IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2009-404-001019
[2014] NZHC 178

BETWEEN	LOCKWOOD GROUP LIMITED Applicant
AND	BARRY SMALL Respondent

Hearing: 17 December 2013

Counsel: N W Taefi for Applicant
C S Withnall QC for Respondent

Judgment: 18 February 2014

JUDGMENT OF PANCKHURST J

The issues

[1] This is an application by the plaintiff for an extension of time to seek leave to appeal, and for leave to appeal to the Court of Appeal, against a judgment of Venning J delivered on 16 November 2011. Two issues require consideration:

(a) whether an extension of time is appropriate in the circumstances of this case, and

(b) whether leave to appeal to the Court of Appeal against the interlocutory decision is appropriate.

[2] The proceeding, however, is in a procedural tangle. The first statement of claim was filed in February 2009. The interlocutory decision concerns the fifth statement of claim filed in May 2011. The proceeding was entered on the commercial list until Venning J ordered its removal to the Invercargill Registry.

Counsel for the plaintiff (Ms Grant, not Ms Taefi) considered that given the removal order, leave to appeal was not required; rather, Lockwood could appeal as of right within 20 working days. An appeal was initiated within this time limit.

[3] On 23 July 2013 the appeal was to be heard by the Court of Appeal. The Court questioned whether an interlocutory decision made in a proceeding entered on the commercial list could proceed absent leave to appeal having been granted.[1] It concluded leave was necessary and declined to hear the appeal.

[4] Accordingly, just over two years after Venning J's decision in Auckland, I heard the application for an extension of time and leave to appeal sitting in Invercargill, so that an appeal to the Court of Appeal in Wellington could proceed.

Some background

[5] Lockwood produces solid wood houses for fabrication by franchisees located throughout New Zealand. In 2009 Mr Small contracted with a franchisee for a Lockwood home to be built at Te Anau. A dispute arose between Mr Small and the franchisee.

[6] On 19 September 2008 an arbitration agreement was concluded between Lockwood, Mr Small and the franchisee. A clause of that agreement provided that the parties would not bad-mouth or speak negatively of the other parties during the course of the arbitration. Lockwood considered that Mr Small breached this term of the agreement, including by contacting the presenters of the television programme, Fair Go, and making certain statements in that context.

[7] In February 2009 Lockwood filed this proceeding which was entered on the commercial list at Auckland. The statement of claim alleged only one cause of action, actual and anticipatory breach of the confidentiality term of the arbitration agreement. The relief sought was an injunction, and costs. A without notice interim injunction was granted against Mr Small.

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[1] Pursuant to s 24G of the Judicature Act 1908.

[8] From the beginning of 2009 until the hearing before Venning J on 4 November 2011 there were numerous developments. These included an application to commit Mr Small for contempt of court, dismissal of that application, modification of the terms of the interim injunction, the filing of amended statements of claim, applications for further particulars and service of a notice to Mr Small to answer interrogatories. The interrogatories were answered in late November 2011, shortly after Venning J's interlocutory decision.

[9] I shall refer to some aspects of the interlocutory history as required in the course of this judgment.

The required approach

[10] Counsel disagreed about the approach to the present application. Ms Taefi submitted that as the proceeding is not presently entered on the commercial list s 24G does not apply. Instead, her submissions were directed to r 20.4 by which 20 working days is allowed for appeals as of right to the Court of Appeal. The rule also provides power to extend time where appropriate.

[11] Mr Withnall QC, however, submitted that s 24G applied so that leave was required and the leave application to be filed within seven days of the decision unless further time was allowed by this Court. He further contended that the established principles governing leave to appeal in relation to a proceeding entered on the commercial list were therefore relevant.

[12] In my view the application is governed by s 24G. The judgment under consideration was delivered in relation to a commercial list proceeding and an aspect of the intended appeal is restoration of the proceeding to the list. The Court of Appeal in dismissing the appeal last year did so on the basis that s 24G applied and, accordingly, that the failure to obtain leave was fatal. It follows that I am bound to apply s 24G and to consider leave by reference to the principles applicable to a commercial list proceeding. I think the test for an extension of time is similar, regardless of the approach to be taken. But the principles relevant to leave are unique to the commercial list jurisdiction and require a different approach.

Extension of time

[13] In considering whether to grant an extension of time to bring an appeal a number of matters fall for consideration. These are the extent of the delay, the reason for the delay, whether an extension will occasion prejudice to other parties (over and above that involved in responding to an appeal) and whether there is substance in the proposed appeal. Consideration of the first three factors is straightforward in this instance. It is convenient, therefore, to deal with delay, the reasons for it and prejudice, before turning to whether a grant of leave is appropriate since that enquiry extends to the substance of the proposed appeal.

[14] The chronological delay is lengthy, being over two years. However, the reason for the delay is explained in an affidavit sworn by Ms Grant in support of the application. She has deposed that she turned her mind to the issue of appeal and concluded that because of the removal order r 20.4 applied and Lockwood had 20 working days within which to file its appeal. It did so on 13 December 2011. Counsel was "confident of the logic of this approach" since it seemed "completely incongruous" for Lockwood to have to seek leave within seven days when its proceeding had been taken off the list.

[15] I note that the Court of Appeal said that leave was not sought because neither counsel had "turned their minds to this question". However, Ms Taefi appeared in the Court of Appeal, whereas Ms Grant had appeared in the High Court.

[16] There is no suggestion of prejudice caused to Mr Small by the delay over and above the expense and further delay entailed in defending the appeal should leave be granted. Indeed, the defendant was promptly on notice of the intended appeal; and a case on appeal, chronologies, a list of issues and written submissions were prepared for the July 2013 Court of Appeal hearing.

[17] In these circumstances I am satisfied that an extension of time is appropriate provided the principles for granting leave to appeal in a commercial list context are satisfied. In other words, the nub of the matter is whether this is a case for leave to appeal or whether, as Mr Withnall contended, the appeal lacks substance and the application should fail on that score.

Leave to appeal

[18] The principles relevant to granting leave under s 24G are conveniently summarised in *McGechan on Procedure*.[2]

> (a) A high threshold for granting leave exists, as the Commercial List is designed to secure the expeditious completion of the interlocutory stages of a case and so minimise delays in its ultimate disposition.
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> (b) Leave will only be granted where circumstances warrant incurring further delay.
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> (c) Error of fact or law is generally insufficient; the case must be such as to create real detriment if not corrected, relate to an important question of law, or touch upon a matter of general or public importance.
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> (d) Challenges to discretionary orders made by a Commercial List Judge will not lightly be initiated by the Court of Appeal.

[19] These principles, however, are subject to qualification in at least one respect. A central aspect of the intended appeal is that the Judge was wrong to strike out various paragraphs in the operative statement of claim. It has been recognised that leave should be granted more readily in relation to a successful strike out application, since the expeditious completion of the interlocutory stages of a case carries less weight when the judgment to be appealed has the effect of disposing of the proceeding. In that situation a lower threshold is appropriate.[3]

[20] In considering whether a grant of leave is appropriate I need to consider four rulings made by Venning J, each of which is the subject of the intended appeal. I shall do so by reference to four separate headings. The submissions of counsel were almost entirely directed to the merits of these intended grounds of appeal. The arguments gave the impression that it was for me to determine the merits, when that is not the case. I must decide whether leave is warranted in light of the relevant principles and with an eye for the fact that certain paragraphs in the statement of claim have been effectively determined by being struck out.

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2 Andrew Beck and others McGechan on Procedure (looseleaf ed, Brookers) at [J 24G.01].

3 *Meates v Taylor [Extension of time]* (1992) 3 PRNZ 483 (CA), *Opotiki Packing and Coolstore v Opotiki Fruitgrowers Co-op (In Rec)* (1998) 12 PRNZ 663 (HC).

The strike out of paragraphs 31, 33, 36 and 37

[21] Venning J struck out the following paragraphs from the fifth iteration of the statement of claim:

> 31. On a date currently unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 3 March 2009, Mr Small told Mr Mike Ross about the Odin dispute and said or implied that Lockwood was:
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> (a) Accountable for the construction failures of its franchisee
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> (b) Legally liable for correction of the defects; and
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> (c) Failing to meet its obligations in relation to the defects.
>
> Or words to that effect. At present, the plaintiff does not know the precise words used.
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> 33. On a date unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 25 March 2009, Mr Small told Mr Norm Kensington about the Odin dispute and said or implied that Lockwood was:
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> (The same particulars and concluding sentence as in 31 followed).
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> 36. On a date unknown to the plaintiff but after 19 September 2008 and on or shortly prior to 17 August 2009, Mr Small told other members of the public, the names of whom currently are unknown to the plaintiff, about the Odin dispute and said or implied that Lockwood was:
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> (The same particulars and concluding sentence as in 31 followed).
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> 37. Alternatively, or in addition, on a date unknown to the plaintiff, Mr Kensington and/or Mr Ross republished the statements made to them by Mr Small, and detailed in paragraphs 31 and 33 above, to other members of the public, the names of whom currently are unknown to the plaintiff. Currently, the plaintiff does not know the precise words used.

These paragraphs were relevant to the second and third causes of action in defamation and injurious falsehood. By reference to these and other paragraphs Lockwood alleges that it was defamed, and claims a permanent injunction and damages of $1,110,000 by way of relief under each cause of action.

[22] The effect of the interlocutory decision is to narrow the ambit of these two causes of action. Mr Small faces further allegations of defamation based on:

- an email sent to Fair Go dated 16 September 2008,[4]

- an email copied to Ms Batt, a franchisee in the Queenstown area, on 16 November 2008,[5]

- an email to Kevin Milne, a Fair Go presenter, on 19 February 2009,[6]

- an email circulated to several Lockwood franchisees on 20 February 2009,[7]

- a further email to Ms Batt which was forwarded by her by Lockwood on 24 February 2009.[8]

Each of these communications is alleged to be defamatory and/or to constitute injurious falsehood.

[23] The obvious difference between the allegations left standing, and those struck out is that the latter relate to oral communications Mr Small is alleged to have had with Messrs Ross and Kensington, or with unknown members of the public, and that Mr Ross and Kensington similarly re-published what they were told to unknown members of the public. The struck out paragraphs first appeared in the third iteration of the statement of claim dated 12 February 2010. In a judgment delivered in April 2010 Allan J described these allegations as somewhat discursive and pointed out that the actual words alleged to have been used by Mr Small would have to be pleaded in the usual way. Subsequently, Lockwood was ordered to provide further particulars of these allegations.

[24] Venning J gave detailed reasons for his decision to strike out the paragraphs. He was requested not to strike out these paragraphs because the day before the hearing interrogatories had been served seeking answers from Mr Small to enable the words alleged to have been spoken by him to be identified and pleaded. The Judge found that it was not in the interests of justice to await a response to the

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4 Fourth amended statement of claim, 3 May 2011, paragraphs 6 – 7.
5 Paragraphs 12 – 13.
6 Paragraphs 15 & 16.
7 Paragraphs 19 – 21.
8 Paragraphs 23 – 26.

interrogatories. He noted how long the proceeding had been afoot, that a notice to provide further particulars had not been met, that directions at a telephone conference to provide the particulars had not been met and that the only response was the service of interrogatories at the eleventh hour. The Judge considered it was a matter of discretion whether he deferred a decision on the strike out application until after the interrogatories had been answered. Finally, he noted that should Lockwood obtain evidence of the specific words used, including details of when, where and the circumstances in which the statements were made, it could re-plead, provided the further allegations were within time, or leave to commence out of time was obtained, together with leave to amend the pleading (if required).

[25] Ms Taefi advanced several arguments in relation to this aspect, including:

- That the Judge did not apply *Couch v Attorney-General*[9] which provides that caution should be exercised before summarily striking out a claim at an early stage of a proceeding.

- That it was legitimate for Lockwood to administer interrogatories and wrong of the Judge to strike out the paragraphs in advance of their being answered.

- That in the circumstances it was simply premature to strike out the paragraphs, since it could not be said that there was no arguable cause of action, or that the pleadings were otherwise frivolous or vexatious, or an abuse of process.

[26] In my view there is limited substance in this intended ground of appeal. The key points are that the allegations are of long standing, they remain obscure and devoid of detail, further particulars have been sought but not provided and there is every indication that obtaining evidence of the words alleged to have been spoken will be most difficult. I regard the reliance upon *Couch* as misplaced. The Supreme Court was considering a novel cause of action. That is not the case here. The relevant allegations comprise part of a conventional claim in

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9 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC).

defamation/injurious falsehood, but suffer from the major deficiency that the words said to be defamatory of the plaintiff remain unknown.

The Kensington claim

[27] An aspect of the first cause of action alleging breach of contract is that Mr Small made negative statements to Mr Kensington and that this resulted in his deciding not to purchase a Lockwood show home and relocate it onto a section he owned. Certain dates were in evidence at the time of the hearing in November 2011. Lockwood alleged that Mr Small made such negative comments to Mr Kensington after September 2008 and before 25 March 2009. After March 2009 the show home was offered for sale, Mr Kensington inspected it and took advice concerning his proposal to relocate it to his section. Such advice dissuaded him from continuing with the proposal. Lockwood's database records were consistent with Mr Kensington's account. The record showed that on 26 March 2009 Mr Kensington spoke to a Lockwood employee concerning the negative reports he had received from Mr Small. Yet, it is common ground that subsequently he explored the purchase of the show home, but then decided not to proceed with the venture. The Lockwood database record of Mr Kensington's expression of interest was dated 10 May 2009, and his decision not to proceed was dated 26 May 2009.

[28] Venning J found:[10]

> Lockwood's own records are inconsistent with the proposition that anything Mr Small said to Mr Kensington affected Mr Kensington's decision not to proceed. Its own records do not support its pleading that the negative comments made by Mr Small to Mr Kensington caused Mr Kensington to cancel his intention to buy.

The Judge also criticised the pleading that the loss of the Kensington transaction was "worth" approximately $110,000 to Lockwood. He said the claim must be for special damages and that r 5.33 required Lockwood to plead particulars supportive of the amount claimed.

[29] On my reading of the judgment it is apparent that Venning J was most influenced by the evidence before him, in particular that from Lockwood's own

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[10] At [57].

records. This confirmed that Mr Kensington's interest in the show home post-dated his discussions with Mr Small, yet he assessed the show home proposition and ultimately decided against it for reasons unrelated to anything Mr Small had told him. I see the concern about the loss of the transaction being "worth" $110,000 to Lockwood as an add-on, rather than the basis of the decision to strike out this particular special damages claim.

[30] To my mind the Judge's reasoning is highly persuasive, if not compelling. I doubt that there is any substance in this intended ground of appeal.

Further particulars of the claim for general damages of $1 million for lost sales

[31] In paragraph 42(a)(iv) of the statement of claim Lockwood alleged that negative statements made by Mr Small to named individuals, franchisees and members of the public caused:

> Loss of up to 10 sales to Lockwood. This belief is based on the fact that the sales of Lockwood products in Odin's former franchise territory[11] in the period after Mr Small's negative comments were made decreased to zero in 2009 and one for 2010, which is disproportionate to the decrease in sales in the market generally.

[32] Venning J considered that this paragraph did not plead a causative link between Mr Small's conduct and the loss of the $1 million. He noted that a disproportionate decrease in sales was alleged in Odin's area of operation, as compared to the market generally. However, no details were pleaded supportive of the disproportionate decrease, nor was it pleaded how Mr Small's actions could have had a particular impact in the Odin franchise area. Finally, there were no particulars provided to show that the loss of 10 sales caused a total loss of $1 million.

[33] These difficulties had earlier been highlighted at a hearing before Allan J. He delivered a judgment dated 9 March 2011 in which the Judge recorded that counsel for Lockwood acknowledged the need to plead sufficient particulars to establish the causative link between the actions of Mr Small on the one hand, and the losses sustained by Lockwood on the other. Accordingly, Allan J made a direction that

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[11] Odin was the name of the franchisee who supplied Mr Small's Lockwood house at Te Anau.

further particulars of the alleged losses, and how they were caused by the defendant, be provided.

[34] The fifth iteration of the statement of claim (and a further draft iteration provided to Venning J but not filed) did not address the deficiency. In the circumstances Venning J provided one last chance to provide the further particulars.

[35] Ms Taefi in foreshadowing the intended ground of appeal questioned whether the further particulars were necessary. She submitted there had been a failure to distinguish between pleadings on the one hand, and evidence on the other. She suggested that both the link between Mr Small's conduct and the downturn in the Odlin franchise area, and the disparity between that downturn and the national downturn were matters of evidence and not appropriate for further particulars. Counsel accepted that Lockwood will need to prove both causation and the $1 million loss at trial, but she questioned whether further particulars were required.

[36] This, it seems to me, was to resile from the concessions made almost three years ago before Allan J. I accept that the distinction between pleaded particulars and evidence can sometimes be elusive. That said, it seems that the present pleading in relation to this aspect of the claim is inadequate. It is not apparent how allegations that Mr Small made negative and possibly defamatory statements about Lockwood to Fair Go, to Messrs Ross and Kensington (both resident in the Waikato area) and to unknown members of the public, caused a disproportionate downturn in Lockwood's trade in the Fiordland/Central Otago area. Nor does the last filed iteration of the statement of claim give proper notice to Mr Small of the case he must meet in relation to the alleged $1 million loss. I accept there may be room for this particular deficiency to be met by the provision of financial records, as opposed to pleaded particulars. No doubt if pertinent financial information was supplied to Mr Withnall that might meet the situation.

[37] But, I am far from satisfied that the submission that nothing more is required at this stage because evidence at trial will repair the breach is sustainable.

Removal from the commercial list

[38] Venning J concluded that the proceeding did not readily fall within the categories set out in s 24B of the Judicature Act 1908. There is no ongoing commercial relationship between the parties. Lockwood and Mr Small were in a contractual relationship while the arbitration was on foot until about September 2009. Two of the causes of action, defamation and injurious falsehood, lack a commercial flavour. The Judge also concluded that Lockwood had not pursued its proceeding in a manner consistent with that expected of cases on the commercial list. As at November 2011 the proceeding was two years, nine months of age. Interlocutory progress had been slow, in part on account of Lockwood's failure to comply with Court directions. In these circumstances removal of the proceeding was ordered.

[39] The reasons given for making the order seem cogent. This was a discretionary evaluation. The order was made by a commercial list Judge, and the appeal points raised do not address the principles relevant to overturning an exercise of discretion.

Conclusion

[40] In my view the intended grounds of appeal lack substance and do not justify leave being granted. To the extent that elements of the claim have been struck out there were compelling reasons for taking that course of action.

[41] The direction to provide further particulars and the removal order are procedural and not determinative, as is a strike-out. But, the merits of these grounds are also dubious. For these reasons leave is refused and an extension is not required.

[42] Although I have approached this matter on the basis of the principles applying to commercial list interlocutory appeals, I am of the view that a standard appeal filed out of time and requiring leave would have encountered similar difficulty through the need to demonstrate that the appeal had substance.

[43] Costs must follow the event, and are awarded to the defendant on a 2B basis together with disbursements as approved, including travel costs.

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