IN THE COURT OF APPEAL OF NEW ZEALAND

CA391/2010
[2010] NZCA 424

BETWEEN	FIDELITY LIFE ASSURANCE COMPANY LIMITED Appellant
AND	GREGORY ALLEN PILKINGTON Respondent

Hearing: 17 August 2010

Court: Glazebrook, Venning and Simon France JJ

Counsel: P R Rzepecky and R Hern for Appellant
H A Cull QC and P A Morton for Respondent

Judgment: 20 September 2010 at 4.00 pm

JUDGMENT OF THE COURT

A The application to call fresh evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Simon France J)

Introduction

[1] Mr Pilkington had an income protection policy with Fidelity Life Assurance Company Limited (Fidelity Life). Mr Pilkington made a claim against the policy in November 2003, on account of a stress-related disability. From then until February 2010, Fidelity Life paid a monthly payment under the policy. In February 2010 the sum was $11,250 per month.

[2] There were issues between the parties over that time. Fidelity Life was concerned about the progress, or lack thereof, that Mr Pilkington was making. It sought to increase the rehabilitation and monitoring obligations on Mr Pilkington. Mr Pilkington took exception to some of the requirements and in October 2007 issued proceedings in the Wellington High Court (the initial proceedings). Eventually the parties reached an agreement that avoided the need for a hearing.

[3] However, on 5 February 2010 Fidelity Life stopped making payments. Two weeks later it advised Mr Pilkington that it had been carrying out an investigation, and had concluded that the policy should be voided for fraud. In broad terms, the allegations related both to withholding information at the time of applying for the policy, and providing misleading information during the period that Fidelity Life had been making the monthly payments. In addition to cancelling the policy, Fidelity Life also commenced proceedings in the Auckland High Court claiming reimbursement of all monies paid since the original claim in November 2003.

[4] Mr Pilkington responded to the cessation of his monthly payments by filing an application, in Wellington, for an injunction requiring Fidelity Life to continue payments pending a trial. Although the initial proceedings had been settled, no notice of discontinuance had been filed and formally the proceedings had been adjourned *sine die*.

[5] Mr Pilkington's application was made ex parte, but quickly became a contested event. The filing of evidence from both sides became a somewhat ambulatory event, characterised in our view by a lack of focus on the concept of relevance. Eventually Joseph Williams J, who was seized of the matter, drew a line

in the sand over the receipt of further evidence. A hearing on 1 April 2010 proceeded on the basis of the evidence filed to date, and on 14 April judgment was issued declining the application.

[6] In the 14 April ruling Williams J indicated that if he had been:[1]

> ... quite satisfied that failure to make interim mandatory orders to protect the plaintiff's position until trial would have led him to immediate and complete financial ruin, I would not have hesitated to grant the orders sought. Among other unacceptable outcomes of failure by the court to act would have been defeat of the applicant's access to justice.

[7] Six days later Mr Pilkington applied to the High Court for "review and recall" of the decision. Essentially Mr Pilkington said the process that had been followed meant there was information that he had been unable to file that would have satisfied the Judge's concerns. The review application led to more evidence being filed by both parties. On 17 May 2010 there was a further oral hearing and on 1 June 2010 Joseph Williams J partially granted the application for an interim injunction. The defendant was ordered to make ten monthly payments of $7,000. The reason for the injunction being in these limited terms was that the plaintiff had provided an undertaking from a third party which was limited to a total liability of $70,000.

[8] Fidelity Life now appeals. A trial date of 31 January 2011 has been set for the hearing of the now consolidated two sets of proceedings (Mr Pilkington having filed an amended statement of claim in his initial proceedings).

Judgments under appeal

[9] By way of background to the two rulings of Joseph Williams J, it can be noted that the basis on which Mr Pilkington sought an interim continuation of his monthly payments was that he was totally dependent on the monthly income. Mr Pilkington had lived in Vanuatu since the middle of 2007, and there he owned a boat and had a charter fishing business. He had invested in leasehold land with a

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1 At [26].

view to building. All these endeavours were subject to significant debt servicing and he faced financial ruin if he lost his sole source of income.

[10] In support of his application for interim relief, Mr Pilkington filed his own undertaking as to damages, and also affidavits and business/banking records supporting his claim of impending ruin. Fidelity Life was critical of the evidence. It said that it was incomplete, and that Mr Pilkington had been inconsistent in his evidence as to his commitments and assets. It also said that, based on his own evidence, the undertaking provided by Mr Pilkington was worthless, and if Fidelity Life ultimately succeeded, it had no prospect of recovering any Court ordered payments.

(a) First ruling

[11] In the first ruling Joseph Williams J identified the applicable law. Since it was conceded by Fidelity Life that there was a serious issue to be tried, the focus of the judgment was on the balance of convenience. Having noted that this involved considerations of the adequacy of damages, and the apparent strength of each side's case, his Honour cited[2] the test posed by Fisher J in *Telecom New Zealand v Clear Communications Limited*:[3]

> The question is whether it has been affirmatively shown that the risk of injustice to an ultimately successful, but temporarily unassisted, plaintiff is greater than the risk of injustice to a temporarily restrained, but ultimately successful, defendant.

[12] Before leaving the law, Joseph Williams J referred to cases which had discussed the issues arising with mandatory interim injunctions requiring the payment of money. The passages he cited established that there is jurisdiction to make such an order, but such orders will be rare.

[13] Against that background, Joseph Williams J concluded he was not satisfied that Mr Pilkington had established that he was in the level of financial peril on which the application was based. Mr Pilkington had filed a monthly budget setting out his

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2 At [15].

3 *Telecom New Zealand Limited v Clear Communications Limited* (1997) 6 NZBLC 102, 325 (HC) at 102, 335.

obligations, and several of the points raised by the Judge related to whether the evidence supported this claimed level of obligation and indebtedness. The points were:

a) Mr Pilkington claimed to be committed to paying $800 a month to his daughters. Evidence from their mother showed this was not so;

b) Mr Pilkington said he had missed loan payments, whereas records later provided by the bank showed this to be untrue;

c) The provision of business and banking records was incomplete, and there had been ample opportunity to redress this;

d) When confronted with inconsistencies Mr Pilkington changed his story.

[14] Joseph Williams J concluded that while relief had been theoretically possible Mr Pilkington had been less than truthful and his disclosures were less than complete. The application was declined. His Honour did however make the observation cited earlier[4] that he would have made an order had he been satisfied that financial ruin was likely to happen.

(b) Second ruling

[15] The oral hearing of the "review and recall" application took place on 17 May. The period before this hearing was marked by a flurry of affidavits; the relevance of many filed by both sides is at best elusive. Prior to the first hearing, four affidavits had been filed. Before the second oral hearing, a further 19 were filed. The common bundle also then had another four affidavits that were sworn after the oral hearing but before judgment.

[16] On the occasions when the affidavits (or parts of them) were directed towards the matters truly in issue, those filed on behalf of Mr Pilkington had two main aims –

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4 See [6] above.

to respond to the Judge's criticisms, and to update the Court on his circumstances. The affidavits filed in response by Fidelity Life, again to the extent they were relevant, sought to maintain or enlarge the picture of incomplete disclosure, inconsistency and untruthfulness.

[17] The second judgment of Joseph Williams J, rightly with respect, focussed solely on the facts. His Honour applied, but did not repeat, the law as identified in his first ruling. Concerning the points of criticism that had been made in the first ruling, based on the further evidence now available, his Honour noted:

a) he now accepted Mr Pilkington's claim about the $800 monthly commitment to his daughters;

b) he accepted that Mr Pilkington had not intended to mislead the Court about the missing loan payments;

c) an unexplained deposit of $8,000, concerning which Fidelity Life had raised issues, was now plausibly explained;

d) Mr Pilkington had disclosed to the Court all the records he had, and also all the records he could reasonably be expected to have.

[18] Having addressed these specific points, his Honour declared himself satisfied that Mr Pilkington presently had no source of income nor cash reserves. That was also the position with his wife. Mrs Pilkington had likewise kept the Court informed through this period. At one point she had obtained employment, but the job was cancelled the day before she was due to commence work.

[19] Joseph Williams J also concluded that, although there were still some unresolved issues, he was satisfied on the balance of probabilities that Mr Pilkington faced financial ruin unless monthly payments were resumed.

[20] Turning to the balance of convenience, it was concluded that the impact on Mr Pilkington of not obtaining relief would be "far greater" than that on Fidelity Life if it had to make payments. However, Fidelity Life was entitled to a fair level of

protection so the quantum involved in the mandatory payments should not exceed the protection provided by a new undertaking filed by a relative of Mr Pilkington. This undertaking was limited to $70,000, and that would be the maximum to which the Court would expose Fidelity Life.

Grounds of appeal

[21] The appellant advances its appeal on four grounds:

a) the Judge applied the wrong test when not requiring the plaintiff to establish irremediable prejudice (or irreparable harm) that cannot be compensated by damages;

b) the Judge failed to identify what financial ruin meant in the case of Mr Pilkington and thereby failed to identify the necessary irreparable harm;

c) the Judge wrongly gave weight to access to justice;

d) the Judge failed to assess if monthly payments by the defendant were the last resort, no other sources of income being available.

[22] Underlying these specific challenges is the proposition that the evidence filed by the plaintiff did not meet the standards required in order to justify an order of mandatory payments. In the earlier decision the Judge had found that Mr Pilkington had been less than truthful in his evidence, and there were serious gaps in the evidence filed. It is submitted the further evidence was not capable of remedying those deficits so as to allow for a different outcome from the initial decision.

The applicable law

[23] It is convenient to begin with a brief restatement of the applicable principles.

[24] The leading authority remains *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited.*[5] There the Court of Appeal endorsed the two step test of arguable case and balance of convenience,[6] but warned against a formulaic approach. Cooke J observed:[7]

> ... the balance of convenience can have a very wide ambit. In any event the two heads are not exhaustive. Marshalling consideration under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has to finally stand back and ask himself that question ... [a]n interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generalities.

[25] In our view, this remains the law. It appeared at times that Mr Rzepecky was seeking to add a gloss by reference to the concept of irreparable harm. The proposition seemed to be that a plaintiff needs to show irreparable harm or an interim injunction will not be issued. In support, reference was made to several Canadian decisions and to an oral decision of Panckhurst J in *Te Rapa Outlet Centre Limited v The Base Te Rapa Limited.*[8] Although Panckhurst J used the term irreparable damage in that decision, it was immediately followed by a reference to *American Cyanamid v Ethicon Limited*. We do not take his Honour to have been suggesting the law was different from that set out above. Irreparable harm may be a useful tool of analysis for assessing what consequences lie beyond the reach of damages as compensation, but that is all it is.

[26] In our view, it is difficult to see that issue can be taken with the Judge's identification of the law. Save for the appellant's emphasis on irreparable harm, the authorities Joseph Williams J relied on, and the extracts he cited, are exactly those which Mr Rzepecky urges on us. In *Telecom New Zealand Limited* Fisher J had noted that mandatory injunctions increase the potential for injustice to a defendant, because their very nature is more intrusive. He continued:[9]

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5 *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA).

6 As set out in *American Cyanamid Co v Ethicon Limited* [1975] AC 396 (HL) and *NWL Limited v Woods* [1979] 3 All ER 614 (HL).

7 At 142.

8 *Te Rapa Outlet Centre Limited v The Base Te Rapa Limited* HC Hamilton CIV 2008-419-1428, 21 November 2008.

9 At 102,335.

> But each case turns on its own circumstances. For example a defendant's withdrawal of a long-standing service could be more intrusive than an order requiring its continuation. A single action from the defendant which has the effect of saving the plaintiff's property from destruction might be easy for the defendant and critical to the plaintiff. The tests for prohibitory and mandatory injunctions are the same; it is merely that when they are applied to the factual circumstances of particular cases, different outcomes may result.

[27] Joseph Williams J expressly noted that mandatory injunctions for the payment of money are permissible but rare. Mr Rzepecky accepts this is a correct summary of the legal position, and the case really turns on the factual issue of whether these circumstances allow or require the making of a relatively uncommon order.

[28] Both parties referred quite extensively to Canadian authority.[10] Those cases, like the present one, arose in the context of cessation of disability payments under an insurance policy. The appellant used them to support its case that irreparable harm had standing as an independent requirement needing to be established. The respondent used them to show that orders such as that made by his Honour are not perhaps as uncommon as has been suggested.

[29] We see no case for suggesting any special rule applies to this sort of dispute. However we do observe that the nature of the dispute (monthly disability payments) and the attendant circumstances of the insured may often be factors given weight when assessing the balance of convenience. In *Ausman v Equitable Life Insurance,*[11] Henderson J commented that the wrongful withholding of disability payments may involve more than mere money. As well as taking away comfort and security, it can cause chaos in the plaintiff's affairs. The long term effects of the loss of security and the impoverished lifestyle caused by cessation can amount to more than the mere loss of money and be beyond the scope of damages.

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[10] *RJR-MacDonald Inc v Canada* [1994] 1 SCR 311; *El-Timani v Canada Life Assurance Co* (2001) 28 CCLI (3d) 195 (ONCJ); *Dempster v Mutual Life of Canada* [2000] ILR 5959 (ONSC); *Hedstrom v Manufacturers Life Insurance Co* (2002) 2 CCLI (4th) 175 (BCSC); *Traynor v Unum Life Assurance Co of America* (2003) 228 DLR (4th) 228 (ONCJ); *Poersch v Aetna* (2000) 19 CCLI (3d) 92 (ONCJ); *Dempster v Mutual Life of Canada* (2001) 55 O.R. (3d) 409 (ONCJ); *Hussein v De Marco* (2003) CarswellOnt 1256 (ONCJ); *Ausman v Equitable Life Insurance Company of Canada* (2002) 46 CCLI (3d) 14 (ONCJ).

[11] *Ausman v Equitable Life Insurance Company of Canada*.

[30] We refer to these authorities to make the observation that whilst damages may theoretically appear capable of redressing all loss if the plaintiff ultimately succeeds, more than monetary loss can be involved in some of the interim consequences and hardships. However, as noted, we consider the approach identified in *Klissers* is more than adequate to allow all relevant considerations to be taken into account.

Decision

[31] As noted, we consider the appeal amounts to a challenge to the Judge's application of the law to the facts. That being so, we structure our judgment by reference to the concerns raised by the appellant.

(a) Mr Pilkington's inconsistency and untruthfulness, as identified in the first ruling, and his lack of full disclosure, should still have been significant in the second ruling

[32] Fidelity Life submits that the Court, in ultimately making the orders, did not carry forward the assessments of Mr Pilkington that had been reached in the first ruling. Weight should still have been given to the Court's initial conclusion that Mr Pilkington had been less than truthful, and had made incomplete disclosure.

[33] Further, although the Court concluded Mr Pilkington had yielded up what he had, the disclosure was still nevertheless incomplete, thereby leaving the evidence too deficient to support the issuing of an order.

[34] Concerning the first point, the submission overlooks the fact that the Judge withdrew all the factual bases on which his initial conclusions were based. He concluded Mr Pilkington had been truthful about his commitment to his daughters; he accepted he had not sought to mislead; and he had accepted that Mr Pilkington had disclosed what he had, and had tried to obtain the records he needed. These conclusions undermined the earlier assessment of untruthfulness.

[35] In relation to inconsistencies we make three observations. First, we were far from convinced that some of the matters to which Mr Rzepecky referred were indeed inconsistencies. For example, the mystery $8,000 deposit on which Mr Rzepecky focussed was, in our view, consistently explained by Mr and Mrs Pilkington. Both identified that it represented wedding presents from guests who had been asked to give cash rather than any other form of present.

[36] Second, the apparent inconsistency between Mr and Mrs Pilkington as to what percentage of the $8,000 was spent on their honeymoon is, in our view, focussing on the trivial. Matters such as that could not possibly impact on the overall outcome.

[37] Third, in all these matters there is a need to have regard to Mr Pilkington's circumstances. Without warning, his monthly income payments were stopped, and proceedings were issued alleging fraud. The reason he had been receiving these monthly disability payments was that he was stressed and unable to cope. Mr Pilkington therefore had to deal with the immediate consequences of the cessation, make some assessment of where to go from there, and also assist from afar with court proceedings being launched in New Zealand. At the same time he had just become married, had pre-paid holiday plans, and his wife was unemployed.

[38] Finally, it seems apparent the obtaining of records from some institutions in Vanuatu may be more protracted than perhaps is common in New Zealand.

[39] All these factors need to be weighed in the mix when assessing a submission by the appellant that relief should be withheld because of the incomplete disclosure of records, or the occasional inconsistency between early statements and corrections once the error is identified. It was plainly a stressful, uncertain and somewhat chaotic situation in which Mr Pilkington found himself. The Judge assessed both the initial evidence, and the subsequent corrections. He was entitled to be satisfied with Mr Pilkington's explanations.

[40] The fact that there are gaps in the business records or banking statements is a factor that needs assessment in its particular context. The application was for interim

relief. The Judge concluded he would consider relief if imminent financial ruin could be shown. Even with matters and disclosure having progressed since the judgment under appeal, there is still nothing Fidelity Life can point to that counters the Judge's conclusion that Mr Pilkington had no income and no cash reserves. No previously undisclosed assets have been identified or suggested. Further, the Judge concluded that Mr Pilkington had done what he could be expected to do to obtain records. In these circumstances we see nothing in the fact of incomplete records that should lead a Court to a contrary conclusion.

(b) The Judge did not identify what financial ruin meant

[41] This point is at the heart of the appeal. We have rejected the appellant's legal proposition that irreparable harm must be shown. Nevertheless, the challenge exists factually in that it is submitted that it was never articulated what it was in Mr Pilkington's situation that was beyond the reach of damages.

[42] It is not possible to respond to this submission by reciting specific passages from the two judgments. However, if one reads the judgments as a whole, the concerns that led the Judge to conclude that financial ruin had been established are clear. The Judge concluded that the Pilkingtons had no income and no cash reserves. They plainly owed money secured against their assets and, without income, obviously they could not service those debts. Further, there were other debts. There was a significant six figure sum owing from previous legal services, and there were credit card obligations needing monthly servicing. Concerning these debts, Fidelity Life had contested Mr Pilkington's claim of imminent bankruptcy by filing evidence, not of his ability to meet the obligations, but rather of the lack of a viable bankruptcy jurisdiction in Vanuatu. Whilst that might be so, it did not defeat the point that Mr Pilkington, without any monthly payments, could not meet any existing obligations, and faced the loss of any assets against which those debts were secured.

[43] We have already commented on the human component of Mr Pilkington's situation, recalling that stress-related disability was the basis on which Fidelity Life had been making monthly payments for six years. Further, in addition to the loss of

assets, the Pilkingtons, as they had foreshadowed in their evidence, have had to sell what personal belongings they had in Vanuatu and return to New Zealand.

[44] In the circumstances of the case we do not accept that the Judge was wrong to conclude that the balance of convenience favoured Mr Pilkington. There were both immediate and impending consequences to the cessation of payments that supported a conclusion that damages were an inadequate remedy.

[45] It is convenient at this point to comment on one other aspect of the appellant's submissions. A persistent criticism has been that Fidelity Life is being made to pay the monthly premium due under the policy as if the plaintiff's claim was valid; in other words the plaintiff is obtaining the contested remedy he seeks. However, this complaint ignores the limited nature of the orders. They require only a partial payment of the monthly compensation due under the policy, and are limited in total to the quantum of an undertaking. The efficacy of that undertaking was not challenged before us, and its presence together with the fact they are only partial payments, significantly undermines the validity of the appellant's complaint in this regard.

(c) Access to justice is irrelevant

[46] The appellant's point is put in more absolute terms than we are willing to accept in what is a discretionary area that balances all relevant factors. We are not prepared to hold that access to justice could never be a relevant factor. However, we agree with the appellant to the extent that, in our view, caution must be shown. It is not generally the other party's obligation to fund a case against itself. Further, concerns over the ability to bring litigation are usually to be addressed by a civil legal aid system, and by procedural assistance such as fee waivers. An example of this system in action is this present proceeding for which Mr Pilkington has obtained a grant of legal aid for the appeal.

(d) Other sources of support

[47] The appellant submits that it had to be shown no other sources of support were available before an order against it could be made. We do not accept this proposition. The starting point is that Fidelity Life accepts Mr Pilkington has an arguable case that the monthly payments it is obligated to make under a contract between them should continue. It is difficult to see that the balance of convenience should involve, as is suggested, analysis as to whether Mr Pilkington's mother-in-law (the source of the undertaking) should mortgage her house to obtain funds for the Pilkingtons to live on so that an injunction that would otherwise issue against Fidelity Life might not.

[48] This is not to say that ready access to third party funds might not in proper cases be a relevant factor. It is a question of degree. Likewise, the capacity of the Pilkingtons to resort to New Zealand's welfare system could be relevant, but again not necessarily decisive. Further, that there might be options available to ensure that the Pilkingtons do not starve is not a complete answer. All the facts, including the nature of the insurance contract in issue, are relevant to the assessment of the balance of convenience.

A change in circumstances?

[49] Based on the evidence before the Judge, we are not satisfied he was wrong to make the limited orders that were made. However, Fidelity Life wish to introduce fresh evidence, namely the fact that since returning to New Zealand Mrs Pilkington has obtained employment. The income now available to the couple that was not previously available is around $70,000.

[50] The respondent opposes on the basis that any change of circumstances should be placed before the trial Judge. It is said that management of the case for trial is well under way. Further discovery has occurred and the trial Judge, if available, is in the best position to assess the significance of a change in circumstances. If the evidence is admitted, the respondent seeks leave to file further affidavits updating

the financial position of the Pilkingtons, their current fixed commitments and the level of debt they are servicing.

[51] We are of the view that the respondent is correct. If there is to be a further review of the position prior to trial, there should be a formal application to the trial Judge. We are not to be taken as encouraging that, given the time until trial. The fact that we prefer this course is also indicative of our view that whilst Mrs Pilkington's employment is a significant new development, it cannot be said that of itself it is determinative. There needs to be an inquiry, under the umbrella of balance of convenience, into the proper fixed commitments of the Pilkingtons and the impact of this income on them, balanced against existing factors such as the limited nature of the orders, and the existence of the undertaking. With a trial date looming, the question will still remain that posed by Cooke J in *Klissers* – standing back, where does the overall justice lie?

Conclusion

[52] Nothing raised by the appellant has led us to a different conclusion from that reached by Joseph Williams J. It was, and is, a fact driven assessment. It was an available exercise of discretion, and we agree that the circumstances of the case favoured an award which was appropriately tailored to the facts. Steps were taken to protect the money Fidelity Life was being required to pay and we are far from persuaded the Judge was wrong.

[53] The application to call fresh evidence is declined. The appeal is dismissed. The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
McElroys, Auckland for Appellant
Kathy Ertel & Co, Wellington for Respondent