

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV 2018-404-2659
[2019] NZHC 776**

BETWEEN COMMERCE COMMISSION
 Plaintiff

AND VIAGOGO AG
 Defendant

Hearing: 10 April 2019

Appearances: J D Every-Palmer QC and A D Luck for the plaintiff
 H O Meikle-Downing for the defendant

Judgment: 10 April 2019

JUDGMENT OF JAGOSE J

*This judgment is delivered by me on 10 April 2019 at 4.00 pm
pursuant to r 11.5 of the High Court Rules.*

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Registrar / Deputy Registrar

Counsel/Solicitors:
James Every-Palmer QC, Wellington
MinterEllisonRuddWatts, Auckland

[1] The plaintiff seeks leave to appeal against Courtney’s J’s decision of 18 February 2019, dismissing its application for interim orders.¹ The defendant (which disputes it is in any event within the Court’s jurisdiction) abides my decision.

[2] The appeal initially was sought to be brought by right on the last day for filing. The Court of Appeal Registry indicated leave would be required. The application for leave thus is made minutely late to this Court. It requires also an extension of time. Given those circumstances, I will grant the extension.

[3] The Commission reserves its position on whether such leave is required. Its counsel James Every-Palmer QC says its application for an interim injunction to restrain contended unlawful conduct “is not a matter of procedure, and reflects part of the substantive relief claimed in the Commission’s statement [of] claim so is not ancillary”, the Judge’s decision therefore not being an order on an ‘interlocutory application’ as defined,² and the Commission having a right of appeal against any other order. He characterises the unsuccessful application as one for “substantive interim relief”.

[4] I find that a difficult proposition to allow to stand undisputed. As is well-comprehended, interim injunction applications are determined on the basis of whether the plaintiff has a serious question for trial, and whether the balance of convenience and overall interests of justice favour granting the injunction.³ The resulting decision does not determine any substantive question. It precisely is ancillary to that point, for which leave is required to appeal.⁴ Hence the reservation of a right to appeal against strike out, dismissal, and summary judgment orders, of substantive effect despite being “relief ancillary to that claimed in a pleading”.⁵ Such terminal relief is not that substantively claimed, but supportive of and/or reliant on its foundation.

[5] Be that as it may, leave is sought. The question for determination by the Court of Appeal is whether this Court’s jurisdiction to make interim orders is constrained by

¹ *Commerce Commission v Viagogo AG* [2019] NZHC 187 (Judgment).

² Senior Courts Act 2016, s 4.

³ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); and *Klissers Farmhouse Bakeries Ltd* [1985] 2 NZLR 129 (CA).

⁴ Senior Courts Act 2016, s 56(3)

⁵ Section 56(4).

any undetermined protest to jurisdiction, or by any prerequisite for service. The question arises because of the Court of Appeal's *Advanced Cardiovascular Systems* decision,⁶ which Courtney J accepted as authority for the proposition she lacked jurisdiction to determine an interlocutory application for interim relief in such circumstances.⁷

[6] Mr Every-Palmer says the Court of Appeal's decision was about a summary judgment application in the face of a protest to jurisdiction, and 'unsurprising' "given its substantive effect". Without any indication of irony as to the Commission's reservation above, he says that cannot be right as to any interim interlocutory application, and the Commission relies on interim relief in pursuit of its mandate to protect New Zealand consumers (inferentially, including as against depredation from without the Court's jurisdiction).

[7] I accept, while the threshold for leave is high, the Commission identifies an arguable error of law in Courtney J's decision, and of public importance in the context of the Commission's role and New Zealand's place in an international economy. Given *Advanced Cardiovascular Systems* has not invariably been followed,⁸ any appellate determination will have precedential value. Only if the defendant's protest is made out can the appeal be said to contribute any delay to finality of the Commission's proceeding, which otherwise should continue to progress to trial, notwithstanding any appeal. And, while exercises of the Court's discretion may not warrant leave to appeal, here the interests of justice are engaged by Courtney J's identification she lacked "jurisdiction" to consider the application. The application passes the 'filter' of unmeritorious or immaterial or delaying appeals.⁹

⁶ *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd* [1997] 1 NZLR 186 (CA).

⁷ Judgment at [7] and [15].

⁸ At [7].

⁹ *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13]. See also *Sandle v Stewart* [1982] 1 NZLR 708 (CA) at 715: "The purpose of [leave] is to limit the cases which may go on appeal in the interests of finality of litigation and the workload of the High Court, while preserving the integrity of the law and the interests of justice".

[8] I extend time for the bringing of the Commission's application for leave to appeal, and grant the Commission leave to appeal against the Judgment.

—Jagose J