

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

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

**CIV-2018-404-002659
[2019] NZHC 187**

UNDER Parts 1 and 5 of the Fair Trading Act 1986

BETWEEN COMMERCE COMMISSION
Applicant

AND VIAGOGO AG
Respondent

Hearing: 5 February 2019

Appearances: N F Flanagan and A D Luck for Applicant
A J Lloyd and H Meikle-Downing for Respondent

Judgment: 18 February 2019

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 18 February 2019 at 3.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] Viagogo AG is a Swiss company that operates a ticket reselling website in New Zealand, www.viagogo.com/nz. In 2018, the Commerce Commission received more complaints about Viagogo than any other trader, and by some considerable margin. To date, more than 750 consumers have complained about Viagogo. The Commission has brought proceedings under the Fair Trading Act 1986 (FTA) alleging that Viagogo is making false and misleading representations on its website. It has applied for an interim injunction prohibiting Viagogo from continuing this conduct pending determination of the substantive proceeding.

[2] The injunction application came before me on a *Pickwick* basis. Viagogo has not yet been served formally. It is aware of the proceedings and its New Zealand solicitors have been provided with copies of the documents but formal service in Switzerland will, apparently, take some six months. Mr Lloyd appeared for Viagogo and advised that the company intends, once served, to file an appearance and objection to jurisdiction.¹ He argued that, in these circumstances, this Court has no jurisdiction to determine the injunction application. Mr Flanagan, for the Commission, argued that jurisdiction clearly exists under the FTA and, in the absence of any objection to jurisdiction actually having been filed, there is no barrier to the Court determining the application.

[3] For the reasons that follow I consider that there is no jurisdiction to determine the injunction application at this stage. That must await service or, if the matter is sufficiently urgent, substituted service, on Viagogo.

Background

[4] The complaints made about Viagogo are reflected in the statement of claim. The Commission alleges that the Viagogo website falsely represents that it is an official ticket seller for events in New Zealand but, in fact, is not retained as an official ticket seller by promoters of events in New Zealand. The Commission alleges that Viagogo represents that the number of tickets available are very limited, which is false

¹ High Court Rules, r 5.49(1).

and misleading because there are tickets available through official ticket sellers. The Commission alleges that Viagogo represents that the tickets it sells are valid when, in fact, many of the tickets it sells are invalid, including because they have already been sold or are forgeries. The Commission alleges that Viagogo only shows the true cost of the tickets (with fees) at a very late stage in the buying process and pressures vulnerable consumers into making hasty decisions by leading them to believe that tickets are selling out.

[5] In the substantive proceedings the Commission seeks declarations as to Viagogo's alleged breaches of the FTA, orders restraining it from continuing to make the representations that are said to be misleading and deceptive and orders requiring Viagogo to publish corrective statements. At this stage, however, it seeks interim orders prohibiting Viagogo from making specific representations about the number of tickets available, the likelihood of the tickets selling quickly and the validity of the tickets.

[6] The application is supported by affidavits from a number of unhappy consumers. The Commission says that the evidence easily demonstrates a serious question to be tried. It also says that the balance of convenience favours injunctive relief because it would not prevent Viagogo from doing business New Zealand but merely require it to stop misleading and deceiving consumers. In these circumstances, the overall justice of the situation favours injunctive relief because of the vulnerability of consumers likely to be misled or deceived by the representations being made.

Jurisdiction

[7] With one exception,² New Zealand courts have consistently declined to determine interlocutory applications, including those for interim relief, where the defendant has objected to jurisdiction until that issue is resolved. In *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* the Court of Appeal held that where the defendant served overseas had filed a protest to jurisdiction, the plaintiff's summary judgment application could not be determined until jurisdiction had been

² *Dale v Jeffrey* HC Auckland CIV-2007-404-2015, 24 April 2007.

resolved.³ Subsequent High Court decisions have followed that approach in relation to applications for interim injunctions.⁴ All these cases involved defendants that had been served.

[8] In this case, however, Viagogo has not been served. This case is therefore closer, factually, to *Discovery Geo Corporation v STP Energy Pte Ltd*.⁵ In *Discovery Geo* the plaintiff applied for interim orders restraining a Singaporean company from advancing an application to transfer a petroleum exploration permit. The dispute had already been referred to arbitration, which would take place in London. Service in accordance with the High Court Rules had not been effected but the matter was said to be urgent. The application was, therefore, heard on very short notice, having been filed on Friday, 14 December 2012 with the hearing set down for Tuesday 18 December 2012. Counsel for the respondent appeared on a *Pickwick* basis and indicated that jurisdiction would be protested.

[9] Dismissing the application for interim relief on the basis that the Court did not have jurisdiction, Kós J said:⁶

First, jurisdiction at heart is dependent on valid service on the defendant ... Where service offshore is involved, some rectitude is required. It involves as has often been said, an exercise of sovereignty within the country in which service is effected. ... Of course, in some circumstances, involving true urgency, formal service by means of substituted service might be permissible. ... However, no application for substituted service was made in this case.

[10] Mr Flanagan argued that *Discovery Geo* was distinguishable because, first, the Court's jurisdiction to make the order sought was doubtful, given that the defendant was an overseas company and the dispute arose out of conduct occurring offshore and had already been submitted to arbitration in London. The present case, in comparison, concerns conduct occurring in New Zealand, in respect of which the FTA specifically confers jurisdiction.⁷ Mr Flanagan identified the second distinguishing factor as being

³ *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd* [1997] 1 NZLR 186, (1996) 9 PRNZ 632 (CA).

⁴ *Rimini Ltd (T/A Cleantastic International) v Manning Management and Marketing Pty Ltd, (T/A Cleantastic International NSW)* [2003] 3 NZLR 22; *Hamilton v Infiniti Capital Andante Ltd* HC Auckland CIV-2008-404-2304, 7 May 2008.

⁵ *Discovery Geo Corporation v STP Energy Pte Ltd* [2012] NZHC 3549.

⁶ At [39].

⁷ Fair Trading Act 1986, s 3.

the timing of the application in *Discovery Geo*. In that case, the defendant, plainly, was not given sufficient time to file an objection to jurisdiction which the High Court Rules require to be filed three working days before a hearing.⁸ In comparison, Viagogo has known of these proceedings for some months, having been advised of them in December 2018 and having taken no steps other than to insist on formal service in Switzerland.

[11] Mr Lloyd did not accept that *Discovery Geo* was distinguishable. He pointed out, first, that r 5.49, which permits the filing of a protest to jurisdiction, only contemplates that step after a defendant has been served. Rule 5.49(1) permits a defendant who objects to jurisdiction to “within the time allowed for filing a statement of defence and instead of doing so, file and serve an appearance stating the defendant’s objection and the grounds for it”. Since a defendant is not required to file a statement of defence until it has been served, it is implicit in r 5.49(1) that there is no obligation nor, indeed, right, to file an objection to jurisdiction until service has been effected.

[12] Mr Lloyd then went on to argue that the fact that the FTA might confer jurisdiction to grant relief in respect of acts done by Viagogo in New Zealand does not, in itself, create the jurisdiction to deal with the application for interim relief at this stage. In my view, this is right. A party is brought within the jurisdiction of the New Zealand courts by being served. Kós J referred to this in *Discovery Geo*, citing *Cockburn v Kinzi Industries Inc*.⁹ That case concerned a New Zealand plaintiff who had obtained leave to serve proceedings outside New Zealand where one of the defendants had filed a protest to jurisdiction. Hardie-Boys J dismissed the plaintiff’s application to set aside the appearance protesting jurisdiction. In considering whether the Court had jurisdiction, Hardie-Boys J discussed the source of the High Court’s jurisdiction and noted:¹⁰

At common law the Court’s jurisdiction in actions *in personam* is territorial and when it exists is of right. It is territorial not in any sense concerning the cause of action but in the sense that jurisdiction is restricted to those on whom the Court’s process can be served within the territorial limits ...

⁸ High Court Rules, r 7.24(1)(b).

⁹ *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243.

¹⁰ At p245.

[13] In my view, it is not right to say that merely because the conduct complained of is amenable to the jurisdiction of this Court, that necessarily brings a defendant, upon whom service has not yet been effected, within the jurisdiction of the Court. The problem for the Commission is not whether an objection to jurisdiction has been filed or merely been intimated, but the fact that the defendant has not yet been served.

[14] Of course, there may be circumstances in which genuine urgency precludes formal service being effected before an application is dealt with. But in those circumstances a plaintiff can avail itself of the provision for substituted service.¹¹ That, of course, has not been done in this case.

[15] In these circumstances, I do not consider that jurisdiction exists that would allow me to consider and determine the application for interim relief. The application is dismissed.

P Courtney J

¹¹ High Court Rules, r 6.8.