IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-0025
[2014] NZHC 393

BETWEEN	DANONE ASIA PACIFIC HOLDINGS PTE LIMITED First Plaintiff
	NUTRICIA LIMITED Second Plaintiff
	DUMEX BABY FOODS CO LIMITED Third Plaintiff
	DANONE DUMEX (MALAYSIA) SDN BHD Fourth Plaintiff
	DUMEX LIMITED Fifth Plaintiff

.../cont

AND	FONTERRA CO-OPERATIVE GROUP LIMITED Defendant

Hearing: 5 March 2014

Counsel: D J Goddard QC and J H Stevens for Plaintiffs
A R Galbraith QC and J Anderson for Defendant

Judgment: 7 March 2014

JUDGMENT OF BROWN J

This judgment was delivered by me on 7 March 2014
at 3 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Bell Gully, Wellington
Chapman Tripp, Auckland
Counsel: D Goddard QC, Wellington
Alan Galbraith QC, Auckland

DANONE VIETNAM COMPANY LIMITED
Sixth Plaintiff

DANONE NUTRICIA EARLY LIFE NUTRITION (HONG KONG) LIMITED
Seventh Plaintiff

NUTRICIA AUSTRALIA PTY LIMITED
Eighth Plaintiff

Introduction

[1] On 9 January 2014 the plaintiffs commenced this proceeding by filing a statement of claim against the defendant.

[2] The court received requests seeking either a copy of the statement of claim or access to the court file from three media organisations, namely Radio New Zealand, The Wall Street Journal and an Australian-based Bloomberg News reporter.

[3] The plaintiffs do not object to the release of the statement of claim. However the defendant does object. It has recently filed an interlocutory application on notice for a stay of proceedings as a consequence of an international arbitration proceeding commenced by the first plaintiff and others in Singapore under the Rules of Arbitration of the United Nations Commission on International Trade Law (the Singapore arbitration).

Relevant principles

[4] The requests are made in reliance on r 3.13 which, among other things, provides that the judge may deal with the application on the papers, at an oral hearing, or in any other manner the judge considers just.[1]

[5] The litigants having indicated a preference for a hearing in person, an oral hearing was scheduled. Although notice of the hearing was given to the media organisations who had made the requests, only the litigants appeared.

[6] The determination of the application is governed by r 3.16 which provides:

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1 Rule 3.13(7).

3.16 Matters to be taken into account

In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

(a) the orderly and fair administration of justice:
(b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:
(d) the freedom to seek, receive, and impart information:
(e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:
(f) any other matter that the Judge or Registrar thinks just.

[7] With reference to the initial step of considering "the nature of, and the reasons for, the application or request" Asher J in *Commerce Commission v Air New Zealand* said: [2]

> ... They form a background for the assessment of the relevant matters that are then listed. They will tend to drive the analysis of the six factors. For instance if the purpose is publication to the public by the media, that may lead to a different focus than if the application was by a private person for personal or commercial purposes. Inevitably a Court will be less sympathetic to an application which does not have a recognisable and legitimate public or private purpose.

[8] In the authorities applying r 3.16 two different approaches can be discerned. In *BNZ Investments Ltd v Commissioner of Inland Revenue* Wild J commented: [3]

> It is clear that the principles of open justice is paramount, effectively creating a presumption of disclosure. This presumption is easily displaced if the request is for documents that were not read in or read by the Court, because the principle of open justice rests on the premise that such documents have entered the public domain.

[9] A different approach was taken by Asher J in *Air New Zealand* where he rejected the suggestion that open justice is the paramount consideration and considered that the six matters to be taken into account under r 3.16 are

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2 *Commerce Commission v Air New Zealand* [2012] NZHC 271 at [30].
3 *BNZ Investments Ltd v Commissioner of Inland Revenue* (2009) 20 PRNZ 311 (HC) at [36].

"unambiguously non-hierarchical".[4] Like a number of other judges in subsequent cases[5] I prefer the analysis in *Air New Zealand.*

The factual background

[10] The context to the litigation was a contamination event and a subsequent recall of a food product. The statement of claim is a substantial document pleading four causes of action arising out of those events: two for breaches of the Fair Trading Act 1986 and two alleging tortious conduct. The pleading includes reference to a Supply Agreement between the first plaintiff and Fonterra Limited. That Supply Agreement contains an arbitration clause.

[11] International arbitration proceedings were commenced in Singapore on 8 February 2014 pursuant to the arbitration clause in the Supply Agreement by a number of parties including the first plaintiff. Although the respondents in that arbitration proceeding, who are companies within the Fonterra group, do not include the defendant in the current proceeding, nevertheless the defendant has made application to this court for an order staying the current proceeding pending the final determination of the arbitration proceeding.

[12] In the normal course of events a statement of defence would be filed within 25 working days after service of the statement of claim on the defendant. However in the stay application the defendant sought an order that, pending the determination of its application for a stay, it should not be required to file a statement of defence.

The nature and reasons for the request

[13] The relevant events have already been the subject of a significant amount of publicity in various news media. The request for access to documents in the proceeding by all three applicants is part of an understandable continued monitoring of the issue by the media.

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4 At [28].

5 *Chapman v P* (2009) 20 PRNZ 330 (HC) at [31]; *Sanofi-Aventis Deutschland GMBH v AFT Pharmaceuticals Ltd* (2012) 21 PRNZ 130 (HC) at [12]; *Orlov v New Zealand Law Society (No 7)* [2012] NZHC 452 at [8]; *Ngai Tahu Justice Holdings Ltd v Attorney General* [2013] NZHC 801, (2013) PRNZ 422 at [9].

[14] The Radio New Zealand application states that the matter concerns one of New Zealand's largest companies and is of public interest. The Wall Street Journal application elaborates on that theme by reference to the asserted implications for the New Zealand economy.

Submissions of counsel

[15] Mr Galbraith QC's argument for the defendant resisting the request for access was founded on two propositions. First, that there is a practice that, in order to achieve a balance in reporting of a dispute, an order permitting inspection of the court file ought not to be made pending the filing of a statement of defence, citing *Commerce Commission v Visy Board (NZ) Ltd*.[6] In that case Allan J observed:

> [16] In my opinion, the applicant has established that it has a genuine or proper interest in the subject matter of the proceeding, and that it ought to be permitted to search the pleadings. But that right of search must be deferred because, save for the first defendant, no defendant has filed a statement of defence. It is unlikely that any further statement of defence will be filed for some time yet because issues as to the jurisdiction of this Court have yet to be resolved.
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> [17] It is important to guard against the risk that the plaintiff's allegations are permitted to be published without the balance that the statements of defence would provide. In Re Ridge Family Trust, Harrison J granted leave to the Sunday News newspaper to search the pleadings in the proceeding, namely the statement of claim and statements of defence, on condition that any article published in relation to the proceeding gave appropriate and balanced prominence to the nature of the claim and the nature of the defences. That is the type of order I consider to be appropriate in this case also. However, such an order is premature because most defendants have not yet filed a statement of defence.
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> [18] I have considered whether I ought, nevertheless, to permit the applicant to search the present amended statement of claim, but have decided that course not to be appropriate. There is simply too great a risk that publication of certain of the plaintiff's allegations without appropriate balancing material would be likely to lead to the adverse public inferences about which the defendants express understandable concern.

[16] Secondly, Mr Galbraith made the point that if the stay is granted then the dispute will be conducted in a forum where the process is confidential. The confidentiality which parties agree to when they incorporate an arbitration clause in

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[6] *Commerce Commission v Visy Board (NZ) Ltd* [2009] NZAR 299 (HC). A similar approach was taken in *Hotchin v APN New Zealand Ltd* (2011) 20 PRNZ 484 (HC) and in *Yarrow v Finnegan* HC New Plymouth CIV-2011-443-000330, 15 July 2011.

their contracts should not be undermined by the release of information at a preliminary stage. On the other hand, if the Court declines to make an order staying the proceeding then a statement of defence will be filed and the issue of access to the file can be addressed in the normal manner.

[17] For the plaintiffs, Mr Goddard QC countered that the *Visy* approach reflects a practice rather than a rule. He argued that the adoption of that practice was not appropriate in this case because the defendant had already made a number of public statements about not only the contamination event but also the merits of the plaintiffs' claim. As a consequence, the plaintiffs were the recipients of inquiries from the media about the details of their claim. Mr Goddard explained that the plaintiffs' preference is not to engage with such inquiries but rather to refer those making inquiry to documentation such as the pleading on the court file. In answer to my question about the plaintiffs themselves releasing the statement of claim, Mr Goddard indicated that there was an apprehension that to do so might amount to contempt of Court.

[18] The point was then made that the effect of the *Visy* practice was that any access limitation was usually of limited duration whereas in the present case a statement of defence would not be filed until, at the earliest, when the stay application was dismissed. However as Allan J recognised in *Visy*, a challenge to jurisdiction usually has that consequence. Furthermore it appears that the plaintiffs in effect acquiesced in that course by the terms of the consent timetable for the disposal of the stay application.

[19] Mr Goddard then made several points concerning the ambit of the arbitration relative to the issues raised in the statement of claim. These points included that:

(a) There is not a perfect overlap of parties. Some of the plaintiffs are not parties to the arbitration and nor is the defendant;

(b) There was a significant prospect that the arbitration could not deal with all issues and that at least some would remain to be addressed in the New Zealand litigation; and

(c) The stay application was not a stay application in the true or orthodox sense but was more in the nature of a forum non conveniens contention.

[20] In response Mr Galbraith directed me to ground 2.2 of the stay application which records the defendant's contention that all dealings which took place with the first plaintiff were dealings between the first plaintiff and Fonterra Ltd within and governed by the terms of the Supply Agreement. Interesting as those issues may be, this is not the time at which to explore, let alone resolve, them. The appropriate time to resolve those competing contentions is at the hearing of the stay application itself.

[21] In reply Mr Galbraith also made the points that Danone had itself issued a press release, that the amount claimed was now in the public domain but that the defendant had not been the source of that information, and that if the statement of claim was released then the defendant would similarly face inquiries from journalists directed to the specific pleaded matters.

The r 3.16 factors

The orderly and fair administration of justice

[22] This litigation has only recently been commenced and, although there has been a significant amount of publicity concerning the events which have given rise to the litigation, none of the documents have been read in open court which is when their contents normally enter the public domain.[7]

[23] In the present case, if a stay of proceedings is granted and if all the matters raised in the statement of claim are subsumed in the arbitration process, then the evidence and the parties' positions and indeed the outcome may never see the light of day because the arbitral process is one which is conducted in confidence. Confidentiality associated with arbitration proceedings is one of the reasons why contracting parties elect to include submissions to arbitration in their contractual

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7 *Home Office v Harman* [1982] 1 AC 280 (HL) at 284.

arrangements. As Associate Judge Osborne observed in *Ngai Tahu Justice Holdings Ltd v Attorney General*:[8]

> By promptly having the plaintiff agree to a reference to arbitration, the defendant has simply maintained its contractual right to have matters resolved privately, a feature of arbitration which is viewed as one of its primary purposes.

[24] The present case is not on all fours with *Ngai Tahu Justice Holdings*. In that case the parties had consented to a stay of the proceeding whereas in the present matter there is a live contest as to whether the fact of the Singapore arbitration should justify the New Zealand proceeding being stayed.

[25] Analysing the matter from the perspective of the "balance of the risk of doing an injustice",[9] the potential outcomes would seem to be as follows. If the stay application is granted but there has been access to the court file in the interim, then the confidentiality associated with the arbitration process will likely have been defeated, at least in part. However if the stay application is unsuccessful and consequently the defendant is required to file a statement of defence then, subject to any further direction of the court, both claim and defence would be available for inspection with the only effect being that the time of gaining access had been postponed.[10]

[26] Associate Judge Osborne's conclusion in *Ngai Tahu Justice Holdings* is reflected at [15]:

> If the plaintiff's claim had been commenced by a submission to arbitration in the first place, without the intermediate step of a High Court order, the present request would not have been open to Mr Clark. On the particular facts of the case this is an overwhelming objection to an acceptance of the request. For that reason, I will only briefly examine the other considerations that come to bear in this case. Some simply reinforce the conclusion which is driven by the agreement to arbitrate. None of the others is sufficient in this case to displace the justice of recognising the privacy of an agreed arbitration.

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8 *Ngai Tahu Justice Holdings Ltd v Attorney General*, above n 5 at [14]. The r 3.16(b) factor is subsumed in this analysis.

9 See May LJ's "substantially less elegant" phrase in *Cayne v Global Natural Resources* [1984] 1 All ER 225 (CA) at 238.

10 Compare the equivalent approach of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 408 G in discussing the issue of the status quo.

[27] While I recognise that *Ngai Tahu Justice Holdings* was an *a fortiori* scenario in that an agreed stay was in place, I consider that it is appropriate to adopt a similar approach in the present case in the period pending the determination of the application for a stay of the proceeding. Consequently I only briefly examine the other r 3.16 factors.

The principle of open justice

[28] As Associate Judge Osborne noted, r 3.16(c) specifically refers to the reporting of and commenting upon "court hearings and decisions". I do not consider that the concept of open justice assumes much significance in the preliminary pleading stages of civil litigation when there is a serious contest as to whether the dispute will even be heard and determined by the court.

Freedom to seek, receive and impart information

[29] As media organisations, all the applicants have a valid interest in the freedom to seek, receive and impart information. However that interest cannot prevail with reference to information in dispute resolution processes when they are the subject of confidentiality arrangements in an arbitral process.

Restriction under r 3.12

[30] This rule lists proceedings in which the files may not be searched and includes proceedings brought under enactments which limit or prohibit access. One of the enactments listed is the Arbitration Act 1996.[11]

[31] In relation to this factor I again endorse the view of Associate Judge Osborne in *Ngai Tahu Justice Holdings*:[12]

> While this present proceeding cannot be properly described as a proceeding brought under an enactment specified in r 3.12(3), the very naming of the Arbitration Act within r 3.12, serves to highlight the important restrictions arising under that Act which the Rule intends should be specifically addressed. This, in a sense by a back-door route, reinforces the previous

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11 Rule 3.12(3)(c).
12 At [24].

conclusions I have reached arising from the parties' contractual agreement as to arbitration.

Conclusion

[32] Rule 3.16(f) entitles a judge to take into account any other matter that the judge thinks just. In that regard I weigh in the mix the fact that there has already been a degree of publicity both about the contamination event and the fact that the current proceeding is on foot. However I do not consider that this is an especially relevant factor. The public interest is addressed already to the extent that the fact of the event is in the public domain. Of itself, the fact that there has been some publicity, even emanating from the defendant, is not a reason why the release of more detailed information relating specifically to the litigation should not await the availability of both a statement of claim and a statement of defence (and any reply) in the event that the dispute or some part of it remains for determination in this court.

[33] Weighing all the factors addressed above I have formed a clear view that the requests by the media organisations should be refused pending the determination by the Court of the defendant's application for a stay of the proceeding. When that judgment is available, depending upon the outcome, that will then be the appropriate time to revisit the issue of access to the court file.

[34] Accordingly the applications from the three media organisations for access to the court file are declined.

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Brown J