicitor and client costs. I consider, with great respect, and this was indeed acknowledged by the Master, that an ex parte order for payment of solicitor client costs was inappropriate. A special order of that kind could rarely, if ever, be made on an ex parte basis. To the extent that the plaintiff had to go to the trouble of filing an application to secure rescission of that ex parte order for solicitor client costs, it should have been entitled as the successful party to a modest order of costs.

It can only be a modest order because once the Master realised what had happened there was no real argument about it and, judging from his notation, he rescinded the order as to costs without requiring any argument. However, to the extent that there was cost involved in preparing the application and appearing before the Master, the plaintiff should have some modest award of costs and I fix those costs at $250. In my view the $500 costs that was duplicitous must be quashed. The end result is that there will remain from the Master's decision the $500 costs made in substitution for the solicitor client costs order, $500 costs for the failed defended application to rescind the restraining orders and $300 costs on the dismissal of the winding up proceedings.

In my judgment it was proper to dismiss the winding up proceedings and the argument that, in the face of the pending application for stay it was permissible for the plaintiff to commence the winding up proceedings on the footing that some other creditor might then be enabled to step into the plaintiff's shoes is fallacious. The simple fact is that, in view of the stay, the winding up proceedings should never have been continued or, put more accurately, there should never have been a refusal to give the undertaking not to continue with them.

In my view the Master was quite right to be extremely critical of the conduct of the plaintiffs and his advisers after the making of the stay on 7 May and the costs order, which I have allowed to stand, is entirely appropriate.

The Master was correct to characterise the conduct of the plaintiff in its solicitor's letter of 10 May 1993 as extraordinary. The background of that correspondence is that counsel for the defendant after the making of the stay order, had sought the withdrawal of the winding up proceeding or an undertaking that it would not proceed. Counsel was met with the extraordinary response that the plaintiff would withdraw the winding up proceedings if the appeal was withdrawn.

This application for review, apart from the costs matters to which I have referred, was wholly unmeritorious and but for those cost matters I would not have granted leave to bring the proceedings out of time. Since in the end I have found it appropriate to modify the Master's decision, I am not proposing to exacerbate matters further by making any award of costs in relation to today's proceedings. What I do say however is that, if the plaintiff is ill advised enough to take any further proceedings pending determination of the appeal, this Court will become increasingly unsympathetic. The plaintiff must understand that the defendant has a right to appeal, which is in the course of being exercised, and the Master has given to the plaintiff the maximum degree of protection which is available where the opposing party exercises a right to appeal.

In summary, I grant leave to bring the review out of time. On the review itself I modify the costs order as indicated. Otherwise the review proceedings are dismissed with no order as to costs.

Solicitors:

Russell McVeagh McKenzie Bartleet & Co., Wellington for Plaintiff
Lamberg & Co., Auckland for Defendant