IN THE SUPREME COURT OF NEW ZEALAND

SC 37/2013
[2013] NZSC 60

BETWEEN	BROOKS HOMES LIMITED, MY REFUND LIMITED AND STEPHEN CAVELL BROOKS Applicant
AND	NZ TAX REFUNDS LIMITED Respondent

Court:	McGrath, William Young and Glazebrook JJ
Counsel:	B W F Brown QC and D J C Russ for the Applicants Z G Kennedy and M D Toulmin for the Respondent
Judgment:	21 June 2013

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay the respondent costs of $2,500 plus reasonable disbursements to be fixed by the Registrar.

REASONS

[1] NZ Tax Refunds Ltd was granted an interim injunction restraining the applicants from adopting the names NZ-Tax Refund and Tax Refund NZ and from using those names in website addresses.

[2] The interim injunction with regard to the name NZ-Tax Refund and its associated website was granted by Fogarty J in a judgment of 5 October 2012,[1] but he declined to grant an interim injunction with regard to the name Tax Refund NZ.

[3] On appeal, in a judgment of 27 March 2013, the Court of Appeal granted an interim injunction with regard to the name Tax Refund NZ and the associated website.[2] The Court of Appeal stated that the approach to an application for an interim injunction is well-established. The applicant must first establish that there is a serious question to be tried. Next, the balance of convenience must be considered. Finally, an assessment of the overall justice of the position is required as a check.[3]

[4] The Court of Appeal disagreed with Fogarty J's conclusion[4] that there was no serious question to be tried with regard to Tax Refund NZ. The Court then proceeded to conduct its own assessment of the balance of convenience and the overall justice of the case. It held it is necessary for an appellate court to carry out its own assessment where it disagrees with a lower court's finding that there is no serious issue to be tried, although it may derive assistance from the lower court's analysis.[5] Having done its own assessment, the Court granted the interim injunction.

[5] The applicants seek leave to appeal against the Court of Appeal decision. In their submission, even though the Court of Appeal disagreed with Fogarty J's view that there was no serious issue to be tried in relation to Tax Refund NZ, it was not entitled then to make its own assessment of the balance of convenience and the overall justice of the case. It should have applied the traditional approach and treated the appeal as an appeal from the exercise of a discretion.[6]

[6] The applicants' approach assumes that the issue of whether there is a serious question to be tried is a threshold question only and that it is not relevant to the balance of convenience or to the assessment of the overall justice of the case. This is

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1 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2012] NZHC 2598 at [64]–[66].

2 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [49] (*NZ Tax Refunds Ltd* (CA)).

3 At [12].

4 This was not a conclusion actually stated by Fogarty J, but the Court of Appeal interpreted his judgment as deciding that there was no serious issue to be tried with regard to the trade name, Tax Refund NZ, and its associated web address: *NZ Tax Refunds Ltd* (CA), above n 2, at [27].

5 At [13].

6 See the Supreme Court's discussion on the distinction between the approach of an appellate court for general appeals as opposed to appeals from exercises of discretion: *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

not how the issue has been approached in New Zealand. The merits of the case (in so far as they can be ascertained at the interim injunction stage) have been seen as relevant to the balance of convenience and to the overall justice of the case.[7]

[7] The question of whether or not the issue on an application for an interim injunction is a true discretionary decision or whether it is in fact an evaluative one,[8] and therefore, what is the appropriate standard of review on appeal, may be a matter of public importance. However, that question does not arise in this case. Even if the decision to issue an interim injunction is a discretionary decision and not an evaluative one, the Court of Appeal took a different view on the issue of whether or not there was a serious issue to be tried. As the Court of Appeal took a different view from Fogarty J on a matter relevant to the balance of convenience and the overall justice of the case, it necessarily needed to undertake its own re-assessment of those issues.

[8] In any event, the order in this case is made on an interlocutory application. We are not satisfied that it would be necessary in the interests of justice to hear the appeal before the substantive proceeding is heard.[9] Although the undertaking as to damages given by the respondent does not completely remove the risk of prejudice to the applicants, it is difficult to see that it would be in the interests of justice to hear the appeal at this stage. This is particularly the case as, in the ordinary course of events, the substantive case would probably be tried before this Court could hear any appeal.

[9] The application for leave to appeal is dismissed. The applicants, having been unsuccessful, must pay costs to the respondent in the standard amount.

Solicitors:
Fletcher Vautier Moore for Applicants
Minter Ellison Rudd Watts for Respondent

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7 See, for example, *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142, and *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168 (CA) at [41]–[42].

8 See the distinction discussed in *Kacem*, above n 6, at [32] and [35].

9 Section 13(4) of the Supreme Court Act 2003 and *Hamed v R [Leave]* [2011] NZSC 27, [2011] 3 NZLR 725 at [13].