IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC47
ARC 22/12

IN THE MATTER OF	interim injunction
BETWEEN	TLNZ AUCKLAND LIMITED AND C3 LIMITED Plaintiffs
AND	MARITIME UNION OF NEW ZEALAND LIMITED First Defendant
AND	GARRY PARSLOE, DAVE PHILLIPS, AND RUSSELL MAYN Second Defendants
AND	JAMES JENNINGS AND 21 OTHERS Third Defendants

Hearing:	7 March 2012 (Heard at Auckland)
Counsel:	Peter Chemis and Joss Opie, counsel for plaintiffs Simon Mitchell and Kishen Kommu, counsel for first and second defendants No appearance for third defendants
Judgment:	13 March 2012

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] These are my reasons for declining the interim injunctive relief sought by the plaintiffs in my oral judgment issued 7 March 2012.[1]

[1] [2012] NZEmpC 45.

The proceedings

[2] The plaintiffs applied to the Court at 2.00 pm on Wednesday 7 March for without notice interim injunctions restraining a threatened strike by the third defendants and restraining the first and second defendants from inducing the third defendants to strike. Mr Chemis, counsel for the plaintiffs, sought to have the ex-parte application heard urgently on the basis that if the strike proceeded, the plaintiffs would incur loss and third parties would be affected. He submitted that if the orders were made, the employees would merely complete their normal duties and suffer no loss, damage or hardship.

[3] In a covering letter filed with the Court documents, Mr Chemis observed that in the past, the first defendant union (the union or MUNZ) had been represented by Mr Simon Mitchell and Mr Peter Cranney and he advised that a copy of the proceedings and his covering letter were forwarded to them by email and telephone contact had also been made. After reading the papers, I convened a telephone conference call with counsel which took place at 3.10 pm on the Wednesday, even though at that stage sworn affidavits in support of the application had not yet been filed.

[4] Mr Mitchell represented the union and the second defendants, who are union officers. In the conference, Mr Mitchell claimed that an agreement had been reached between the plaintiffs and the union as to the terms on which the vessel in question, the Maersk Radford (the vessel), would be worked. This agreement allegedly excluded 57 containers which the union's members would not load (the blacklisted containers).

[5] Mr Mitchell also advised that the defendants intended to oppose the injunction application on the grounds that this was not a strike, because the third defendants were under no contractual obligation to move the blacklisted containers. If they were required to do so by an injunction, he contended, this might have implications under s 97 of the Employment Relations Act 2000, (the Act), which

deals with the performance of the duties of striking or locked out employees by other persons.

[6] Mr Mitchell advised that he would be filing an affidavit from Russell Mayn, the third named of the second defendants, dealing with these matters. He also gave notice of a desire to cross-examine the plaintiffs' main deponent, Warren John Pritchard, the General Manager Employee Relations of the second named plaintiff, C3 Limited (C3) on whether there had been an agreement reached between the plaintiffs and the union and as to the terms of the third defendants' employment.

[7] Mr Chemis assured me that these were issues which had not been anticipated by the plaintiffs and that was why they had not been covered in the affidavits filed in support of the ex parte application. He advised that he would need to obtain instructions. I accepted his assurances.

[8] Because the vessel was due to be loaded with the blacklisted containers at the Port of Auckland at around 1.00 am on Thursday 8 March, and because there were contested factual matters at the heart of the ex parte application, I directed that it was not to proceed ex parte. I considered that the fullest opportunity that could be given in the circumstances for both parties to be able to present their respective cases required a hearing to be convened that evening. In the event, it was convened at 8.00 pm to permit sufficient time for Messrs Chemis and Opie to travel from Wellington to Auckland.

Background from the affidavits

[9] The first plaintiff, TLNZ Auckland Limited (TLNZ), is a stevedoring company in Auckland, involved in an essential service as defined in schedule 1 to the Employment Relations Act 2000. It is a wholly owned subsidiary of the second named plaintiff, C3. It is alleged that due to an error some time ago, the relevant collective agreement with the union was concluded by C3 and not TLNZ and that the plaintiffs and the union were still working through this issue. The union denies this was an error. Because of the urgency surrounding this application, it was agreed by the parties that no issue would be taken about this matter and the hearing would

proceed on the basis that C3 was the employer of the third defendants in an essential service. The collective agreement with C3 and the union expired in 2011.

[10] C3 employs approximately 22 permanent members of the union to work as stevedores in the container terminal at the Port of Auckland. Although it is not referred to in the affidavits filed in support of the application, I presumed that these are the 22 persons named in the first schedule to the statement of claim as the third defendants.

[11] Mr Pritchard has deposed that negotiations are ongoing for a new collective agreement but these have been delayed pending the outcome of the industrial issues between the union and Ports of Auckland Limited (POAL). Another reason is said to be that the plaintiffs are attempting to restructure their Auckland business with the aim of avoiding it having to close on financial grounds. Although it is not clear from the affidavits, it appears that the Auckland business being referred to is that of TLNZ. This has apparently been running at a considerable loss, which losses are compounding each month. Work for six vessels per month has also recently been lost due to a reconfiguration of services and there has been the loss of other customers. Apparently, TLNZ has gone through a restructuring process which led to recent redundancies.

[12] In spite of this, it is said that TLNZ and C3 are substantial companies capable of meeting their obligations under the undertaking as to damages they have provided as part of the proceedings. No details of the financial affairs of C3 and TLNZ were provided to enable the Court to assess the worth of the undertaking.

[13] The vessel was said to have docked at the port at approximately 3 pm on 7 March and was being unloaded by C3 employees while the hearing of the interim injunction was proceeding. TLNZ has an oral contract with Maersk to load and unload the vessel. The revenue that would be obtained, if this contract were completed, is said to be in the region of $60,000 which is claimed to be substantial revenue for this part of the business. It is said to be critical revenue at a time when this part of the business is under significant financial pressure and, if it is paid, it will be the first time this part of the business has been in profit for some months.

[14] At about 1.00 am on 8 March 2012, the vessel was to be reloaded with containers currently at the port. These included the 57 blacklisted containers, which allegedly have been handled by non-union labour.

[15] Mr Pritchard deposed that he believes that the blacklisted containers will not be loaded onto the vessel by the union's members, the third defendants. Mr Pritchard deposed that this belief was formed as a result of discussions with Garry Parsloe and Mr Mayn, two of the second defendants, respectively the President and the Secretary/Treasurer of the union's Auckland branch. Mr Pritchard deposed that, if the 57 blacklisted containers were not loaded before the vessel sailed, TLNZ would lose its contract and this would cause the plaintiffs considerable financial loss now and may also affect future opportunities with Maersk, one of the most important shipping companies. He stated that if the vessel sailed without the 57 containers and this caused Maersk loss, that company may look to the plaintiffs to recover that loss. He also deposed that failure to load the containers would inconvenience and may cause loss to third parties waiting for the delivery of their cargo. Further, if the containers were not moved promptly, he deposed that this would cause congestion and inconvenience at the Port of Auckland and additional costs to the plaintiffs, as they would be held liable for meeting the costs of keeping them at the Port. He deposed that this inconvenience would be worse if the employees also refused to handle other containers.

[16] Mr Mayn's affidavit asserted that moving the blacklisted containers was not the usual business of C3, which provided stevedoring services for general cargo vessels and not pure container vessels. He also deposed that the vessel would be worked at the Bledisloe Terminal which is solely a container wharf, as is the Fergusson Terminal, and they are not wharves where C3 performs its stevedoring services. He asserted that the blacklisted containers would have been worked, but for the strike affecting POAL, by POAL stevedores. That assertion did not appear to be in issue.

[17] Mr Mayn accepted that Mr Pritchard had been in discussions with him, Mr Parsloe and Dave Phillips, (the Walking Delegate) who is the other named second defendant, about the issue of the 57 blacklisted containers. He claims that the union

agreed to the vessel being worked by C3's union members, on Bledisloe wharf, despite this being outside the coverage of the collective agreement, because Mr Pritchard agreed that the blacklisted containers would not be worked. He deposed that he was present on a teleconference call when it was made clear that the union's members would work the vessel, but not the 57 blacklisted containers, and that Mr Pritchard said he understood the position and was quite happy with it. He said there was no discussion of injunctions or Court proceedings and that Mr Pritchard accepted the situation. Mr Mayn claimed to be astounded to have been served with the injunction application.

The hearing

[18] At the hearing, Mr Mitchell indicated that he was prepared to waive cross-examination of Mr Pritchard and to allow the matter to proceed on the papers filed. This included the affidavit sworn by Mr Mayn which annexed the collective agreement. Various key matters raised in Mr Mayn's affidavit had not been addressed in the two affidavits filed on behalf of the plaintiffs. Because of the importance of these matters and the need to address them before the vessel was due to be loaded, I gave the plaintiffs' counsel the opportunity to take instructions on whether the plaintiffs wished to lead any oral evidence which would then be subject to cross-examination.

[19] After an adjournment, the plaintiffs elected to call Mr Pritchard, who was apparently based in Tauranga, and who had previously been the stevedoring manager in Auckland, three years ago. The following is a summary of Mr Pritchard's evidence, taking into account his responses in cross-examination.

[20] C3 employs stevedores on the general cargo wharves at the Port of Auckland, mainly the Jellicoe and Freyberg wharves. Once, to his recollection, they worked on a vessel at the Bledisloe wharf. C3 was a general stevedoring company which would load mixed cargo vessels and this included the loading of containers that were delivered by shuttle service from the Fergusson container wharf to the general wharves. On some general cargo vessels up to 250 containers might be carried. These would be for delivery around other smaller ports in New Zealand or to the

Pacific Islands. The containers would be loaded using the vessels' own cranes, there being no shore cranes. C3 employees did not load or discharge vessels on the container terminals except on the one occasion which he referred. The vessels serviced on the Bledisloe and Fergusson wharves were large container ships and the containers were loaded and unloaded by portside cranes known as Portainer cranes and not the cranes on the container ships.

[21] C3 had never previously before the POAL strike had any arrangement to load or unload a Maersk vessel. If it had not been for the strike of the union members employed by POAL on the Bledisloe and Fergusson wharves, they would have worked the vessel. C3 employees would have had no involvement in loading or unloading the vessel.

[22] Mr Pritchard understood from discussions with Messrs Parsloe and Mayn on Thursday 1 March 2012, that the union would have no issue if C3's union employees (the third defendants) loaded and unloaded the vessel but that there could be a problem with some 90 containers. Mr Pritchard sent an email to Messrs Parsloe and Mayn at 10.00 am on Friday, 2 March 2012, referring to previous discussions and advising that C3 had agreed to work the vessel, due in the following Wednesday. He referred to 90 containers which needed to be moved and asked for advice as to how these containers could be moved so as to best deal with the situation. Mr Pritchard confirmed that the true number turned out to be 57 blacklisted containers rather than 90.

[23] Mr Pritchard spoke again to Mr Parsloe on the Friday at around 12.30 pm and was told that these 57 containers were blacklisted and they could not be moved. He stated Mr Parsloe told him he would get back to him on Saturday morning if anything could be done. Mr Pritchard did not hear from Mr Parsloe again so he called Messrs Parsloe and Mayn on Tuesday, 6 March and at about 2.30 pm, was told that the 57 containers could not be moved or touched. There was no discussion about another 109 empty containers which the union's members apparently would also not touch.

[24] Mr Pritchard fairly conceded that he was aware at least from Friday, 2 March that there could be an issue over the 57 containers.

[25] Mr Pritchard accepted the proposition put to him by Mr Mitchell that POAL would not be charging demurrage on any containers affected by strike action and this therefore is unlikely to be a cost to Maersk or the plaintiffs. Mr Pritchard stated that in order to preserve the good relationship between C3, the union and its union employees, C3 would be most unlikely to seek to recover any losses on the Maersk contract from them if the injunction was not granted.

[26] Mr Pritchard also accepted that C3 would be paid for such work that it was able to perform on the vessel and therefore its loss was likely to be in the vicinity of 50 percent of the $60,000 it would otherwise have earned had it been able to complete the contract fully. He accepted that if the strike of the POAL workers was to end, the vessel would then be serviced at Bledisloe by POAL employees and not by employees of C3.

[27] Mr Mayn's evidence was that, but for the strike, vessels on the Bledisloe and Fergusson terminals would only be serviced by POAL employees and the employees of other companies would not be given permission to work on those wharves.

[28] Mr Mayn claimed that at the earliest point in the discussions, it was made clear that the 57 blacklisted containers could not be moved and that this was not part of the normal duties of C3's union employees, although the union agreed that the vessel could be unloaded at the Bledisloe terminal. Because of the draft and length of the vessel, it is unlikely to have been able to have been berthed at any of the general wharves in Auckland that C3 employees worked.

[29] The plaintiffs continued to deny there was any such agreement but accepted that no objection was taken by the union to C3's union employees loading and unloading the vessel at the Bledisloe wharf as long as it did not include the blacklisted containers.

The questions

[30] Against this factual background, the parties made their respective submissions. It is not in issue that the Court must address three questions in deciding whether to grant interlocutory injunctive relief and a statement of these is to be found in the recent decision of Chief Judge Colgan in *Lyttelton Port Company Ltd v Maritime Union of New Zealand Inc*:[2]

> [7] … The first is whether there is a serious arguable case for trial substantively between the parties. If so, the second question is where the balance of convenience will lie between them pending substantive judgment. The third consideration is whether the overall justice of the case warrants the making of an interlocutory injunctive order because it is equitable and discretionary.

[31] I considered it was unlikely in this case that there would be a substantive hearing seeking permanent injunctive relief because there would not be a live issue, other than damages. Whatever was decided at the interim hearing was going to be dispositive of the issue of the blacklisted containers on the vessel, as that work had to commence at approximately 1.00 am on Thursday, 8 March so the vessel could sail that same day. That was the reason for convening the Court at 8pm on the Wednesday.

[32] Where an application before the Court is in the form of an interim injunction but to all intents and purposes is really an application for final judgment, the plaintiff should demonstrate that it has a "meritorious substantive case."[3] This is because the defendant will have little or no opportunity to appeal the decision if the injunction is granted and would be deprived of the opportunity of a full hearing to determine the matter on its merits. For these reasons, and taking into account the specialised role of this Court in dealing with strikes and lockouts, I found in *Chief Executive Officer of the Dept of Corrections v Corrections Association of New Zealand*[4] (sharing the view of the Chief Judge expressed in *Service and Food Workers Union Inc v OCS Ltd*[5]) that:[6]

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[2] [2012] NZEmpC 44.
[3] *Nelson Hospital and Health Services v New Zealand Resident Doctors' Association* (No 2) [1998] 3 ERNZ 145 at 147.
[4] [2006] ERNZ 235.
[5] [2005] ERNZ 717 at [26].

> it is incumbent on the plaintiff [in such situations] to persuade the Court that it has a strongly arguable case. This means that its arguments have merit and there is a real prospect of them succeeding if the matter was to proceed to a substantive trial.

[33] The Court must approach the issues in a realistic and robust fashion.[7] Whilst a plaintiff may be able to satisfy the threshold question of whether there is a serious issue to be tried, in situations like the present where the interim relief is dispositive, a stronger case to justify the exercise of the discretion may be required.

Strongly arguable case

[34] There was no issue between the parties that if the refusal of the third defendants to load the blacklisted containers amounted to a strike, it would be an unlawful strike, as no notice in an essential industry had been given and it did not relate to bargaining for a collective agreement that would bind C3's employees.

[35] Mr Chemis contended that the refusal constituted a strike as defined in s 81(1)(a) of the Act as being the act of a number of employees who are, or have been, in the employment of the same employer or different employers:

> (i) in discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or …
>
> (iii) in breaking their employment agreements; or
>
> (iv) in refusing or failing to accept engagement for work in which they are usually employed; or
>
> (v) in reducing their normal output or their normal rate of work.

[36] Those acts must be due to "a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees."[8]

[37] Mr Chemis submitted that the term "coverage clause" in the expired collective agreement, is defined in s 5 of the Act as a provision in a collective

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[6] At [3].
[7] *Service and Food Workers Union Nga Ringa Tota Inc v Rendezvous Hotels (NZ) Ltd* [2010] NZEmpC 78, [2010] ERNZ 154 at [3].
[8] Section 81(1)(b) of the Act.

agreement that "specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees." This, he submitted included the work in question in this case. He relied on clause 4 of the agreement, the coverage clause, the relevant parts of which are as follows:[9]

> 4 COVERAGE
>
> 4.1 The main duties of permanent and GWE [Guaranteed Wage Earner] employees of the Company covered by this Agreement shall consist of the *existing core business* of the Company. This includes the stevedoring of vessels, handling of all categories of cargo, on and off the wharf, including packing and unpacking of containers, operating of mobile plant and ships gear, tallying of cargo and all other associated waterfront work including ships' lines and cargo carpentry.
>
> 4.2 Further duties may also include such work as may be required by the Company and mutually agreed between the parties to this Agreement.
>
> 4.3 This Agreement covers all work that is *customarily and currently performed* by members of M.U.N.Z. who are permanent, GWE workers of C3 in the Ports of Auckland and may include as required:-
>
> - The loading and unloading of ships, the handling and storage of cargo and other goods at or about or in the immediate vicinity of any wharf, wharves, quay, pier or jetty.
>
> …
>
> - The driving of mechanical equipment, straddles, hoists, cranes, stationary machines, ship cranes and ship gantries, all lashing work and ship's gear used in cargo handling, all self propelled machinery, equipment and other tools, now or hereafter used in performing work described in and covered by this CEA.
>
> - All work associated with the stacking, monitoring, loading or unloading, preparation and cleaning of containers. …

[38] Mr Chemis submitted that the work being intended to be performed on the vessel was covered by the coverage clause on its face and the refusal to do the work therefore constituted a strike.

[39] Mr Mitchell submitted that the "existing core business" (clause 4.1) of C3 did not include the loading and unloading of vessels which were serviced by Portainer cranes and this was not work "customarily and currently performed" (clause 4.3) by

[9] Emphasis added.

the third defendants. Such work, he submitted, could be carried out by mutual agreement in terms of clause 4.2 but it was clear there was no such agreement in relation to the blacklisted containers.

[40] I accept Mr Mitchell's submission that work on the vessel at the Bledisloe wharf is not the usual work of C3 employees and indeed is very unusual. It is also the first time it has ever been performed on a Maersk vessel at the Bledisloe wharf or for that matter on a pure container ship of the size of the vessel in question. It is, however, arguable that the coverage clause is wide enough to contemplate such work in terms of the three bullet points in cl 4.3.

[41] There is a dispute between the parties as to whether the work in question is covered by the wording of the collective agreement. This is an issue that should more properly have been dealt with as a dispute. This was a determinative factor noted by the Chief Judge in *Port of Napier Ltd v Maritime Union of New Zealand*,[10] in refusing injunctive relief in that case, citing *Sky Network Television Ltd v Duncan*.[11]

[42] My initial impression at hearing was that the plaintiffs had the stronger case in asserting that the work in question was covered by the plain wording of the expired collective agreement. Depending, however, on the resolution of the factual conflict as to whether or not an agreement was sought and then reached between the plaintiffs and the union on the working of the vessel and the terms of that agreement, there may well be an argument open to the defendants, based on the principles of construction outlined by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd.*[12] If the agreement, as asserted by the defendants, was found to have been reached, this would suggest that the parties were proceeding in terms of cl 4.2 of the collective agreement to agree on further duties as were required by C3. Support for that proposition is to be found in the wording of the email communication sent by Mr Pritchard to Messrs Parsloe and Mayn on 2 March in which he refers to there being 90 containers that needed to come from Fergusson wharf. These included the 57 blacklisted containers. Mr Pritchard stated:

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[10] [2007] ERNZ 826 at [41].
[11] [1998] 3 ERNZ 917 (CA).
[12] [2010] NZSC 5, [2010] 2 NZLR 444.

> As per our discussion yesterday morning, we need to have those containers moved in order that we load them on the general wharves; we have a 5 day window to deal with that in as least disruptive manner as possible whilst understanding the issues you are dealing with currently.
>
> If there is any indication of action by the union to interfere with those moves the only other option to Maersk we believe will be to put their ship under the Port cranes and have it worked by those port non-union employees on individual contracts.
>
> We need to know urgently your response in order for Maersk to organise bringing the rest of the cargo for the exchange in through the Tinsley street gates this morning.
>
> Maersk as per the ANL message yesterday respect the situation and wish to cause no disruption, they do obviously however want the vessel worked and the cargo waiting loaded.
>
> Can you advise your position please with urgency and offer some advice so we can move these containers to best deal with this situation.

[43] The union's position in the subsequent telephone discussion was that the containers could not be moved but that they would come back to Mr Pritchard on the Saturday morning, which did not occur.

[44] The whole tenor of the email is a search for an agreement, or, in the alternative, a way of dealing with the blacklisted containers by POAL employees who were not on strike.

[45] Mr Chemis vigorously cross-examined Mr Mayn on whether he could point to anywhere where the union had raised the coverage issue specifically in any email correspondence or where the union had asserted the work was outside coverage and the union was not doing it for that reason. Mr Mayn said that they had spoken about it on the phone.

[46] It appears to be common ground that there was no correspondence relating to coverage. Equally, and perhaps more importantly, there was no communication orally or in writing put before the Court from C3 to the union or its employee members directing them to perform the work. If C3 was firmly of the view that this was within coverage, then it is indeed surprising this was not asserted by way of any direct order by Mr Pritchard or any other manager of C3. Instead, Mr Pritchard sought to reach an agreement with the union. When that was not forthcoming,

without any notice or the usual solicitor's letter demanding the defendants' compliance, the plaintiffs instead sought ex parte injunctive relief shortly before the Court's normal closing hours and some 11 hours before the work was to commence at night.

[47] Whilst some of these matters may also carry weight in assessing the balance of convenience and the overall justice of the case, they also undermine the strength of the plaintiffs' contention that the work in question was clearly within coverage. I conclude that there was a serious issue to be tried as to coverage but that it was not as strongly arguable as the plaintiffs asserted. It could not be said with any degree of certainty therefore that, had this issue had been allowed to proceed to trial with full disclosure of correspondence, the plaintiffs' contentions would have been upheld.

Balance of convenience

[48] Putting aside for the moment the defendants' contention that there were implications under s 97, and having found that there was a serious issue to be tried, but that it was not as strongly arguable as the plaintiffs submitted, it was then necessary to consider where the balance of convenience lay. If the interim injunction had been granted, the third defendants would have been required to carry out work which they dispute can be required under the coverage clause of the expired collective agreement. If it was found that there was an agreement as alleged by the union, then the injunction would have had the effect of forcing the third defendants to work in breach of that agreement. To compel the third defendants to work in such a situation where they and their union had agreed to perform the highly unusual duties of loading a container vessel at the Bledisloe container wharf, a situation which Mr Pritchard conceded had happened only once before to his recollection, but subject to a condition as to the non-loading of the blacklisted containers, would have the effect of depriving the defendants of an important part of that agreement.

[49] Further, as will be dealt with under the heading of overall justice, it could well have the effect of causing a breach of s 97 because it was clearly the performance of work that would otherwise, but for the strike, have been carried out

by POAL employees. That was an important consideration for the first and second defendants.

[50] None of these matters would be readily addressed by the plaintiffs's undertaking as to damages should they have lost the coverage argument in a subsequent substantive hearing. There would be no economic loss because the third defendants would have been compelled to work and no doubt have been paid, in a situation where they had no desire to handle the blacklisted containers. It is unlikely that there could be any realistic assessment of non-economic distress or humiliation losses in such a context. Thus the undertaking as to damages, if the plaintiffs did have the economic means to support it, which the evidence did not deal with in adequate detail, would have been of no practical value.

[51] On the other hand, the plaintiffs' loss was at most, half of the value of the work in relation to the vessel, of approximately $30,000. There would be no subsequent losses in relation to demurrage for the containers remaining on the wharves. Any loss arising from the plaintiffs being required by Maersk to deliver the cargo was speculative. The alleged reputational loss had no real factual basis in a situation as fraught as the present conditions on the Auckland waterfront as a result of the dispute between POAL and its union employees. Mr Pritchard freely conceded that the POAL strike had brought economic benefits for C3 as it was able to pick up contracts that would otherwise have been performed by POAL and its employees. If that strike was to end, Maersk would resume its operations using POAL on the Bledisloe and Fergusson terminals and C3, as presently constituted, would have no further involvement.

[52] I accept Mr Chemis's submission that there would be some residual inconvenience to third parties whose containers would not be delivered quickly and this is a factor I take into account in reaching the conclusion that the balance of convenience marginally favours the plaintiffs.

Overall justice of the case

[53] There is compelling evidence that an agreement was reached to perform work on the vessel on the Bledisloe terminal, a most unusual event, but subject to the condition that the blacklisted containers would not be moved. The interim nature of the hearing prevents that issue being resolved. The arguments over coverage are reasonably finely balanced and cannot be said, in considering the overall justice of the case, to firmly favour the grant of the injunctive relief sought.

[54] This is particularly so because there is no evidence before the Court that the plaintiffs ever asserted to the defendants that they had the right to direct the work be carried out or gave the third defendants any direct order to that effect. Nor was there any prior warning to the defendants by letter that they were intending to seek last minute ex parte injunctive relief if the work was not performed. There is an argument that there was undue delay in commencing these proceedings, especially with the lack of notice, as Mr Pritchard was aware of this situation on Friday 2 March. That delay would be another discretionary factor against the grant of the relief sought at the last minute. Then there are the implications of s 97 which provides, insofar as it is relevant:

> **97 Performance of duties of striking or locked out employees**
>
> (1) This section applies if there is a lockout or lawful strike.
>
> (2) An employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with subsection (3) or subsection (4).
>
> (3) An employer may employ another person to perform the work of a striking or locked out employee if the person—
>
> (a) is already employed by the employer at the time the strike or lockout commences; and
>
> (b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and
>
> (c) agrees to perform the work.
>
> …

[55] Mr Mitchell's argument was that on the plain wording of s 97(2), C3 as an employer was employing or engaging its union employees to perform the work of a striking or locked out employee of POAL. If so, it could only do so in the present case, in accordance with subsection 3. He accepted that the C3 employees were already employed by C3 at the time of the strike and were not employed principally for the purpose of performing the work of striking workers, but they had not agreed to perform the work in terms of s 97(3)(c).

[56] In the best traditions of the bar, Mr Mitchell pointed out that there was a decision against him on the interpretation he advanced of s 97. This was the decision of Chief Judge Colgan in *National Distribution Union v General Distributors Ltd.*[13]

[57] In that case, the plaintiff union was seeking an interim injunction to prevent a logistics company delivering goods to the first defendant's supermarkets. The Court held there was insufficient evidence to show the first defendant had engaged the logistics company. Instead, it was engaged by the suppliers of products, not the first defendant employer, to perform the work. In reaching that conclusion and declining injunctive relief, the Court rejected the argument that the logistics company could have been the employer for the purposes of s 97(2) in the following manner:

> [19] Mr Cranney for the plaintiffs argued that the phrase "an employer" used a number of times in s97 should be read as "any employer" and not as "the employer of striking or locked out employees". That is very unlikely to be correct. That is for a number of reasons, not the least of which is that if this very broad interpretation were correct, it would nevertheless exclude from the process of engagement any legal person that was not an employer. If Parliament had intended to mean "any person", it would have done so and not artificially constrained the status of any persons engaging others to perform the work of striking or locked-out employees by requiring that they be employers. It seems almost inarguable that the constraints imposed by s 97 are upon the employers of striking or locked-out employees so that it is those employers who are not to employ or engage others to perform the work of their striking or locked-out employees. It cannot be argued, at least with any degree of confidence, that Parliament intended a broader definition of the nature of persons so constrained.

[58] Mr Mitchell submitted that this interpretation was incorrect. If the term "employer" where it appears in the section was limited to the employer of the striking workers, this, he submitted could easily have been stated by the legislature.

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[13] [2006] ERNZ 790.

If the Chief Judge was correct, it opened the possibility for arrangements to be made for an outside employer to carry out the work of the striking employees, thus seriously affecting the efficacy of strikes as a negotiating tool. It would enable in this case, POAL, to avoid the full economic consequences of the union strike action by allowing the use of its wharf facilities, normally barred to non-POAL employees, to carry out the work of its striking employees.

[59] Although the issue has not been specifically argued again, there was discussion of s 97 in *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd (No 2).*[14] The Cheese Company was a wholly owned subsidiary of a dairy company and when the Dairy Workers' Union gave its strike notice to the cheese company, the chief executive officer of the dairy company mobilised the dairy company's employees to move to the cheese company's plant to keep it operating. The union claimed that the cheese company had breached the provisions of s 97 by employing or engaging the dairy company's employees and volunteers.

[60] In that case, it was common ground that the only employer who might claim the benefit of the s 97(3) exception was the employer of the striking workers, applying the *National Distribution Union* case and that the employer referred to in 97(2) was the employer of the striking or locked out employees, the cheese company.[15] Those concessions are referred to in the subsequent Court of Appeal decision.[16]

[61] Those concessions were not made by Mr Mitchell in the present case.

[62] A further, and I consider, much stronger argument raised by Mr Mitchell was that the performance of the work C3 required of the third defendants, conferred a benefit on POAL by having the work of POAL's striking workers carried out at

[14] [2009] ERNZ 488.
[15] At [26].
[16] *New Zealand Dairy Workers' Union Inc v Open Country Cheese Company Ltd* [2011] NZCA 56 at [13].

POAL's exclusive site, at Bledisloe wharf. That was the question posed by the Court of Appeal in the *Cheese Company* case:[17]

> The words "employ" and "engage", when read in the light of the purpose of s 97(2), refer to the employer's use of the other persons, irrespective of its legal relationship with them. In terms of s 97(2), the question then is: Did the Cheese Company use other persons to perform the strikers' work – that is, the work normally undertaken by them for its benefit? The section's concern is with the employer's acts or omissions – not those of another entity or that entity's relationship with the replacement workers.

[63] What is required is an objective inquiry into the purpose, nature and effect of their work, assessed by reference to all the relevant circumstances. Mr Mitchell submitted that POAL arguably was party to an arrangement to have the striking workers' work carried out for it, because it has the sole control over Bledisloe wharf and must have consented to C3's use of its equipment and premises to service the vessel and perform that work. As the Court of Appeal made clear in the *Cheese Company* case, if POAL allowed other persons to perform the strikers' work, which was itself POAL's normal work, that would be to "employ" or "engage" for the purposes of s 97(2).[18] Even the volunteer farmers who came of their own accord to work at the Cheese Company's factory were found by the Court of Appeal to have constituted a breach by the Cheese Company of s 97(2).[19]

[64] In the absence of consent by C3's employees, Mr Mitchell submitted the work should not be enforced by an interim injunction because that would neither be equitable, nor in accordance with the Court's equity and good conscience jurisdiction.

[65] I shared those concerns. I considered there was a real risk that s 97 would be involved either because it was arguable on its plain wording that C3 was the employer for the purposes of s 97(2), or even more arguable that POAL would be engaging C3's employees when C3 performed the Maersk contract.

[66] That later argument found support from the decision of the Supreme Court in *Air Nelson Ltd v New Zealand Amalgamated Engineering, Printing and*

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[17] [28].
[18] At [34].
[19] At [38].

Manufacturing Union Inc.[20] There, the majority held that the question of whether contractors were doing their own work, and therefore not doing the work of another person, was a matter of fact and practical substance, not of considering the duties set out in the employment agreement. The majority of the Supreme Court stated:

> [24] We would decline to refine upon the statutory language, which is straightforward. It calls for judgment. Another worker cannot be substituted for a striking worker in the performance of the work of the striking worker. … The Employment Court was right to stress that this was a matter of practical substance, not potential duties under the employment contract.

[67] If the injunction was granted, it would arguably require the third defendants to perform work, which was not their usual work, in a vessel of a type which they did not service, on a wharf which was solely under the control of POAL for its own employees, but for the strike, and which they did not consent to perform.

[68] For these reasons, I concluded that the overall justice of the case, which in itself, I did not find to be strongly arguable and only marginally balanced in favour of the plaintiffs, required me to decline the interim relief sought.

[69] I reserved the question of costs.

B S Travis
Judge

Judgment signed at 12 noon on 13 March 2012

[20] [2010] NZSC 53, [2010] 3 NZLR 433. [2010] ERNZ 279.