

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2012] NZEmpC 7
WRC 25/11**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN TRANSPACIFIC ALL BRITE
LIMITED
Plaintiff

AND MICHAEL RICHARD SANKO
First Defendant

AND TIMOTHY MICHAEL BLAIR COMBS
Second Defendant

Hearing: 12 October 2011
(Heard at Auckland)
and by memoranda of submissions filed on 28 October and
1 December 2011

Appearances: Stephen Langton and Alex Chadwick, counsel for plaintiff
Stuart Webster, counsel for defendants

Judgment: 26 January 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The question for determination in this interlocutory application in proceedings removed from the Employment Relations Authority (the Authority),¹ is whether Transpacific All Brite Limited's claims in this Court should be stayed until associated proceedings in the High Court at Napier are determined. The defendants, Michael Sanko and Timothy Combs,² say they are entitled to have the claims against

¹ [2011] NZERA Wellington 131.

² I will refer to this defendant as Timothy Combs as his father also features in associated litigation.

them in this Court determined without the delay that would result from a stay, and oppose the plaintiff's application.

[2] By consent, the delivery of this judgment was postponed until after the High Court at Napier had determined relevant interlocutory applications in associated proceedings in that jurisdiction and counsel had taken the opportunity to make any further submissions to this Court, by memorandum, arising from that judgment. The High Court's judgment³ was delivered on 24 November 2011.

[3] The matters relevant to the decision of this application include the nature of the proceedings in both Courts illustrated by the pleadings, augmented by some affidavit evidence from each side. That the Court is empowered to order a stay is agreed. So, too, is the broad test for determining whether a stay should be granted. That test is the interests of justice in the particular circumstances of the case. It was not argued that any stay ordered cannot be for a fixed duration or may not be on conditions.

Concurrent proceedings generally

[4] Before turning to its decision, I wish to emphasise that this is one of a number of cases identifying the very unsatisfactory consequences of the current legislative state of the boundaries between this Court's (and the Authority's) jurisdiction and the jurisdictions of the courts of ordinary jurisdiction, principally the High Court. This is a matter of litigation procedure, about which Judges have a legitimate concern, and not of employment policy on which we do not comment.

[5] This issue has been identified persistently by Judges for many years in the hope that Parliament would clarify and simplify these issues in the interests of parties and, as in this case, principally, but not exclusively, of employers or former employers. As in this case, the difficulties arise typically where a former employee acts in concert with a new entity (either a new employer or the former employee's own new corporate entity) allegedly in contravention of contractual obligations to

³ *Transpacific All Brite Limited v MPC Traders Limited* HC Napier CIV-2011-441-169, 24 November 2011.

the former employer. Again typically, that may be allegedly breaching a restraint of trade, misusing confidential information, or enticing other staff of the former employer to breach their contracts with it. There are, of course, many other examples but these serve to illustrate the problem.

[6] A former employer's causes of action against a former employee personally, are principally in breach of contract. These proceedings must be brought in the Authority but they sometimes find their way (as in this case) to this Court at first instance. However, proceedings against persons who were not in an employment relationship with the former employer and/or for causes of action other than breach of the employment contract (for example in equity or tort), must be taken in the courts of ordinary jurisdiction. That is the effect of longstanding case law interpreting those jurisdictional boundary questions. That is how parties find themselves involved in concurrent proceedings in separate judicial bodies but which proceedings arise essentially out of the same former employment-related transactions.

[7] Especially where the proceedings for breach of contract are brought to and remain in the Authority, the systems by which the dual proceedings are dealt with are very different. The courts of ordinary jurisdiction (and especially the High Court) deal with cases as adversarial litigation encompassing relevant interlocutory measures such as discovery of documents. In contrast, the Authority is intended to operate as a low level, informal, speedy, investigative tribunal that is directed to resolving employment relationship problems, although in such cases as these, the employment relationship is almost inevitably a former employment relationship. In practical terms, matters generally move more swiftly in the Authority (and in this Court where they come here upon their removal) when compared to the High Court. That is, of course, not a criticism of the High Court but a reflection of the means by which civil litigation is dealt with and the current delays to it, at least in major High Court centres. In this case, however, events in the High Court at Napier appear to be moving at a faster pace than in this Court, illustrating the need to speak generally and not absolutely.

[8] Such a situation leads, not infrequently, to an application such as this to stay proceedings in one forum or, as this Court is aware, informal agreement between the parties to progress one proceeding before the other, in other words an informal stay.

[9] It is unsatisfactory that there should be concurrent proceedings between the parties over essentially the same matters in different courts. That is because there should be inter-curial comity and the system of civil justice should operate efficiently. There are also significant practical disadvantages in such a situation. Effort and, therefore, costs are duplicated. There is a temptation for a party to progress or delay the litigation in one or other jurisdiction to gain purely tactical advantage. The legal process and respect for it suffers. Litigants ask why this should be so, and the difficulty lawyers have in explaining it convincingly should in itself be an incentive for timely reform. This unsatisfactory position can only be addressed by legislative change.

[10] That said, it is necessary to determine whether in this case a stay should be granted and, in effect, whether the issues between the parties should be progressed in this Court or the High Court.

The Employment Court proceedings

[11] The Employment Court proceedings necessarily encompass the proceedings in the Authority which were removed to this Court. The plaintiff has now filed a statement of claim in lieu of its statement of problem in the Authority and it is this statement of claim dated 24 August 2011 that sets out the nature of the proceedings. The plaintiff's original statement of problem from which the statement of claim now emanates was filed in the Authority on 25 March 2010 and was responded to by a statement in reply on 12 April 2010. Soon afterwards, a stay of the Authority proceeding was sought by Transpacific. This was opposed, but granted by the Authority which then removed the proceeding to this Court, necessitating a fresh consideration of the stay application.

[12] The plaintiff's claim in this Court relies, as it must, on alleged contractual breaches by Mr Sanko and Timothy Combs of their former employment agreements

with Transpacific. Mr Sanko was formerly the plaintiff's financial controller and the defendant Timothy Combs was formerly the plaintiff's managing director. In the case of the first defendant, Mr Sanko, the particular terms and conditions said to have been breached included:

- express obligations to perform his duties in the best interests of his employer;
- to deal with his employer in good faith in all aspects of the employment relationship;
- not to disclose his employer's confidential information;
- to disclose to his employer any potential or actual conflict between his personal interests and those of his employer;
- not to use his employer's email and internet facilities for personal use contrary to his employer's interests;
- implied obligations of trust, confidence and fidelity owed to his employer during his employment; and
- an obligation to adhere to a statutory duty of good faith during his employment pursuant to s 4 of the Employment Relations Act 2000 (the Act).

[13] In respect of the claims against Timothy Combs, the terms and conditions of his employment are allegedly implied or otherwise not contained in the form of a written agreement.

[14] The plaintiff alleges that Mr Sanko breached these obligations during his employment with the result that the second defendant Mr Combs has been allowed to undertake business in competition with the plaintiff without its knowledge and against its best interests. Timothy Combs is said to have aided and/or abetted Mr

Sanko in the latter's breaches of his employment agreement resulting in loss to the plaintiff.

[15] The remedies sought against the defendants include declarations. I assume this means findings of breach by the first and second defendants with the latter being as aider and abetter of the first defendant's breaches. The plaintiff claims a compliance order against the first defendant to deliver up the plaintiff's confidential information. It seeks an inquiry into damages or, alternatively, an account of profits derived by the first defendant from the breaches of his employment obligations. Claimed against the first defendant also, is a penalty of \$10,000 pursuant to s 133(1)(a) of the Act, a further penalty of \$10,000 in respect of each breach by him of s 4 of the Act, pursuant to ss 4A and 133(1)(b) of the Act. In respect of the second defendant, the plaintiff also claims a penalty of \$10,000 for each of the breaches of the first defendant's employment agreement that the second defendant incited, instigated, aided and/or abetted, pursuant to s 134(2) of the Act.

The High Court proceedings

[16] The proceedings in the High Court at Napier were issued by Transpacific All Brite Limited against four persons, MPC Traders Limited, Michael Combs, Timothy Combs, and Michael Sanko. So there were two additional defendants in the High Court proceedings, MPC Traders Limited and Michael Combs.

[17] Transpacific's claims arise out of events that followed its purchase of a business from MPC Traders Limited in 2008 including the resignation first of Timothy Combs and subsequently of Michael Sanko.

[18] Transpacific's claims in the High Court are contained in the amended statement of claim filed there. After filing its proceedings in the Authority, Transpacific issued proceedings against MPC Traders Limited and its owner, Michael Combs, who is also Timothy Combs's father and a former employee of Transpacific. The proceedings in the High Court were first filed on 10 March 2011. All defendants in the High Court proceedings have filed statements of defence. The first case management conference in the High Court proceedings was conducted by

an Associate Judge on 19 May 2011 and timetable orders were made including for the exchange of verified lists of documents, inspections of documents, the issuing and answering of interrogatories, and whether an additional defendant should be joined. The proceedings in the High Court were scheduled to have a further case management conference on 15 September 2011 at which time it is likely that outstanding and further interlocutory applications will be dealt with by that Court.

[19] Transpacific's amended statement of claim of 12 May 2011 in the High Court proceedings asserts six causes of action. The first is against the first defendant to that proceeding (MPC Traders Limited (previously All Brite Industries Limited)) and alleges breach by that company of the agreement for sale and purchase of the business now operated by the plaintiff. This is a cause of action that is independent of the employment relationships between Transpacific and the Messrs Combs and Mr Sanko. The second cause of action in the High Court is for breach of the agreement for sale and purchase by the second defendant Michael Combs.

[20] The High Court has now permitted Transpacific to add a fifth defendant to its proceedings and, therefore, a second amended statement of claim represents the plaintiff's position in the High Court. The significance of that further amended pleading is that it clarifies and particularises the plaintiff's High Court cause of action against Timothy Combs (the third defendant in those proceedings) and Mr Sanko (the fourth defendant in those proceedings). It is sufficient to say that the causes of action against those defendants are founded other than on the relationships between those defendants as employees and Transpacific as employer. In the case of alleged contract breaches, they rely on covenantor obligations under the agreement for sale and purchase. Other causes of action are in economic torts which are both beyond the Employment Court's exclusive jurisdiction and beyond the jurisdiction of both the Court and the Authority. Finally, the cause of action alleging breach of fiduciary duties is in equity.

[21] The latest judgment of the High Court⁴ deals with a number of aspects in that litigation but, in particular, the following which are relevant to this application for stay.

[22] At [22] of the judgment, Gendall AJ refers to the Employment Court proceedings and records:

... Mr Macfarlane [counsel in the High Court proceedings for the defendants MPC Traders Limited, Michael Combs and Timothy Combs] also brought my attention to existing proceedings between some of the parties to the present proceeding which are extant in the Employment Court. Those proceedings, I am told, have been stayed pending the resolution of the present proceeding before this Court. Mr Macfarlane submitted, therefore, that any further delay in matters before this Court would also have downstream effects on matters before the Employment Court.

[23] Although decision of this application for stay was delayed until the High Court's interlocutory judgment, the proceedings in this Court were not stayed at the time of the High Court's judgment.

[24] At [28] of the High Court's judgment, orders were made, joining as a fifth defendant to the proceeding in that Court, NZ Pulp & Paper Limited, and directing the timetabled filing of the plaintiff's second amended statement of claim and notice of proceeding to reflect that joinder.

[25] The plaintiff was also successful in the High Court in applications concerning inspection of documents and setting aside claims of confidentiality as a basis for resisting disclosure. It was also unsuccessful in applications relating to discovery of some documents.

[26] An application by the defendants in the High Court proceedings in relation to inspection of documents was successful, on a conditional basis, to address issues of confidentiality. The High Court made a number of other interlocutory orders all of which make, or at least allow, progress towards a fixture for those proceedings. I anticipate, however, that the addition of a new defendant in the proceedings will

⁴ Above n 3.

postpone a fixture of the proceedings on their merits, although the degree to which it will do so is not ascertainable from the High Court's interlocutory judgment.

[27] Although the determination of interlocutory questions in the High Court proceedings such as disclosure and inspection of documents, interrogatories and the like, may smooth a path for the proceedings in this Court, the issues are not identical and it would be unrealistic to think that similar issues may not arise in this Court in which adversarial litigation is conducted in much the same way as in the High Court. That would, in turn, mean that an early fixture here would be unlikely.

[28] Unlike the proceedings in the Authority and now in this Court, which are founded on employment agreements and breaches of them, the High Court proceedings are founded on an agreement for sale and purchase of the business in which the former employees were engaged and alleged breaches of that commercial contract.

[29] Although the plaintiff is correct that this Court does not have jurisdiction to determine the non-employment agreement-founded proceedings that have been issued in the High Court, it is equally true that no other court has the jurisdiction to hear and determine those employment agreement-founded causes of action: see ss 161(3) and 187(3) of the Act. The defendants have not sought to stay the proceedings or any of their causes of action in the High Court proceedings and it is not for this Court to determine or even suggest what should happen to the proceedings in the High Court.

[30] This Court's exclusive jurisdiction to deal with those employment agreement-founded causes of action provides an argument against the plaintiff's application for stay. Although the plaintiff's application proceeds on the assumption that the High Court can and will determine employment agreement-founded obligations and damages resulting from breach of these at the same time as it determines the tort and equity based proceedings that are before it, I do not think that can be so. If it were, that would be a very powerful argument in favour of staying or even dismissing the proceedings in this Court because they would simply duplicate some of those causes of action in the High Court. But the position is that each Court has before it not

simply justiciable causes of action between the parties, but ones which are exclusively within the jurisdiction of one or the other. Whatever may have been the position earlier, the plaintiff's statement of claim in the High Court does not contain causes of action that are in the Authority's or this Court's exclusive jurisdiction.

[31] There may be instances in which the High Court is required to examine and determine what might be described as employment relationship issues. These may arise where employment contractual obligations constitute a necessary element of one of those other non-employment relationship founded causes of action. So, for example, in the case of allegations of inducement to breach employment agreements, those agreements may need to be identified, interpreted and applied by the High Court. On the pleadings filed to date for the defendants in the High Court, however, there is no dispute about either the existence or meaning of those contractual provisions. Rather, the defendants deny primarily that they and/or the other defendants are or were engaged in competitive economic activity that was in competition with the plaintiff so that there is no foundation at all for proceedings against them. I assume that the defendants will also assert that even if it is found in the High Court that the parties are or were in commercial competition, they did not undertake other acts or omit to do things that are other necessary constituents of those causes of action, for example that they did not conspire with others.

[32] In these respects, both Courts are entitled in law to have regard to and, if necessary, interpret and apply relevant employment agreements although for different purposes and with different ends. In the proceedings for breach of contract in this Court, damages arising from the breach may be available to the plaintiff on contractual damages principles. In the High Court, by contrast, it will neither be a question of whether the former employees breached their employment agreements nor that contractual damage principles will apply in the event of the plaintiff establishing those torts, covenantor obligations, or breaches of fiduciary duties.

[33] Mr Webster accepted, in principle, that courts should strive, where possible, to right wrongs in a way that compensates the wronged party rather than to impose monetary penalties for those wrongs, which penalties are payable to the state. A number of the plaintiff's causes of action against the defendants in the Employment

Court proceedings are for penalties for breaches of statutory or contractual obligations. If these are established, there is nevertheless a presumption that penalties awarded will be payable to the Crown unless the Court is satisfied that it is just that the penalties or parts of them should be paid to the wronged party.

[34] I have already noted that the principal consideration for deciding whether there should be a stay of proceedings is the interests of justice in the particular case. Decided cases have, however, provided a number of useful guidelines for the application of this test and I will examine and apply those where they are relevant to this case. They are summarised conveniently in *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd*⁵ and, more recently, and in employment related proceedings, in *Rooney Earthmoving Ltd v McTague & Ors*.⁶

[35] Applying the *Mackay* tests, followed in *Rooney*, I conclude as follows.

Proceeding first commenced

[36] This was the proceeding originally in the Authority that is now before this Court. However, what is more important than the date of issuing of proceedings, is their relative advancement at this time. The High Court proceedings are more advanced at this stage, although I accept that if there are no interlocutory issues, an earlier trial date might possibly still eventuate in this Court if this proceeding is not stayed.

Potential effect on the other proceeding

[37] There has been no application to the High Court for stay or partial stay of the proceedings before it or for severance of issues. Not directing a stay of the proceedings in this Court would not, theoretically at least, affect the progress of the proceedings in the High Court. On the other hand, a stay of the proceedings in this Court would enable the High Court proceedings to progress to judgment without the distraction of concurrent and dynamic proceedings. Given the absence at this time

⁵ [1997] NZLR 477, (1997) 11 PRNZ 295.

⁶ HC Christchurch CIV-2009-476-471, 30 April 2010.

of what will, almost inevitably, be interlocutory issues in the proceedings in this Court, it is difficult to estimate when these proceedings may go to trial. Assuming some delay to deal with interlocutory issues including document disclosure, particulars and possibly interrogatories, not to mention settling the pleadings, the best estimate of a fixture in this Court is likely to be mid to late 2012. From what counsel have told me, that may be earlier than the trial in the High Court, especially now that a fifth defendant has been added to that proceeding and in respect of which interlocutory issues will almost inevitably arise and need to be dealt with.

Public interest

[38] This is private litigation so except to the extent of duplication of court resources which is contrary to the public interest, this is not a particular factor in this case.

Witnesses

[39] Although it is likely that the same witnesses who would give evidence in the Employment Court will do so in the High Court, there will be a not insignificant number of additional witnesses in the High Court proceedings. In this sense, it is preferable to have those duplicate witnesses give evidence in the High Court trial first.

Duplication and waste

[40] This consideration has already been touched upon. Much, although not all, of the preparatory work and cost involved in a trial in this Court will have to be undertaken in the High Court or, perhaps more correctly, vice versa.

State of advancement

[41] This, too, has already been alluded to. Given my conclusion that it is almost inevitable that there will be disputed interlocutory issues between the parties in the proceedings in this Court, I conclude that the preparation for trial in the High Court

proceedings is more advanced even although it may not necessarily follow that an earlier trial date will be available.

Multiplicity of proceedings

[42] I accept the principle, as have other courts, that it is an abuse of process to allow two concurrent proceedings involving the same subject matter to proceed. Here, however, it is not suggested that the Employment Court proceedings be stayed permanently. Rather, the plaintiff seeks a temporary stay until the High Court proceedings are disposed of. So while this would avoid concurrence, it would not necessarily avoid what was described by Barker J in *Anderson v Northland Health Ltd*⁷ as the “hardship to a defendant in being vexed twice for the same cause”⁸. Theoretically at least, the defendants’ second vexing may simply be postponed by the plaintiff’s proposal, so that all that is avoided is concurrent vexing.

[43] There is a good deal of dispute between the parties about the rate of progress of the proceedings in the High Court and the responsibility for this. The latter is not the concern of this Court but the former is relevant in determining when those proceedings may come on for trial and be decided. I accept that there are ongoing interlocutory issues in the High Court proceedings that will probably continue through 2012. At the same time, however, it appears that progress is being made to deal with those issues: they are coming before, and being determined by, an Associate Judge of the High Court including, from time to time, in Wellington where the Associate Judge is based at times, when he is not in Napier.

[44] Many, but not all, of the issues in the proceedings before this Court will also be before the High Court as will other associated heads of dispute that cannot be determined in this jurisdiction. It may be inevitable that even after the High Court determines the proceedings there, the remaining employment contract issues may have to be litigated in this Court. Although the delay inherent in that possibility is unfortunate, it would be more unjust for the separate proceedings to continue to go to trial concurrently with the attendant risks and disadvantages of such a course.

⁷ HC Whangarei, CP 2/96, 13 October 1997.

⁸ At 4.

[45] Once the Court concludes that the hearing of the two sets of proceedings in different courts is not in the interests of justice, the question whether there should be a stay of the proceedings in this Court really answers itself in the absence of any suggestion of a stay of the High Court proceedings. Although such applications should not be decided simply on the basis of which party is first out of the blocks to apply for a stay in one or other jurisdiction, the absence of any such application in one would mean a continuation of the undesirable concurrency unless the stay already applied for in this Court is granted.

Decision

[46] For the foregoing reasons there will be a stay of the proceedings now in this Court but on conditions. These include that the plaintiff must prosecute expeditiously its High Court proceedings. Any party may apply, on reasonable notice, to review the order for stay if material circumstances change. In any event, the proceedings in this Court are to be the subject of a telephone conference call with a Judge approximately six months after the date of this judgment to review the order for stay in light of the progress of the High Court proceedings.

[47] I reserve costs on the stay application.

GL Colgan
Chief Judge

Judgment signed at 11 am on Thursday 26 January 2012