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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY
IN ADMIRALTY

M. 79/96

ADMIRALTY ACTION IN REM

BETWEEN NORTHLAND PORT CORPORATION (NZ)
LTD

Plaintiff

AND THE SHIP "BIG Z"

Defendant

AND LUIS MEGO MIRANDA

First Intervener

AND FRANCISCO ANTONIO LAINEZ

Second Intervener

AND KIA JONG TAN

Third Intervener

AND JACK ALONZO FIERO

Fourth Intervener

AND JOHN CRISCI

Fifth Intervener

AND UNITED STATES OF AMERICA, acting by
and through the SECRETARY OF
COMMERCE

Sixth Intervener

AND TCW SPECIAL CREDITS

Seventh Intervener

In Chambers

Hearing: 1 August 1997

Counsel: P. Rzepecky for Registrar
A. Tetley for Westside Marine Inc.
A.D. Ford for Sixth Intervener

Judgment: 1 August 1997

ORAL JUDGMENT OF ANDERSON J

SOLICITORS

McElroys (Auckland) for Registrar
Russell McVeagh McKenzie Bartleet & Co (Auckland) for Westside Marine Inc
Bell Gully Buddle Weir (Wellington) for Sixth Intervener

On 10 July 1997 an auction was conducted on behalf of the Registrar pursuant to the Admiralty rules in respect of the ship "Big Z". The successful bidder was the sixth intervener, which is the United States of America acting by and through the Secretary of Commerce.

Mr Rzepecky has been acting on behalf of the Registrar for the purposes of the sale. Mr Ford is present as counsel for the United States Government. He presented for the purposes of settling the sale entered into in consequence of the auction and finds himself improvidently involved in litigation instead. Mr Tetley appears on behalf of a party called Westside Marine Incorporated, the registered office of which, if there be such a thing in terms of its law of incorporation, is unknown to the Court, but a letter bearing date 25 July 1997 addressed to this Court cites an address in San Diego, California.

I am informed by counsel for the Registrar, supported by counsel for the United States Government, that the sale was conducted strictly in accordance with Orders made by this Court. I refer in particular but not exclusively to an order by The Hon Justice Salmon made on Thursday 13 March 1997.

Salmon J's order makes provision for a form of credit bid by the United States Government in terms which suggest that its rationale is entirely mechanical, its purpose being to cover any outstanding claims in respect of the arrested vessel which stand in priority to those of the United States Government, and to meet the Registrar's costs in respect of the sale. Westside Marine Incorporated, as far as I can understand the argument which counsel has been obliged by his client to put at the eleventh hour on inadequate instructions, is that this mechanical method of meeting prior claims and necessary disbursements somehow affects the validity of the sale in terms of manifest fairness. Emphasis is placed by Mr Tetley on the international marine imperatives of manifest fairness in relation to such transactions.

Assuming as I must in the circumstances, there being no indication to the contrary, that the sale was conducted strictly or substantially in accordance with Orders of this Court, then Mr Tetley has the formidable task on behalf of his clients of persuading me

that his client has a seriously arguable case for obtaining an Order recalling the Orders of this Court authorising the sale. The principles attending the Court's power to recall a judgment are well established. Generally speaking a judgment once delivered must stand for better or worse, subject of course to appeal. As the Court noted in *Horowhenua County v Nash (No.2)* [1968] NZLR 632, an authority frequently cited before this Court, there would be great inconvenience and uncertainty if the position were otherwise. In the present case the applicant faces a further difficulty of establishing that there is a person with a status to bring a proceeding for recall.

Mr Ford, being obliged to argue without any opportunity for preparation as I have indicated, submits that great cost and inconvenience would be caused to his client if there were any delay at all having regard to berthage costs and a contract entered into by the United States Government for re-fitting the vessel. His understanding is that costs might be even as much as \$30,000 per day, but of course he has had no opportunity to verify figures or provide affidavits.

Mr Tetley seeks on behalf of his client by way of oral application an injunction restraining the settlement of the sale which was to have occurred one hour ago and which has been delayed pending the appearance of counsel for the purposes of this hearing. The principles attending applications for interim injunction are also well known. Succinctly put, the Court has a fairly broad discretion to make an order which is just in the circumstances, but conventionally a Court approaches the issue on the basis of a consideration whether an applicant has a seriously arguable case and what the balance of convenience dictates.

The concept of balance of convenience can sometimes be examined in terms of the path of least risk to all affected parties. Where a proceeding is sought by an overseas legal person, security for costs is virtually inevitable. Further, a condition of the grant of an application is an undertaking to meet damages if an injunction should have been granted but subsequently falls to be displaced. Any such undertaking must, of course, have a realistic quality and not be a mere statement by a person of no ability to meet the consequential damage. In the present case I have nothing more to go on than a

letter on its face purporting to be from an entity called Westside Marine Inc., Tenth Avenue Marine Terminal, 692 Switzer Street, San Diego, California. This is enough to satisfy me that the entity is an overseas person. There is nothing to show whether it has any substance at all or any ability even to meet costs. Still less am I able to be assured of any reasonable basis for thinking that the applicant might have standing to seek or a seriously arguable case for obtaining recall of the judgment and rescission of the Orders hereinbefore mentioned.

The applicant has had three weeks since the auction and chose to act only in the last few days and to instruct counsel, as I have mentioned earlier, at the eleventh hour. If it had a claim its nature would be that of an opportunity to be a successful bidder in a situation where a credit bid may not have been accorded to the United States Government or any other party. Looking at the matter realistically, I think it would have no greater opportunity to acquire the vessel in such circumstances, given the formidable financial realities of the United States Government, than it had last time when a purely mechanical expedient for effectuating settlement was accorded. I find:-

1. The applicant has no seriously arguable case.
2. The applicant gives no assurance, let alone any to my satisfaction, of its ability to meet any award of costs or damages in the event that an injunction were granted but subsequently fell to be discharged.
3. The potential damage to the purchaser, the United States Government, while not readily quantifiable before me at present is obviously reasonably palpable and there is no assurance of the ability of the applicant to meet it.

The justice of the case lies resoundingly in dismissing the oral application for injunction, and it is dismissed.

Because this judgment is to be issued for purposes which include transmission to Mr Tetley's client, I think it only fair that I should record the tenacity with which he pursued a very difficult and inevitably unsound application.

The question of costs is reserved.

A handwritten signature in black ink, appearing to read "N. Anderson J.", written in a cursive style.

NC Anderson J