IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-8021

	BETWEEN	NEW ZEALAND SPORTS MERCHANDISING LIMITED Applicant
	AND	DSL LOGISTICS LIMITED Respondent

Hearing: 7 December 2009

Appearances: M Heard for the Applicant
D Hickson for the Respondent

Judgment: 7 December 2009

ORAL JUDGMENT OF WOODHOUSE J

Solicitors:
Mr M Heard, LeeSalmonLong, Solicitors, Auckland
Mr D Hickson, Solicitor, Auckland

[1] This is an application for an interim injunction which has proceeded on an urgent basis but on notice with both parties represented by counsel.

[2] The background to this matter is set out in a recent decision of the Court of Appeal: *New Zealand Sports Merchandising Limited v DSL Logistics Limited* CA691/2009, 1 December 2009.

[3] The essential issue dealt with by the Court of Appeal was the amount of money that had to be paid by the plaintiff to the defendant before the defendant was contractually bound to release the plaintiff's goods. The amount determined by the Court of Appeal to be payable has been paid. The defendant refuses to release the goods unless an additional sum it was claiming is secured by payment of that sum into the plaintiff's solicitor's trust account. The amount involved is approximately $290,000. It is relevant to my decision that this is the sum which the Court of Appeal has in effect unanimously held is not payable by the plaintiff to the defendant.

[4] The only basis upon which the defendant maintains that it can resist the plaintiff's claim to possession of the goods unconditionally is that the defendant wishes to apply to the Supreme Court for leave to appeal against the Court of Appeal's decision. I will come back to that point when considering the balance of convenience.

[5] Based on the present state of the law between these parties – if I can put it that way in light of the Court of Appeal's decision – there is no issue of fact or law between them. The defendant has no right to retain the plaintiff's goods. This is not simply a question as to the strength of the argument. The matter has been determined definitively by the Court of Appeal.

[6] There is also no issue as to the amount payable in terms of the Court of Appeal decision. The sum involved of approximately $12,000 is not in issue and it has been paid.

[7] In my judgment the balance of convenience overwhelmingly favours the plaintiff. A number of considerations are set out in the following paragraphs.

[8] There is a question as to the relative strength of the cases of the parties. I have already dealt with that. In terms of the Court of Appeal's decision, the defendant does not have an argument of fact or of law for me to weigh in this Court.

[9] There is a question as to the plaintiff's ability to pay the defendant if the defendant gets leave to appeal to the Supreme Court and is ultimately successful. In my judgment, this does not provide grounds for retention of the goods and certainly not in a way which tilts the balance of convenience in favour of the defendant. The defendant's contractual right to hold the goods pending payment is now at an end. If the Supreme Court grants leave and finds in favour of the defendant, the Supreme Court judgment would, in effect, be that the defendant is entitled to approximately $290,000. The right to recover that sum would remain.

[10] In terms of the contract between the parties I accept Mr Heard's submission for the plaintiff that the defendant has never had security over the goods in the sense that it could recover the debt by selling the goods. Certainly, in a practical sense, on evidence that I heard this morning, the defendant has no priority over the holder of a registered security interest, namely the plaintiff's bank. The bank has security over these goods for a debt of approximately $1.2 million. In that context I note that the goods were said by the Court of Appeal to be worth approximately $600,000. I was informed by Mr Heard that that is apparently the cost price.

[11] If the goods are not released it is likely, based on the evidence before me, that the plaintiff will go into receivership. It is also likely that if that occurs that will be the end of the plaintiff's business. There is ample evidence of this. It was not challenged. In fact, it was the basis for a submission for the defendant that there should be security by money paid into trust if the goods are released. These losses for the plaintiff would include the loss of the prospect of added profit arising from the 2011 Rugby World Cup. If it is not already apparent from the Court of Appeal's judgment, I note that the principal business of the plaintiff is selling sportswear under licence from organisations such as the Rugby Union.

[12] A further consequence of the plaintiff going into receivership would likely be that the defendant's prospects of any recovery if it ultimately succeeded in the Supreme Court would be negligible. Again, this is based on the evidence before me, including the amount owing to the bank. Indeed, when considering this aspect of the balance of convenience, and bearing in mind the difficulty of making these sorts of assessments when looking into the future, the defendant's position might be better served by releasing the goods and allowing the plaintiff to get on with its business, than by insisting on the amount in dispute being secured as a condition of release. Mr Hickson, for the defendant, advised me that the defendant's position is that it would prefer to take its chances with a receiver. That, with respect, is not a particularly persuasive submission when weighing the balance of convenience.

[13] Relevant to the matters I have been dealing with, and specifically to the question of securing the amount in issue, is the evidence that the plaintiff is not able to pay $290,000 as a secured sum even if it had a legal obligation to do so. The defendant, understandably, points to that to an extent as an indication in its favour on the balance of convenience relating to financial strength. In my judgment it does not take the balance very far at all in favour of the defendant. It tends to emphasise the matters I have just dealt with.

[14] A further consideration relevant to the present context is that there is a reasonable basis for concluding that at least some of the current financial difficulties for the plaintiff have arisen from the continued retention of the plaintiff's goods from the termination of the warehousing contract on 20 October. The defendant, understandably, continued to hold the goods in light of the High Court's decision. But, as it happens, in light of the Court of Appeal's decision, which of course is retrospective in its effect, the defendant's retention was and continues to be wrongful. The consequences of that in terms of the plaintiff's business have been adverse. There is a substantial body of uncontradicted evidence in that regard.

[15] Also relevant to the balance of convenience is that third parties are affected. One group of third parties are licensors of the plaintiff company. They expect their goods to be marketed. If they are not actively marketed there are obvious adverse consequences for licensors. And there is a further risk to the plaintiff from this in

that the licences may be terminated. There is evidence of that risk. Retailers buying from the plaintiff are also adversely affected. The evidence is that there are outstanding orders from retailers for a total sum of approximately $100,000. I apprehend from the evidence that these overdue orders can be met if the goods are released without further delay.

[16] The defendant, in its notice of opposition, has indicated that counsel who argued this matter in the High Court and the Court of Appeal is considering an opinion on whether there should be leave to appeal, but counsel would not be in a position to provide that before the end of this week. I am satisfied that the urgency in this matter for the plaintiff cannot warrant further delay. In any event, given the clear urgency, I would have thought, with respect, that a question as to whether there were grounds to apply for leave could have earlier been dealt with and, if need be, by instructing other counsel. In saying that I am not intending to be in any way critical of any of the counsel involved, including Mr Hickson who is not counsel from whom the opinion is being sought.

[17] Deferring action in this matter pending a possible application for leave to appeal to the Supreme Court is not an option in my judgment. Inquiries of the Supreme Court have indicated that an application for leave, if there is one, would not be heard until February 2010, at the earliest. If leave were to be granted the matter would then not be heard for a further period of time, which might be some months.

[18] It will, of course, be for the Supreme Court to determine whether leave should be granted, but I need to make some preliminary judgment in that regard. My judgment is that the defendant faces some difficulties in getting leave. Two grounds for seeking leave are set out in the notice of opposition. One is that the Court of Appeal failed to address arguments advanced for the appellant. With respect, that does not appear to come close to providing a basis for granting leave, or even basis for an appeal if leave was not required. The other ground is that an issue dealt with by the Court of Appeal is one of general public importance in the commercial arena. This involves a question whether the obligations in issue, contained in a clause in the contract, was an entire obligation. The issues that arose involved the application of well established principles to the particular contract between these parties. The

interpretation of the particular contract would not appear, at first blush, to be a matter of general public importance even if the public is confined to the commercial community. The matter of general public importance is the principle relating to entire contracts, but in that regard there is no issue – the law is settled.

[19] The order sought by the plaintiff might be considered to be mandatory in its terms. Mr Hickson did not submit that an order should not be made for that reason and there is ample authority justifying the grant of a mandatory interim injunction. In my judgment it is certainly justified in all of the circumstances of this case with the starting point, and the critical point, being the determination of the Court of Appeal.

[20] Mr Hickson submitted that, if an injunction is to be granted, it should be on condition that the disputed sum of $290,000 odd is paid into the plaintiff's trust account. I have already dealt with a number of considerations relating to that. For the reasons I have already stated I am not prepared to impose that condition.

[21] For all of these reasons there will be an order for immediate release of the goods. The formal order, following discussion with counsel on practical aspects, is as follows:

> The defendant will, not before 2:00 p.m., release to the plaintiff or the plaintiff's agents all of the plaintiff's goods present held by the defendant. That is to be done by the plaintiff arranging transport to go to the defendant's premises no earlier than 2:00 p.m. today to collect the goods which will be loaded on to the vehicles used by the plaintiff by the defendant's staff.

[22] The plaintiff has applied for full indemnity costs. The essence of the application is that the defendant's position is completely without merit and there should have been no resistance to the plaintiff's application for release of the goods.

[23] I do not consider that this is a case where indemnity costs should be awarded. The defendant understandably maintained a position based on the judgment of the High Court. It was certainly entitled to maintain that position up to 1 December,

when the Court of Appeal's decision was issued. Mr Heard submitted that in light of the Court of Appeal's decision the plaintiff should not have had to make this present application. I do not consider it can be said that the defendant's essential proposition – that there be a condition to release – was completely without merit. I have certainly rejected the submission, but the grounds for doing so do not provide grounds for indemnity costs in terms of the Rules.

[24] Mr Hickson accepts, of course, that costs should follow the event and submits that scales costs on a 2B basis are appropriate. I agree. There will be costs on a 2B basis together the usual disbursements.

[25] The plaintiff has sought leave to seek substantive judgment by way of summary judgment. That leave was not sought when the proceedings were filed because of the urgency. It is appropriate that leave be granted for that purpose and it is accordingly granted.

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Peter Woodhouse J