

IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2006

IN THE MATTER of an Application for Leave to adduce further evidence

BETWEEN **PAPER RECLAIM LIMITED**

Appellant

AND **AOTEAROA INTERNATIONAL LIMITED**

Respondent

Counsel GJ Judd QC and AC Rowe for Appellant
AF Grant and AA Sinclair for Respondent

Hearing 9 February 2007

Coram Blanchard J
Tipping J
McGrath J

**APPLICATION FOR LEAVE TO APPEAL TO ADDUCE FURTHER
EVIDENCE
(VIA VIDEO CONFERENCE)**

10.22am

Blanchard J Now Mr Judd.

Judd May it please Your Honours, I appear with Mr Rowe for Paper Reclaim in support of the applications.

Blanchard J Yes Mr Judd, thank you.

Grant And Your Honour I appear with my learned junior Ms Sinclair for the respondent.

Blanchard J Yes, thank you Mr Grant. Now Mr Judd, we can at last see and hear you although you look a bit fuzzy and I don't know whether the viewing you're getting is any clearer but it probably makes little difference. It's your application if you'd proceed.

Judd Yes thank you Your Honour. What I would like to do first is to go through the documents....

Blanchard J Could you speak into the microphone please?

Judd What I would like to do first Your Honours, is that better?

Blanchard J Yes, although the shuffling of papers by others is not helping. It's not a particularly loud sound but we can hear you.

Judd Well if you can hear me Your Honours I'll continue whilst Madam Registrar's trying to see if she can improve the situation.

Blanchard J That's better.

Judd What I would like to do first of all is to have Your Honours look at the document which is the foundation for these applications. It's exhibit A to Mr O'Rourke's first affidavit and Your Honours will see that it's described as an agreement between Aotearoa International Limited and Paper Reclaim Limited and if we can go first to the second page you will see that it's been signed on behalf of Aotearoa and on behalf of Paper Reclaim and it's dated the 1st October 1997 and of importance is clause 9 which says what the agreement is. It's an agreement to allow for AIL to be an exclusive agent on the export market and it goes on to say that any deals direct by Paper Reclaim must be disclosed to Aotearoa. Then if you go back to the first page you can see from the opening three lines that the agreement was designed to formally cover all arrangements between the two parties and then if you go to clause 5 it says that the agreement will replace any prior agreement whether written or unwritten and clause 6 that the agreement it is on a monthly basis and can be terminated by either party with one month's notice. Now as I have indicated the second page of the agreement is signed by Mr Cash. I'll come back to that specifically in a moment, but in my submission the questions which arise need to be approached analytically and without emotion and regard must be had to facts and not to assertions. The fact is that this written agreement replaced any prior agreement. The plaintiff's claim is based on a prior agreement made in the 1980s, and it's not an issue in the substantive appeal that the agreement made in the 1980s was made. Paper Reclaim argued to the contrary and the Court of Appeal accepted that that being essentially a factual issue would not be appropriate to seek leave to appeal to this Court against that finding, but the point is that the written agreement doesn't have any effect on the question whether the agreement was made in the 1980s. The fact that the agreement was made and has been accepted by Paper Reclaim to have been made is essentially irrelevant because this written document replaced any earlier agreements. So really in my submission the critical question is whether or not the document is genuine.

Blanchard J No Mr Judd I don't think that is the critical question. Let us assume for the moment that the document is genuine. Even if it is, how can you possibly, having run your defence on one basis, now come back after considerable delay and on a second appeal and seek to run a completely different case which contradicts the case which was run at trial?

Judd Well the reason Your Honour is this, the reason why I submit that I am entitled to come to this Court on that basis, is because this document shows that the plaintiff's case was completely misguided, that the plaintiff's case was based throughout on a false premise.

Blanchard J They made the same mistake as you made?

Judd That's right, they made the same mistake as we made and either they made the same mistake as we made or they knew what the position was and decided not to raise it. Now we don't know that that's the case but I've dealt with that in para.39 of my written submissions and what I've pointed out there is that Mr Cash signed a document and it doesn't seem to be an issue that he signed the second page of these two pages and that second page contained the clause 'providing this agreement allows for the plaintiff to be an exclusive agent on the export market' and as the whole case was about the plaintiff's allegations that the defendant, had a contract giving the plaintiff exclusive rights to export the defendant's waste paper, the signature of a document being described as an agreement in 1997 dealing with that precise issue was fundamental.

Blanchard J So it's understandable that your people would forget about it but not understandable that Mr Cash would forget about it, is that the argument?

Judd No Your Honour that's not the argument. The argument is precisely the converse, because the only argument which could be said to be based on facts, which is advanced on behalf of Aotearoa, is that it is not credible that my clients' witnesses could have forgotten this agreement, but the point that I make in para.39 of the written submissions is that that cuts two ways. If it's not credible that my clients' witnesses would have forgotten about it then it's not credible that Mr Cash would have forgotten about it. I mean he signed a document which says 'this agreement allows for AIL to be an exclusive agent on the export market etc', so the argument on behalf of Aotearoa is that as they say is a bit undercut or undermined read of nugatory by the fact that Mr Cash must have forgotten also that he signed such a document. Now the point is that if, and the reason why I submit it, that the question of genuineness was critical, is because at least there can be some credible basis for saying that the agreement is not genuine, then we had a situation where all of us here, Your Honours in your Courtroom and we here, know that there is a document which makes the plaintiff's claim a false claim and the question really is, is this

Court going to exercise it's discretion in such a way as to allow this case to continue on a false basis when everyone knows that that is what is happening, and it's my submission that that could not possibly be an appropriate exercise of discretion. The discretion which exists obviously is a discretion which is to be exercised sometimes in appropriate cases and in my submission you couldn't really get a more appropriate case for the exercise of the discretion in this case when you have the emergence of a document which demonstrates that the plaintiff's claim is a false claim, that must surely be a situation where this Court should exercise the discretions which it has.

McGrath J Mr Judd I understand the argument you're advancing but the concern I have is that the function of this Court is an appellate function, indeed a second appellate function, and it's the essence of an appeal that the appellant seeks to obtain a judgment from the Court that ought to have given by the Court below because it's an error correction function if you like. Now that doesn't contemplate a complete change on the basis on which the case was run in the Court below and it seems to me that if we allow your application we're essentially allowing the introduction of a totally new course of action and in essence we're converting the process into something that is not an appeal. Now surely the Act can't have contemplated that in providing for miscarriages of justice to be a ground for appeal, it can't have contemplated that we would alter the essence of what we're doing in that way. I mean I'm merely suggesting to you that if we agree to this application we won't we be dealing with an appeal at all, we'll be having a new trial.

Judd Well exactly how the matter should be worked out will be a matter to be dealt with at the substantive appeal if these applications before the Court today are dealt with, sorry, are granted, but just

McGrath J But we've got to look forward to that, we've got to look forward to what the consequences will be, but I'm suggesting to you the consequences would be the introduction of a totally new cause of action with different evidence being admitted to support it and that's a new trial, it's not an appeal.

Judd Well in my submission it doesn't need to be that way. It hasn't been suggested I don't think that Aotearoa would be wishing to make a new claim based on the agreement, the written agreement. The only effect, the only effect that the written agreement has on the issues to be dealt with by this Court substantive appeal is in relation to the period of notice and if the agreement is admitted then the answer to the question 'how much notice should have been given' is given by this agreement. And the answer of course is one month.

McGrath J But the period of notice issue only arises because you're seeking to set up a new contract.

- Judd Well the period of notice is an issue which has been raised on Aotearoa's appeal and by subsequent addition we were permitted to also argue the period of notice
- McGrath J In the context of an agreement entered into in the 1980s.
- Judd Exactly, so Your Honours would be proceeding on the artificial basis of deciding what was to be reasonable notice arising out of an implied term of an agreement made in the 1980s, knowing that there is a written agreement of October 1997, which says that the notice period is one month. I really accept that it is a very unusual situation but at the end of the day what Your Honours must be seeking to achieve is a just outcome and the way in which Paper Reclaim is approaching the matter is not to say that Aotearoa must completely reformulate its case, but simply saying that on the basis of this document the notice period issue is one which is resolved in favour of one month and that's it.
- Tipping J Mr Judd can I just ask for some help on this point? If as you say we would be asked to deal with this case on a false premise but without this new evidence, can it not also be said that leave has been granted on this issue, if not others, on a false premise?
- Judd Leave on the issue of the length of the notice Your Honour?
- Tipping J Yes. I mean if it's as clear as this, I mean the whole substratum of the appeal, at least on this point, is completely misconceived. You've got your toe through the door on basis A, and are now saying well we want to have the case tried in this Court on basis B.
- Judd Well that's correct Your Honour and that's why of course it's necessary to apply for leave to amend the grounds of appeal as well as leave to admit this document.
- Tipping J But this ground of appeal isn't one of great or public importance. The only possible argument is that there would be a serious or whatever the phrase is, miscarriage of justice. That's really what you're saying is it?
- Judd Yes Your Honour.
- Tipping J If on a second appeal we don't allow you to present a completely different case there would be a serious miscarriage of justice. Speaking quite plainly that's the position isn't it?
- Judd No.
- Tipping J Analytically as you invited in your opening remarks.
- Judd Analytically Your Honour the position is that there is a written agreement.

Tipping J I know that, but can you not just address my point? You don't need to tell us five times that there is supposed to be a new written agreement. I've at least grasped that.

Judd Well if I understand Your Honour correctly, Your Honour is putting to me that I am seeking leave to make a new case in this Court.

Tipping J To avoid a substantial miscarriage of justice which would otherwise be present?

Judd Yes, and I submit that there is a substantial miscarriage of justice if there is a written agreement which shows that the plaintiff's case was a false case.

Tipping J Were you effectively in this Court going to try and impugn the judgment for fraud?

Judd No.

Blanchard J By false case aren't you suggesting that this was done deliberately?

Judd No Your Honour. That's why I used that term. It is objectively a false case because we know now that by this written agreement, previous agreements were replaced. I'm prepared to accept that in the same way as my clients' witnesses forgot about this agreement, so also did Mr Cash. I'm certainly not going to be advancing the contract, but there are only two alternatives because he did sign it. One is that he forgot about it and if he forgot about it then why should my clients not have forgotten about it and if he didn't forget about it well then that makes it worse, but I'm not going to be advancing the argument that he deliberately suppressed it.

Tipping J Well just assume we move on to this question of genuineness for the moment, just on the assumption that it's something we must consider, how do you propose that the genuineness of the document is to be tried in this Court?

Judd Well in my submission nothing has been put forward upon the basis of which it could be said that the document is not genuine.

Tipping J Well the other side have put notice haven't they that they dispute it's authenticity or genuineness, have I not read something to that effect?

Judd Well the position is that Mr Cash has accepted that the signature on the second page is his, or appears to have accepted that and so

Tipping J Could we not just confine ourselves to the precise question? I thought that the other side had said that they do not accept, indeed they contest the genuineness of either all or part of this document. Am I not right in that Mr Judd?

- Judd No that's correct Your Honour.
- Tipping J Well therefore there will be an issue in this Court as to its genuineness.
- Judd Well if there is an issue then Aotearoa has to support its position on that issue by producing some evidence to demonstrate, or to show that the document is not genuine because as I
- Tipping J Well that is what my question was leading to. Are you proposing that that should be done viva voce or by affidavit and then cross-examination in front of five Judges or what?
- Judd What I'm suggesting Your Honour is that it's already been done. If Aotearoa had evidence to indicate that the document was not genuine, then that evidence should have been put forward, and it hasn't been.
- Blanchard J They are saying it's not genuine and they're suggesting that the first page was substituted effectively and they're relying on the absence of Mr Cash's signature on that page and they're suggesting that factually it's a very unlikely document for them to have made. It doesn't square with, they say, it doesn't square with the facts of how payments were being made at the time. We're inevitably going to have to hear witnesses. We're going to have to try and conduct a trial in this Court and it's a partial trial because it comes against the background of all the other material and all the other allegations have been flying backwards and forwards about bad faith and so on, on both sides of the case.
- Judd Well if Aotearoa wish to maintain the, well although I think I have to accept that there might have to be a cross-examination on the affidavits, but that would deal solely with the issue of whether or not the document was a genuine document.
- Tipping J But if we work on the premise that both sides have innocently overlooked this apparently crucial document which seems if I can say parenthetically an inherently unlikely proposition, the question is who's going to bear the loss emerging from that situation. I think your clients, if this document was in your clients' advantage, you're going to bear the loss because it's hardly evidence. It was there to be found if a thorough search had been made.
- Judd Well the affidavits explain in my submission why it was not there to be found if a thorough search had been made because it was in a place where nobody would have expected
- Blanchard J If this document is as important as was being suggested, it seems to be unbelievable that all your people would have no recollection of it.
- Judd Well I put the point that I made before. If that's the case the same applies to Mr Cash.

McGrath J Yes but you're seeking the introduction

Blanchard J My point goes to genuineness.

McGrath J Yes, but it also goes to diligence. I suggest Mr Judd that to get this evidence in as fresh you have to show with due diligence that you, even with due diligence, it wouldn't have been found and all we've had on that at the moment in the affidavits as I see it is one that it's been forgotten, and two, that it was put in a box when it should have been put in some more apparently logical file or something of that kind. Now given the, I mean this apparent from the High Court judgment, the huge extent to which the documentary evidence was surveyed in the course of the trial, can you really say you've satisfied the diligence requirement for getting this evidence in as fresh evidence?

Judd Yes Your Honour I submit that I can say that that requirement has been satisfied. Mr O'Rourke's first affidavit explains where the document was. It was in an attic amongst archived files and the files that it was in described in para.2.6 Mr O'Rourke's first affidavit and in that paragraph he says 'in late September 2006 Murray James Pinkham found the document and he brought to me two brown cardboard boxes and drew my attention to a contract in one of them. He told me that while he was sorting through one of the boxes he discovered the contract amongst the other documents in respect of the Australian carrier operator *Manton, Woodall & Associates Pty Limited*. The boxes were mainly relating to commission and freight charges payable to *Manton, Woodall & Associates Pty Limited*. I was told that the contract was found in one of the two brown cardboard boxes, one of which is described as '*Mantoon Woodall*' and the other as '*Manton Woodall*'. These two brown cardboard boxes were placed behind the wages records boxes'. Now in Mr Pinkham's evidence

McGrath J Look I think we're familiar with all of the affidavits that Mr Pinkham supports it and the others including Mr Bland did too, but what I'm really putting to you is that all you've really told us through these deponents is that the document was put in a brown box which it shouldn't have been put in and put upstairs with other files and that the transactions concerns had just been forgotten about, now just for my own part, given the extent of the litigation that's involved here over 20 days of trial in the High Court, I would have expected some greater diligence or some indication of what had been done at the time to pull out all of the relevant documents to have been put before us. I mean it is really a very casual picture that's portrayed here. Look we've found another document, it got mis-filed, we've forgotten about the transaction so therefore we want the Court in effect to start this whole process again, or at least to consider an issue that was never considered before.

Judd Well you have to remember Your Honour that the plaintiff's claim was that there was an oral contract made some time between the end of November 1984 and the 31 March 1985 and the search for documents was obviously focused and given parameters by the plaintiff's claim. Now this agreement made in October 1997, Your Honour is suggesting that with due diligence in a search made after the proceedings were issued in 2001, perhaps it should have been found. Well in searching for documents for discovery purposes fairly obviously the defendants would be looking for documents which were within the parameters of the plaintiff's claim. Now

McGrath J But the documents in this case weren't just the contractual documents. I mean just a reading of the judgment shows that all sorts of documents came out at the trial covering the period right through to at least 2001 and obviously those were sort out and there were some discovery exercise of some substance. Why wasn't this particular apparently on your argument very important document turned up?

Judd Because the documents that were sort out were documents relating to, and in the files, relating to the dealings between the plaintiff and the defendant. Now this document because of it being put in this box relating to some Australian Carrier operator wasn't amongst the documents in files concerning the plaintiff and the defendant.

Blanchard J It seems to me amazing that your people would simply file it like that. They knew that they were dealing with somebody who was litigious; there had been lots of problems. They say in 1997 they managed to make a deal which would sort everything out and the relationship for the future would be dealt with on the basis of that document and then they put it to one side and totally forget about it. It's an incredible story.

Judd Well I agree with Your Honour, but it also an incredible story that Mr Cash must have forgotten about a document which whatever was on the first page, and I can come back to discuss

Blanchard J Well he only forgot about it if it actually existed.

Judd Well the second page obviously did exist. He signed it. He doesn't dispute that he signed it.

McGrath J I think Mr Cash's situation is a red herring. It's your application; you're the one who has to show that there was due diligence on this occasion and that despite due diligence this document wasn't found and therefore it wasn't produced. Now your people should have it seems to me have had enough knowledge of the reliability of their filing systems to know what they would have to look at when they're looking for relevant documents on dealings between the parties over the relevant period. There's nothing here to indicate they went about this in any diligent way at all. I mean there's a high area of policy here

Mr Judd. The Court can't allow a new case effectively to be set up as to what's the governing contract in parties relationships after a trial let alone after as a first appeal just on any sort of casual basis, because that would be simply allowing a party that had in retrospect chosen the wrong way to go in the litigation to repair it by coming up with another cause of action even after it had lost the case and I rather suspect that's the position you might be in, but the real test you've got to satisfy me on is that there was a diligent search for all relevant documents and this particular one wasn't discovered despite diligent search.

Judd Well I submit that there were many thousands of pages of documents and

McGrath J Yet the one document that would have solved the whole problem was overlooked.

Judd It was overlooked because it had been forgotten about and it had been placed in a position where when going through the discovery exercise one wouldn't expect it to be located.

Tipping J The evidence as to the actual search processes for discovery and trial purposes is pretty thin Mr Judd isn't it?

Judd Well

Tipping J There's pretty of evidence as to how they innocently happened upon this document later but there's precious little evidence as to the steps they actually took to make sure they had covered all the documentary material.

Judd Well really what is being suggested is that my client should have gone through every document in its possession, whether or not it had anything to do with this case because the problem here is that this document was in a box of documents which had nothing whatsoever to do with this case.

Tipping J Well I have to say that that seems an inherently extraordinary state of affairs, and a very convenient one too.

Judd What, that it was in a

Tipping J In a box that had nothing to do with this case.

Judd I must with respect challenge the premise which underlies Your Honour's observation, because plainly if my clients had considered that it's implicit in Your Honour's observation that my clients did know about it, but if they knew about it

Tipping J Well no not actually knew, but I find it extraordinary that a document that a document which basically says this is a new beginning and it's

all off on one month's notice when you're being sued for eight years notice, or whatever it was, has been overlooked. It's got to apply a wee bit of common-sense to an issue like this. But for me frankly Mr Judd the key point really is that your client is trying to set up a wholly new defence on the notice question, which would require considerable factual investigation as to authenticity and I find it difficult to accept that that is a proper use of the discretion. I hear what you say about oh there's going to be a terrible injustice here – I hear what you say about that, but litigation is an adversary process.

Judd Well I think that if Your Honour were to decide the application on that basis it would be necessary to consider what would be the nature of the evidence which would need to be adduced to deal with the authenticity issue and in my submission if there is to be any evidence additional to that which is already before the Court, then it would be confined to forensic evidence relating to the document itself.

Tipping J If we were to admit it the other side would be perfectly entitled, and probably would have to make further inquiries along those lines, if there view that this is not a genuine document.

Judd They already have Your Honour and if I can take Your Honour to Mr O'Rourke's second affidavit

Tipping J But they're not obliged to put in all their evidence about genuineness in relation to this hearing. It's only if we let it in that the issue of genuineness really strictly arises. They've just foreshadowed, haven't they, that they don't accept it's genuine and merely said that this isn't the proper forum if you like, or the proper occasion to have a major battle on genuineness. That would be if it's let in for the whole Court, not just for three Judges sitting to hear the application as to whether it should be let in. I just think we've said about as much as we can Mr Judd about this from your client's point of view. You're doing your best for your client's position, but as you yourself accepted, it is an incredible situation.

Blanchard J I agree with what my brother has just said. It seems to me Mr Judd it's far too late to be trying to raise this point now. We're at a second appeal level – we can really only determine the appeal on the basis of what was before the Courts below. If we were to exceed to your application it is as my brother has said a wholly new case. Effectively everything that went before would have to be scrapped and there'd have to be a new trial involving the question of authenticity, and the Courts simply don't operate in that way. You had your opportunity at trial. You may have had an opportunity after trial to go back and have the matter re-looked at in the High Court, but it's too late now for that as well. You're stuck with the situation you've got and the Court will simply have to determine the appeal on the basis of the material which is already in. I say that without wishing to determine the question about the other evidence which we have reserved our position on.

Judd Well the point was made about something being a matter for the full Court. I would submit that the question that Your Honour has just canvassed in that observation is actually a matter for the full Court.

Blanchard J Are you suggesting we should get another two Judges in?

Judd No, no Your Honour, what I'm suggesting is that the application for leave to admit this evidence should be granted and the application having been granted then the full Court decides what to make of it. I mean

Blanchard J What, after hearing all the evidence?

Judd No, no, after hearing the argument which includes argument in relation to this particular document. I mean the outcome might very well be, the full Court might very well decide that given the circumstances it's appropriate that there should be a retrial, unpalatable as that may be for all concerned. But really in my submission

Blanchard J Well if the three of us don't consider that that's the position it's unlikely that five are going to come to a different conclusion.

Judd Well that's true, three out of five would trump the other two but nevertheless the Court does have a discretion and I would submit that this very unusual situation is the very sort of situation where the discretion should be exercised in favour of allowing the document to be admitted.

Blanchard J Have you any case that you can cite to us which is at all similar to this?

Judd No Your Honour.

Blanchard J Alright, was there anything further that you wished to add?

Judd No I don't think so Your Honour.

Blanchard J Yes, well we will just confer for a moment. Yes Mr Grant we don't find it necessary to hear from you. The applications will be dismissed and we will issue our written reasons in due course. Thank you counsel.

Judd As Your Honour pleases.

Blanchard J We'll now adjourn.

11.04am Court adjourned