

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

CIV-2009-404-0856

BETWEEN	RAJENDRA PRASAD Plaintiff
AND	INDIANA PUBLICATIONS (NZ) LTD First Defendant
AND	ARIN LAL Second Defendant
AND	VENKAT RAM Third Defendant
AND	MAHESH PARERA Fourth Defendant
AND	CHENCHU NAGULU Fifth Defendant

Hearing: 3 November 2009

Appearances: Mr Prasad in person
Mr Harrison for defendants

Judgment: 16 November 2009 at 10 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

*This judgment was delivered by me on
16.11.09 at 10 a.m., pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

Counsel:

Mr R Prasad, P O Box 14-637, Panmure: by email: mails@nzicom.co.nz

Mr G M Harrison, P O Box 4338, Auckland: by email: gmh@shortlandchambers.co.nz

Background

[1] The defendants have appealed to the Court of Appeal against my judgment of 27 July 2009 declining the defendants' application for summary judgment. The defendants now seek a stay of the proceedings pending the determination of the matter by the Court of Appeal. They make their application pursuant to Rule 12 of the Court of Appeal (Civil) Rules 2005. Mr Prasad, the plaintiff, opposes the application.

[2] For his part, Mr Prasad has made an application for an order pursuant to s 64 of the Judicature Act 1908 that the High Court proceeding be transferred to the Court of Appeal for determination. The defendants oppose the making of that order.

Application for stay of High Court proceedings pending hearing of appeal

[3] The defendants' appeal has been filed and all necessary steps have been taken in order to obtain a fixture before the Court of Appeal. An allocation of a half-day fixture is awaited. Mr Harrison told me that it is unlikely that a date will be allocated by the Court of Appeal until the first quarter of next year. In the meantime, the hearing of the substantive matters in this case has been allocated a fixture in the High Court at Auckland for April 2011.

[4] The substantial reason why the defendants seek a stay of execution in this Court is that they wish to avoid having to engage in the full course of interlocutories that would be likely to be ordered in this case, which would prove unnecessary if they were to succeed on appeal. Mr Harrison pointed to the fact that if there was a stay which effectively arrested case management progression of this case until the determination of the Court of Appeal, that would not prejudice the plaintiff because the trial date will not be until 2011. Even if there is a pause in the proceedings at this point, there will be plenty of time to complete interlocutory steps, should that prove necessary, between the expected date of any Court of Appeal judgment and the date of trial.

[5] I agree that there is no prejudice to Mr Prasad in granting a stay. I also agree that the cost of interlocutory steps such as discovery and inspection would be wasted

if the parties were to find that the Court of Appeal agreed with the appellants/defendants' contention that the judgment should have been entered for them on their summary judgment application. I also accept that the appellants have been taking proper steps to prosecute their appeal and that the overall balance of convenience favours granting a stay. In reaching my decision, I do not propose to go into the merits of the appellants' case here: *Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Co Limited* HC WGTN, CIV-2005-485-819, 5 August 2005.

[6] For all of those reasons I conclude that the Court should exercise a discretion conferred by Rule 12 and order a stay of proceedings pending further order of the Court. The costs relating to the present applications are reserved.

Application for transfer of proceedings to Court of Appeal

[7] Section 64 of the Judicature Act 1908 provides:

64 Transfer of civil proceedings from High Court to Court of Appeal

- (1) If the circumstances of a civil proceeding pending before the High Court are exceptional, the High Court may order that the proceeding be transferred to the Court of Appeal.
- (2) Without limiting the generality of subsection (1), the circumstances of a proceeding may be exceptional if—
 - (a) A party to the proceeding intends to submit that a relevant decision of the Court of Appeal should be overruled by the Court of Appeal:
 - (b) The proceeding raises 1 or more issues of considerable public importance that need to be determined urgently, and those issues are unlikely to be determined urgently if the proceeding is heard and determined by both the High Court and the Court of Appeal:
 - (c) The proceeding does not raise any question of fact or any significant question of fact, but does raise 1 or more questions of law that are the subject of conflicting decisions of the High Court.

- (3) In deciding whether to transfer a proceeding under subsection (1), a Judge must have regard to the following matters:
- (a) The primary purpose of the Court of Appeal as an appellate court:
 - (b) The desirability of obtaining a determination at first instance and a review of that determination on appeal:
 - (c) Whether a Full Court of the High Court could effectively determine the question in issue:
 - (d) Whether the proceeding raises any question of fact or any significant question of fact:
 - (e) Whether the parties have agreed to the transfer of the proceeding to the Court of Appeal:
 - (f) Any other matter that the Judge considers that he or she should have regard to in the public interest.
- (4) The fact that the parties to a proceeding agree to the transfer of the proceeding to the Court of Appeal is not in itself a sufficient ground for an order transferring the proceeding.
- (5) If the High Court transfers a proceeding under subsection (1), the Court of Appeal has the jurisdiction of the High Court to hear and determine the proceeding.]

[8] The effect of Section 64 is to empower the High Court to transfer proceedings to the High Court where those proceedings are ‘are exceptional’: section 64(1). Proceedings which may be exceptional include those that satisfy the three criteria which are set out in section 64(2). Mr Harrison submitted, and Mr Prasad did not refute him, that this is not a case which comes within the circumstances referred to in s 64(2)(a).

[9] Likewise, Mr Harrison submitted that subsection ‘(b)’ did not apply. Mr Prasad did not submit otherwise. In my view, subsection (2)(b) is concerned with cases which are urgent because of their public importance.

[10] Subsection (c) does not apply either. Moreover, the various discretionary considerations under subsection (3) tell against the plaintiff’s application. The usual process by which a proceeding is escalated to the appeal Courts starts with a trial as a result of which many side-issues and matters of subsidiary importance are weeded out. Further, factual determinations which provide the framework within which the

appeal is decided are made at first instance. The structure of the appeal process is predicated upon a first instance trial in the form that I have described taking place. Only in exceptional circumstances will that be departed from.

[11] In regard to the other criteria set out in section 64, I am satisfied that this is not an appropriate case for the primary hearing of this matter and determination of factual issues as well as legal issues to occupy the time of three Court of Appeal Judges rather than one High Court Judge. As well, to accede to the course proposed by Mr Prasad would mean that the defendants would not have a chance to have the proceedings considered on appeal by two different Courts. For those reasons Mr Prasad's application to transfer the proceeding into the Court of Appeal is declined.

J.P. Doogue
Associate Judge