

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-002489

BETWEEN

JOHN A BURROWS
Plaintiff

AND

HAPAG-LLOYD (NEW ZEALAND)
LIMITED
Defendant

Hearing: 30 July 2009

Appearances: N Carter for Plaintiff
J McMillan for Defendant

Judgment: 30 July 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitors: Carter & Partners, PO Box 2137, Auckland
Chapman Tripp, PO Box 993, Wellington

[1] Mr Burrows commenced these proceedings in person. His claim seeks compensation for loss of a horse freighting business, a racing stable and a horse agistment business together with general damages as a consequence of alleged over charging by a shipping company. The plaintiff in his claim pleads that the contracts he had were with Australia, New Zealand Direct Line Limited. He acknowledges that at some stage that company was amalgamated with CP Ships (UK) Limited. He claims that on or about 14 December 2005 CP Ships (UK) was amalgamated worldwide with Hapag-Lloyd (New Zealand) Ltd who are the defendants and it is on the basis of that amalgamation that he claims the defendants to be liable. The defendant's deny any liability or any contract with the plaintiff and along with their defence have brought an application for summary judgment.

[2] That application together with the claim were considered by Associate Judge Abbott on 2 July 2009 when directions were made requiring the plaintiff to file any notice of opposition with supporting affidavits by 16 July 2009 and directing the proceedings to be listed before me today for any further directions. Although the plaintiff did not file the affidavits and notice of defence within the required time, an affidavit has now been filed. That affidavit repeats the allegation contained in the claim that CP Ships Limited has amalgamated with the defendant and points out that CP Ships Limited and the defendant operates from the same office.

[3] The plaintiff has obtained legal aid. However, it is possible that the plaintiff may not be represented by counsel if the matter is adjourned to a full defended hearing. The plaintiff has indicated a wish to come to Auckland from Christchurch where he lives to be present at the hearing and to present its case.

[4] The evidence produced by the defendant is to the effect that until late 2005 the defendant and CP Ships (UK) Limited not only were separate entities but also operated in competition in New Zealand. According to the evidence of the defendant between October and December 2005 the entity that owned the defendant's parent company purchased the shares in CP Ships (UK) Limited. Consequently, the defendant and CP Ships (UK) Limited ceased to be competitors and according to Mr Carter became sister companies sharing an office in Auckland's North Shore from May 2006 when the defendant moved into CP Ships (UK) Limited's premises.

However, as is confirmed by a search of the registrar of companies the defendant and CP Ships (UK) Limited remain separate legal entities. Had the plaintiff been able to produce some evidence to support his contention that the defendant had assumed liability for contracts between the plaintiff and CP Ships (UK) Limited I would have had no hesitation in adjourning these proceedings to a defended summary judgment hearing. However, the plaintiff has produced no such evidence.

[5] In those circumstances I cannot see how the plaintiff's claim against the defendant can succeed. Clearly at the relevant time the plaintiff acknowledges his contract and the contract of his company was not with the defendant. There is no evidence to establish that the defendant has in some way taken over the liability attaching to the contracts between the plaintiff and CP Ships (UK) Limited. To a certain extent the summary judgment procedure operates for the benefit of the plaintiff in this case. It means that his exposure to further costs is removed by the entry of judgment against him. It also saves him and possibly the State the costs of proceeding with a hopeless case. It would also save him the costs and inconvenience of travelling from Christchurch to Auckland to present a case which clearly cannot succeed. Of course I accept that the summary judgment procedure also operates for the benefit of the defendant because once again the defendant is saved the costs of being involved in a full hearing to say nothing of the costs each party would be involved in what would be very complicated and expensive discovery involving documents, some of which may have been lost because I observe that the contracts apparently go back to the year 2001.

[6] Consequently, I can see little purpose in adjourning the proceedings. The plaintiff has had every opportunity to produce any evidence he might have in support of his claim. The evidence he has produced is clearly insufficient to contradict the records of the Companies Office and the evidence of the defendant. For the reasons I have given therefore I conclude that the plaintiff's causes of action cannot succeed against the defendant and the defendant is therefore entitled to summary judgment.

[7] Although the plaintiff is legally aided the defendant applied for costs relying on s 40(3) of the Legal Services Act 2000. That section commences with the provision that in the normal case no order for costs can be made against an aided

person unless there are exceptional circumstances. Those exceptional circumstances are set forth in subsection 3 and include the following conduct by the aided person, namely, any conduct that causes the other party to incur unnecessary costs, failure to comply with procedural rules, misleading or deceitful conduct, unreasonable pursuit of issues in which the aided person fails and unreasonable refusal to negotiate a settlement. It is submitted on behalf of the defendant that the plaintiff's conduct in pursuing the cause of action in circumstances where the defendant had pointed out that the cause of action had no chance of success justified the Court in awarding costs against the plaintiff notwithstanding the general prohibition contained in s 40. However, in determining the costs s 40(1) provides "such costs must not exceed an amount that is reasonable for the aided person to pay having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute." I have no evidence of the means of the parties other than of course the fact that the plaintiff has received legal aid which would support a conclusion that the plaintiff's means are limited. On the other hand I suspect that the defendant is a shipping company with significant means and is unlikely to be able to establish that the costs of being involved in this litigation have been so great as to effect its financial viability.

[8] In the circumstances I have decided not to exercise my discretion and conclude that there are exceptional circumstances to justify costs against the plaintiff. However, the plaintiff should be well aware that there is the jurisdiction to make such an order and I suggest that he bear that in mind when considering any further action he intends to take with regard to these proceedings.

Associate Judge Robinson