NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

HC 53/93

IN THE MATTER of Part V of the District Courts Act 1947

BETWEEN M F SZEWCZYK

Appellant

A N D G F AALDERS

Respondent

Hearing: 7 February 1994

Counsel: A Challis for Appellant
R M Dillon for Respondent

Judgment: 7 February 1994

ORAL JUDGMENT OF ROBERTSON J

This is an application for leave to appeal to the Court of Appeal pursuant to s 67 of the Judicature Act 1908. The appeal in this Court was heard in November 1993 before Williams J. It has come to my attention in the absence of the appellate Judge.

The appellant and the respondent own adjacent sections. They have owned them for 12 or 14 years. The appellant resides for a substantial part of the year out of New Zealand. In 1987 the respondent was alleged to have chopped down half-a-dozen pine trees. The matter has maintained the interest of lawyers and Judges to an extraordinary degree since that time. There was a 7 day hearing in the District Court before His Honour Judge Morris, at the conclusion of which he found for the respondent. There was a two day hearing before Williams J and in a comprehensive reserved decision he found for the respondent also.

Ms Challis has had the unenviable task of having to advance this proposition without having been involved in the previous litigation. She faced a Judge who had spent some considerable time over the weekend reading the background and a reading of the file indicated this was in a nutshell, a disgruntled litigant wanting yet another "bite of the cherry". Ms Challis was not deterred and with commendable professionalism advanced the instructions which she has from solicitors acting on behalf of the appellant.

The principles to apply are well known and they were succinctly stated by Salmond J in *Rutherfurd v Waite* [1922] GLR 34. There really is no difference in the thrust of the approach in the more recent re-statement by the Court of Appeal in *Cuff v Broadlands Finance Limited* [1987] 2 NZLR 343.

It is said that the two fundamental issues determined by Williams J were whether a Mr Monk was held out by the appellant as having ostensible authority to organise the removal of trees and secondly, whether Mr Monk gave authority for the removal of the trees. It is important I think to focus

on that because that is what the case is about. Even without adopting the effectively dramatic course which Mr Dillon does to underscore that the issues are really factual (by counting words in the submissions) one cannot help but conclude that what was decided was as a result of the assessment of the evidence which is available.

There are no substantial questions of law. There are no matters of public interest or of community gravity. As counsel has said this was a neighbour dispute. As any Court knows they often engender more heat than light.

An experienced and practical District Court Judge listened to a volume of people give evidence for some days. It may be true that the Judge did not in words of one syllable definitively express his assessment of credibility. But even one with the meanest intelligence could not help but see the thrust of the assessment which is implicit in his entire decision making process.

It is clear that this failure was substantially ventilated before Williams J. He in no uncertain terms made findings - made is possibly the wrong word - for he merely articulated what was implicit in the District Court Judge's decision. That is now complained about by the appellant as being improper, unfair and detrimental to his interests in that neighbourhood.

One always prefers to see litigants not going away dissatisfied. Sadly however some people will always be disgruntled if things do not go exactly their way.

I can see nothing in this case which could go anywhere near justifying a second round of appeal. No matter how the issues are dressed up or what sort of semantic construction is put upon them, at the end of the day there was a factual dispute and that has been determined. There are now concurrent findings of fact in the District Court and the High Court. There is nothing which in my view could possibly justify the matter proceeding further.

I am told by Mr Dillon that the very substantial award of costs made in the District Court and the High Court have not been satisfied. There could be no basis for a stay. There was never an application in that regard. The failure to meet these awards speaks volumes as to the position of this appellant and underscore my assessment that what is being dealt with is not a substantial legal issue but a factual rehearing.

The application for leave to appeal is accordingly dismissed. The respondent is entitled to costs on this application which I set in the sum of $525.

J

Solicitors

Harman & Co, Christchurch for Appellant
Gaze Burt, Auckland for Respondent

NZLR

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