IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2024-404-000645
[2024] NZHC 712

BETWEEN	SUPERMEGA MARKET LIMITED Applicant
AND	NBL (NEW ZEALAND) LIMITED Respondent

Hearing: 28 March 2024

Appearances: JWA Johnson, A Ho & OEG Harding for the Applicant
Z Chen for the Respondent

Judgment: 28 March 2024

ORAL JUDGMENT OF JOHNSTONE J
(Application for interim injunction)

This judgment was delivered by me on 28 March 2024 at 4.00pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors/Counsel:
Crimson Legal, Auckland
Bankside Chambers, Auckland
Righteous Law Ltd, Auckland

[1] Supermega Market Limited markets and sells milk powder and various nutraceutical products. NBL (New Zealand) Limited also markets white-labelled nutraceutical products under its own brands, and further, it rents industrial premises at 12 Harbour Ridge Drive, Wiri.

[2] In March 2022, Supermega and NBL entered a so-called business cooperation agreement which in essence provided for:

(a) Supermega to have access to the premises, at which it would operate both its own and NBL's production facilities, paying expenses such as rent in the amount of $78,000 per month, wages, water, electricity and depreciation;

(b) Supermega to assist NBL to meet its debts, including by lending its sums that required to be repaid within 12 months; and

(c) NBL to purchase all of its products for on-sale from Supermega.

[3] On 27 February 2024, Supermega made demand for payment by NBL of a sum just short of $800,000, which it alleges it is owed, primarily as a result of financial assistance by Supermega pursuant to the Agreement. It has ceased meeting all of the above expenses. In response, NBL issued its own default notice and sought to re-negotiate the Agreement.

[4] On 25 March 2024, there being no response from Supermega to NBL's default notice, NBL issued notices of cancellation and re-entry. It engaged security guards and restricted Supermega's access to the premises.

[5] By application without notice dated 27 March 2024, Supermega applies for interim orders prohibiting NBL from restricting its access to, and from dismantling and removing any of Supermega's equipment located at those premises.

[6] Supermega says that:

(a) the Agreement amounted to a lease, and that NBL failed to comply with the Property Law Act 2007 when purporting to cancel and re-enter;

(b) NBL has not validly terminated the Agreement; and

(c) NBL has breached the Agreement.

[7] Accordingly, it says, Supermega is entitled to interim relief pending determination of the substantive differences between the parties.

[8] While the application was made without notice, it was served, and I heard responsible and helpful submissions from Ms Chen on behalf of NBL, offered on a Pickwick basis.

[9] Ms Chen submits that the Agreement does not amount to a lease, and that the amounts in dispute are, at worst, broadly equivocal so that if Supermega is permitted to remain in the premises NBL will continue to be prejudiced by conduct that it says involves Supermega perpetuating breaches of the agreement. Her submission is that the threshold for interim relief in those circumstances is not met.

Issues for determination

[10] I am required to consider:

(a) whether there is a serious question to be tried, or put another way, whether Supermega's claim is vexatious or frivolous;

(b) the balance of convenience, requiring consideration of the impact on the parties of granting, and refusing, the application; and

(c) as a check, the overall justice of the position.[1]

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1 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12].

Serious question to be tried

[11] In determining whether Supermega established a serious question to be tried, I have considered whether there is a tenable resolution of the facts and law on which Supermega may succeed at trial.[2] Here I consider the position relatively clear. The agreement upon which Supermega relies refers at clause 11 to Supermega's "exclusive rights" to use the office workshop, warehouse, and equipment and machinery and accessories in a so-called "cooperation area". The exclusivity of use is, in my view, sufficiently clear as to give rise to serious argument that Supermega is entitled to all of the protections of a lessee pursuant to the Property Law Act 2007.

[12] Ms Chen points out other clauses in the agreement which refer to ways in which the cooperation area might be accessed, albeit pursuant to notice, and indeed joint access being feasible in relation to a broader part of the factory described as "factory premises".

[13] While there is much to be desired in terms of the precision with which the Agreement was drafted there is, at the very least in my view, a prima facie case that Supermega has been entitled to exclusive use of a particular area within the premises in the nature of a leaseholder's entitlement. That being the case and there being no dispute that the re-entry requirements pursuant to notices of the Property Law Act 2007 have not been met, there is a serious question to be tried as to whether in fact Supermega is entitled to ongoing exclusive possession of the cooperation area.

Balance of convenience

[14] Turning to the question of balance of convenience, the purpose of an interim injunction is to protect the plaintiff from injury that cannot adequately be compensated in damages.[3] The Court must be satisfied that the orders sought are reasonably necessary to preserve the position of the applicant.[4] The Court may consider all the circumstances of the case, including the apparent strengths or weaknesses of the claim,

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2 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 133.
3 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL).
4 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA).

the statutory framework, the public interest, and the private and public repercussions of granting relief.

[15] Here, Mr Johnson for Supermega calls primarily in aid the prospect of an indeterminate level of damage to Supermega vis-a-vis its customers other than NBL if it continues not to be able to access and operate its manufacturing equipment. Further, he submits that it being unable to operate its equipment, Supermega's employees are thereby locked out of their entitlement to ongoing wages and indeed their own livelihoods. On the other hand, he says the amounts in dispute as between the parties are such that in fact the liabilities owed by NBL to Supermega comfortably exceed those currently owed by Supermega to NBL, even allowing for the fact that monthly expenses will accrue while Supermega insists on its entitlement to repayment of the debt owed by NBL.

[16] This was a point that received some attention during the hearing. There will of course, subject to how long the proceeding takes before it is determined, come a time when the non-payment of expenses such as rent at the rate of $78,000 per month might exceed the amount that Supermega says it is owed by NBL. Naturally, that is a matter which would remain under review and which Supermega would be required to identify in due course even allowing for its argument that the amount it owes NBL are significantly lower than the amount the NBL owes it. Be that as it may, recognising NBLs argument that in fact Supermega's liabilities exceed NBLs counter liabilities at the present moment, Mr Johnson in the course of the hearing and shortly prior to delivery of this judgment sought leave to amend the application so that in the event re-entry were ordered, Supermega would then be rendered susceptible to an express condition of re-entry that it pay $78,000 in monthly rental commencing 1 April 2024.

[17] I consider that amendment to the application such as to render the balance of convenience clearly in favour of Supermega's application. The short point is that the status quo will be preserved and arguably improved upon to the extent that Supermega will be required to meet at least the primary monthly expenses it had been meeting prior to the issue of its notice of default.

Overall justice

[18] Standing back, and whilst again recognising NBLs submission that it has acted responsibly throughout and is frustrated at what it regards as ongoing prejudice arising because of Supermega's position within its own premises, I am persuaded that the justice of the position favours re-entry. There will inevitably require to be a full accounting of sums owed, which are readily calculable insofar as amounts loaned and payable by way of expense are concerned. The broader issue appears to be that of the underlying business relationship between the parties. I see that aspect as distinct from the aspect of how presence within the premises and access to the parties' respective items, valuable items of equipment should be protected.

Result

[19] In those circumstances, I make the following interim orders:

(a) NBL is prohibited from restricting Supermega's access to the premises at 12 Harbour Ridge Drive, Wiri and from dismantling or removing any of the industrial equipment at those premises whether that be equipment owned by Supermega or by NBL.

(b) That prohibition is conditional upon Supermega paying a monthly rental of $78,000 including GST on the first of each month commencing 1 April 2024.

The proceeding is to receive formal on notice mention in the Duty Judge list commencing at 10 am on Wednesday 10 April 2024, at which point the parties can anticipate timetabling, in accordance with part 19 of the High Court Rules, of that aspect of this proceeding which requires determination whether the agreement is in the nature of a lease, and if so how and on what basis it may be cancelled.

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Johnstone J