Case Note

MARITIME UNION OF AUSTRALIA (MUA) V PATRICK STEVEDORES PTY LTD: MARRYING INJUNCTIVE RELIEF AND LABOUR SUPPLY CONTRACTS

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INTRODUCTION

One of the most significant legal difficulties which the Maritime Union of Australia (MUA) faced in its highly publicised 1998 litigation with the Patricks Group of companies,[1] was that the practical effect of the injunctions sought was to require specific performance of contracts of labour supply, or employment, about which courts have always had some hesitation. It was contended by the Patricks Group ("Patricks") that it was contrary to the principles governing the grant of injunction that the orders sought by the MUA be made because the orders would involve compelling the parties to maintain or engage in business relationships and would involve the court in supervision of many commercial activities.[2]

This argument represents the traditional wariness of mixing the discretionary equitable remedies of specific performance or injunction with contracts requiring the conduct of personal services. As one court has said:

Very rarely indeed will a court enforce ... a contract for services. The reason is obvious: if one party has no faith in the honesty or integrity or the loyalty of the other, to force him to serve or to employ that other is a plain recipe for disaster.[3]

However, where once it was considered appropriate to confine the parties to a personal services contract to their remedy in damages, and deny any enforcement of the contract or injunction which would have the effect of forcing the parties to continue with their contractual obligations, this stance has been

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1 The relevant litigation the subject of this casenote is: *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 153 ALR 602 (North J); *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 626 (Full Federal Court); *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 643 (High Court of Australia).

2 *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 153 ALR 602, 617.

3 *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482, 506.

reconsidered in both England[4] and Australia.[5]

The purpose of this casenote is to examine the various arguments raised by Patricks to try to dissuade the courts from exercising their discretion to award the injunctions sought, and the manner in which each of those arguments was refuted.

THE FACTS[6]

Patricks conducted the business of stevedoring at 17 facilities around Australia. In particular, four companies in the Patricks group ("the employers"[7]) employed the applicant employees, approximately 1,400 in number, and who were members of the MUA, to carry on the stevedoring business. The employees believed that the employers intended to dismiss their unionised workforce and replace it with non-union labour. This concern was fueled by the fact that, in January 1998, the Patricks group transferred the right to use No 5 Webb Dock in Victoria for stevedoring operations, together with cranes and equipment, to companies associated with the National Farmers Federation (NFF). The MUA employees believed that Patricks had some involvement with the NFF companies, and that the transfer of No 5 Webb Dock was part of a plan by Patricks to train an alternative workforce with which to replace the union employees.

In response, the employees filed an application on 11 February 1998, in which they alleged that the transfer of No 5 Webb Dock was part of a wrongful plan to replace the MUA employees with a non-union workforce. However, matters escalated considerably just before Easter when the employees learned that Patricks intended to dismiss the whole workforce during the Easter period. Then, on 7 April 1998, Patricks announced that it had entered into contracts "for a range of services from nine separate companies including the ... NFF backed P&C Stevedoring ..." and that Patricks had "taken steps to ensure all displaced employees ... will be eligible to receive their full leave and redundancy

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4 The first, and exceptional, case in the English jurisdiction occurred in 1972 in *Hill v C A Parsons & Co Ltd* [1972] 1 Ch 305. There followed *Powell v London Borough of Brent* [1987] ICR 176, *Hughes v London Borough of Southwark* [1988] IRLR 55, *Irani v Southampton and West Hampshire Area Health Authority* [1985] ICR 590, and *Robb v London Borough of Hammersmith* [1991] IRLR 72.

5 For example: *Turner v Australasian Coal and Shale Employees Federation* (1984) 6 FCR 177, 192-3; *Gregory v Philip Morris Ltd* (1988) 80 ALR 455, 482 per Wilcox and Ryan JJ; *Buckenara v Hawthorn Football Club* [1988] VR 39; *Hawthorn Football Club v Harding* [1988] VR 49; *Gillespie v Whiteoak* [1989] 1 Qd R 284; *Wilson Parking Australia 1992 Pty Ltd v Kao Holdings Pty Ltd* (unreported, Supreme Court of Western Australia, White J, 8 September 1995).

6 These facts are summarised from those in the judgment of His Honour North J (1998) 153 ALR 602, 604-6.

7 Consisting: Patrick Stevedores No 1 Pty Ltd, Patrick Stevedores No 2 Pty Ltd, Patrick Stevedores No 3 Pty Ltd and National Stevedores Tasmania Pty Ltd.

entitlements."

On the evening of the 7th of April, each of the four Patrick employer companies appointed administrators under Pt 5.3A of the *Corporations Law*. The court was told on 8 April that the administrators intended to dismiss the employees because the employers were insolvent. An interim injunction to restrain the employers from doing so was granted by His Honour North J on 8 April 1998, to have effect until the first hearing day after Easter, that was 15 April 1998. It is this latter hearing, and the subsequent appeals from the decision, which is the subject of this casenote.

The employees sought injunctive orders which, in general terms, sought to prevent the employers, until the trial of the action, from dismissing the employees, and which required Patricks to utilise the MUA employees and no others in operating its stevedoring business.[8] The court was also asked to restrain the employers from acting on or giving effect to the purported termination of certain labour supply agreements between the employers and another company in the Group, Patrick Stevedores ESD Pty Ltd.[9] That purported termination, which occurred on the evening of 7 April 1998, armed the Patricks employers with the power to claim that the MUA workforce was redundant.[10] In other words, the purported termination left the employers with no work for their workforces to perform.[11]

THE ISSUE

As an application by the employees for interlocutory injunctive relief, the court had to be satisfied that, first, there was a serious question to be tried, and second, that the balance of convenience favoured the grant of relief.[12] For the purposes of this casenote, it is sufficient to note that North J found that the first condition

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8 (1998) 153 ALR 602, 608.

9 This operating company purchased the stevedoring businesses from each of the four employer companies in about September 1997. It subsequently changed its name to Patrick Stevedores Operations No 2 Pty Ltd. After the sale, the employer companies ceased to carry on the business of stevedores. They merely provided their employees' labour to the operating company pursuant to the labour supply agreements. The operating company had the right to terminate the labour supply agreements without notice if there was any interference with the supply of labour. Thus, after the sale, the only significant asset of each of these employer companies was its labour supply agreement. If that agreement was, for any reason, terminated, the employer companies were rendered insolvent. Due to industrial action in early 1998, there was an interruption in the supply of labour. The operating company exercised its power to terminate on 7 April 1998.

10 (1998) 153 ALR 602, 610.

11 (1998) 153 ALR 643, 650 (High Court).

12 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153-4.

for the grant of injunctive relief was satisfied.[13]

His Honour's consideration of the balance of convenience, in the context of a personal services contract, posed some difficulty and is discussed shortly.

The employees were seeking injunctive relief against the Patricks Group at this interlocutory stage in order to preserve their entitlement to the statutory remedy of reinstatement,[14] in the event that they could prove a breach of s 298K of the *Workplace Relations Act 1996 Cth*("the Act") at the trial of the action. It was feared that if the relief sought was not granted in the interim, it would have been practically impossible for the court to make such order or orders later at trial, as there would have been "irreversible changes flowing from the employees' absence from the workplace."[15]

Thus, there was no question of the employees' claims being satisfactorily met by monetary compensation. By the time of a final hearing, the inevitable reorganisation of the waterfront, and the employees' lives, was likely to make any reinstatement of a workforce of 1,400 people quite unrealistic and futile.[16] Damages were not an adequate remedy in all the circumstances.

JURISDICTION TO AWARD INJUNCTIVE RELIEF

As the Full Federal Court pointed out, the court had the power to award interlocutory injunctive orders against the Patricks *employers* by virtue of s 298U(e) of the Act, but that its discretion had to be exercised in accordance with the general equitable principles governing the granting of injunctions.[17] Neither the Full Federal Court[18] nor the High Court[19] accepted the argument that a court had to be satisfied that conduct contravening s 298K of the *Workplace Relations Act 1996* had in fact occurred before its injunctive power could be exercised.

However, one of the jurisdictional issues was that certain of the respondents

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13 There were, at the very least, two issues alleged on the face of the pleadings: *first*, that the threatened termination of employment of the employees was a breach of s 298K(1) of the *Workplace Relations Act 1996* (Cth) in that the employers were alleged to have injured the employees in their employment or altered their position to their prejudice; and *second*, that Patrick Stevedores ESD Pty Ltd and the Patricks employers were involved in a conspiracy byunlawful means, whereby the former agreed to participate in a strategy to provide for the easier termination of the workforce by the employers: (1998) 153 ALR 602, 609-14 per North J.

14 Section 298U(b) of the *Workplace Relations Act 1996*.

15 (1998) 153 ALR 602, 613 per North J.

16 (1998) 153 ALR 602, 613 (North J); (1998) 153 ALR 626, 634 (Full Federal Court).

17 (1998) 153 ALR 626, 631.

18 (1998) 153 ALR 626, 630.

19 (1998) 153 ALR 643, 655 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; 677-8 per Gaudron J.

against whom the injunctions were being sought[20] - were not "employers" within the definition of that term under the *Workplace Relations Act 1996*. The only person who could engage in conduct contravening s 298K was an "employer." Moreover, one other wrong alleged against the Patricks operators was the tort of conspiracy, a cause of action quite apart from any statutory wrong under the *Workplace Relations Act*. The issue therefore, was on what basis could an injunction be issued against the Patricks operators? Both the Full Federal Court[21] and the High Court[22] held that any injunctive orders made against the Patricks operators were permitted by s 23 of the *Federal Court of Australia Act 1976* (Cth).[23] Further, although injunction is a remedy of equitable origin, the "fusion of law and equity had enabled courts to use equitable remedies in aid of common law proceedings and it has become commonplace for them to do so."[24]

Hence, whilst the power to award the injunctive relief against both employers and operators was conferred by statute, the factors and principles governing the courts' discretion arose from the equitable jurisdiction in which the injunction had its origin.

THE FACTORS AND THEIR REBUTTAL

The injunctive orders granted by North J and upheld on appeal[25] essentially had the effect of requiring Patricks as employers to retain their workforce, and compelled Patrick Stevedores Operations Pty Ltd to use that workforce for any stevedoring work. The orders amounted to the specific performance of the

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20 *Supra* n. 7.

21 (1998) 153 ALR 626, 631-2.

22 (1998) 153 ALR 655-6 and 659 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

23 That section confers upon the Federal Court "power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders ... as the Court thinks appropriate."

24 (1998) 153 ALR 626, 632 (Full Federal Court).

25 Within a couple of hours of the orders being made by North J, the Full Federal Court stayed three of those orders, not because of any view about their merits, but to prevent any "chopping and changing that would occur if the orders were allowed to operate for a short time and were then set aside on appeal": (1998) 153 ALR 626, 628. Following the hearing on 22-23 April, the Full Federal Court dismissed an appeal against the orders made by North J, and made a further order, the content of which is not relevant to the matters raised in this casenote. Those orders were again stayed by Hayne J, on 24 April 1998, pending an application for special leave to the High Court: (1998) 153 ALR 641. On further appeal, the High Court considered that the orders made by North J fettered the discretion conferred on the administrator by s 437A of the *Corporations Law* to either continue or to desist from trading, which error was corrected by appropriate amendments to the orders - but North J's reasoning concerning the balance of convenience, and entitlement of the employees to injunctive relief, were approved by a majority of the High Court, Callinan J dissenting. The further order made by the Federal Court was set aside as being "unnecessary": (1998) 153 ALR 643, 666.

labour supply agreements, and required that the pre-7 April situation, whereby the Patrick operators had employed as their labour force members of the MUA, be maintained.[26] The employees were protected against the imminent termination of their employment.

An examination of the relevant tests indicate why the balance of convenience was resolved in favour of the employees, and how a court may justify the intervention of equitable relief in the employment context:

THE PARTIES ARE READY, WILLING AND ABLE TO PERFORM THE CONTRACT OF SERVICE:

To enforce a contract of service by specific performance or injunction, it is incumbent upon the plaintiff to demonstrate that he is ready and willing to perform his obligations under the contract.[27] This factor is a decisive one. The employment cases to date indicate, where a plaintiff employee fails to give an undertaking to the employer that there will be no further industrial disruption,[28] the parties are **not** in a position to perform the contract of employment.

In contrast, the stevedoring employees proffered an undertaking to the court that, if interlocutory injunctions were granted, they would not engage in industrial action against the employers.[29] Whilst His Honour North J called this an "unusual feature of this case"[30], it was an influential factor in favour of the grant of the injunction sought by the employees.

WHETHER EQUITABLE RELIEF MEANS FINANCIAL POSITION OF PARTY TO SERVICE CONTRACT ADVERSELY AFFECTED, AND WHETHER APPROPRIATE UNDERTAKINGS HAVE BEEN GIVEN

If an injunction were granted so as to compel the specific performance of the services contract, and its effect would be to prejudice the financial position of the defendant to such an extent that it would be precluded from litigating the matter further to a final hearing, or would otherwise suffer enormous financial hardship,

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26 (1998) 153 ALR 626, 637 per the Full Federal Court. However, as the High Court noted, it was one thing to restrain the parties to the labour supply agreements from giving effect to the termination of those agreements, which was proper in the circumstances; and another thing to fetter the discretion of the administrators so as to oblige them to continue to trade while the employer companies were insolvent. The latter course was inappropriate, and it was for this reason that the orders of North J were amended by the High Court to restore to the administrators the discretions conferred upon them by s 437A of the *Corporations Law*: (1998) 153 ALR 643, 663.

27 *Australian National Airlines Commission v Robinson* [1977] VR 87; *Chappell v Times Newspapers Ltd* [1975] WLR 482 at 502 per Lord Denning.

28 For example: *Gordon v State of Victoria* (1980) 21 AILR 285 at 286.

29 One specific complaint against the employees was that they had engaged in industrial action in late 1997 and early 1998. The action in 1998 appeared to comprise about 40 days in total: (1998) 153 ALR 602, 614. On appeal to the Full Federal Court, the form of this undertaking was amended slightly to reflect the definition of "industrial action" in s 4 of the *Workplace Relations Act 1996*.

30 (1988) 153 ALR 602, 614.

then equitable relief will not be granted. The defendant (so goes the argument) would be much better off financially by breaching the contract and paying damages (in the event that the breach is proved at trial to have been wrongful) than being forced to comply with the contract until trial.

This argument has met with mixed success in the employment context.[31] In the instant case, Patricks argued that the effect of the injunctions would be to require it to carry on its stevedoring business at a loss; that it was insolvent; and in no position to employ the applicants as the injunction would have the effect of compelling. However, North J considered that whilst the view may have been formed on 7 April that the employers were insolvent, circumstances had changed considerably between that date and the date of the hearing just over one week later. The employees were prepared to offer their labour at no cost to the extent necessary to get the employers' business back to profitable operation,[32] and the undertaking given by the employees not to take industrial action could influence customers who had decided not to use Patricks Stevedoring Operations Pty Ltd.[33] Thus, the necessary degree of financial hardship could not be proven so as to tip the balance of convenience in favour of Patricks.

In relation to this factor, the High Court was prepared to uphold the orders made by North J, in light of the undertakings given, on the basis that the administrators had to retain their discretion as to whether the employer companies ought to continue trading, or cease trading, and whether or not it would be feasible to retain the whole workforce. Decisions of that kind were for the administrators to make, not the court.[34] However, if the administrators decided to continue trading, the effect was to restore the pre-7 April employment situation.

WHETHER EXISTENCES OF ONGOING MUTUAL COOPERATION AND CONFIDENCE BETWEEN THE PARTIES

In circumstances where the employment contract involves mutual trust and confidence, then its absence, because the party's trust in the other has been betrayed or has genuinely gone, will be a decisive factor - it would serve the interests of neither party for the contract to be specifically enforced, or enforced by means of an injunction.[35] In that event, the balance of convenience is weighed heavily against the grant of any equitable relief which would have the effect of forcing the parties back into a personal relationship which had broken

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31 For example, extreme financial hardship was demonstrated in *McLachlan Consultants Pty Ltd v Boswell* (1988) 24 AILR 413, 414, as a result of which an injunction was not granted.

32 (1998) 153 ALR 602, 616. It was suggested that the employees may have needed to sacrifice wages for only a few days per month.

33 *Ibid.*

34 (1998) 153 ALR 643, 665 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

35 *Warren v Mendy* [1989] 3 All ER 103 at 113. Also: *Turner v Australasian Coal and Shale Employees Federation* (1984) 55 ALR 635 at 648.

down.

However, in the circumstances, North J was prepared to hold that:

> From the evidence before the court, it seems likely that Mr Butterell [one of the administrators] and the employees and the union will not have the same difficulties in cooperation as did the officers of the employers and the employees and the union before the administrators were appointed.[36]

And later in the judgment:

> In *Argyll*, Lord Hoffmann explained that the court resisted making such orders because it was undesirable to force hostile parties to work together. The administrator's presence makes this consideration of less concern in this case. Control of the employers is in the hands of a neutral, independent person.[37]

There are other Australian cases in which, despite a purported breach of the contract of employment, evidence of ongoing mutual trust and confidence was found to exist, or at least no loss of it, in which case equitable relief is more likely.[38] The replacement of the officers of Patricks employers by administrators provides a further example of how mutual confidence may be proven to the satisfaction of the court.

THE IMPORTANCE OF MAINTAINING THE STATUS QUO UNTIL TRIAL

If the effect of granting the injunction or decree of specific performance would be to maintain, rather than change, the status quo in the employment relationship, then the balance of convenience will favour retaining the status quo until trial, and equitable relief is more likely.

An important factor in the decisions of both North J[39] and the Full Federal Court[40] was that, until 7 April 1998, the MUA employees constituted Patricks' workforce. That was the status quo which existed when the application for interlocutory relief commenced. Moreover, as there was no material before the court at the interlocutory stage that justified any conclusion that the workforce was

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36 (1998) 153 ALR 602, 616.

37 *Id.* 620. The Full Federal Court was equally as optimistic of ongoing cooperation and goodwill: "Threats made in anger, however vile, are usually just that; they subside when the cause of the anger is removed. Vendetta is not the Australian way. All parties will need to exercise restraint in adjusting to the changed arrangements required by North J's orders; provided there is proper leadership we are confident they will.": (1998) 153 ALR 626, 638-9.

38 *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 34 AILR 213 (employee dismissed for smoking in a non-smoking area, contrary to the employer's policy); *Reilly v State of Victoria* (1992) 34 AILR 167 (employee dismissed due to lack of funds).

39 (1998) 153 ALR 602, 613.

40 (1998) 153 ALR 626, 638.

unsatisfactory,[41] injunctive relief had the effect of maintaining the status quo until trial. His Honour North J was also of the opinion that if interlocutory relief was not granted so as to preserve the status quo, then " the passage of time and events"[42] would render any remedy of reinstatement to which the employees might prove an entitlement impossible.

EFFECT ON THIRD PARTIES IF EQUITABLE RELIEF IS GRANTED

In circumstances where an employee seeks an injunction restraining an employer's breach of employment contract, if the awarding of an injunction (having the effect of specific performance) would work undue hardship on third parties other than the defendant employer, the more likely course is that a court will refuse to award the relief in favour of the employee.[43] The interests of third parties, and the impact of the order on them, is not determinative in itself, but is taken into account in determining the balance of convenience.[44]

The third party at the centre of this argument was PCS Resources Pty Ltd, a company associated with the NFF,[45] which, on 7 April 1998, agreed to provide labour to Patrick Stevedores Operations Pty Ltd. If an injunction were granted, it would have the effect of rendering the performance of that agreement impossible.[46] However, the parties appeared to have anticipated this and entered the agreement knowing of that risk, the MUA offered an undertaking as to damages to meet any claim arising from the non-fulfillment of the contract, and it had the resources to meet such a liability. North J concluded that, in all the circumstances, the third party contract was not a factor against granting the injunctions.[47]

This was confirmed on appeal.[48]

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41 (1998) 153 ALR 602, 613.

42 *Ibid.*

43 *Corbett v Aboriginal Legal Service of Western Australia* (unreported, Supreme Court of Western Australia, Commissioner White, 13 July 1989); *Reilly v State of Victoria* (1992) 32 AILR 134. See generally, I C F Spry, *The Principles of Equitable Remedies*, fifth edition (Sydney: LBC Information Services, 1997) 402-3.

44 (1998) 153 ALR 643, 666 (per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

45 (1998) 153 ALR 643, 673 per Gaudron J.

46 (1998) 153 ALR 602, 614.

47 (1998) 153 ALR 602, 614-15.

48 It was unsuccessfully appealed to both Full Federal Court and High Court that the interlocutory injunctions granted by North J would operate unfairly on PCS Resources and its employees, and thus should be overturned, but no error was found to be present in the trial judge's reasoning about this factor: (1998) 153 ALR 626, 636-7 (Fed Ct); (1998) 153 ALR 643, 667 (per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); 688 (per Gaudron J); cf 704 (per Callinan J, dissenting, who considered that the injunctive orders could tend to impose economic duress upon parties other then the Patricks employers).

WHETHER CONSTANT SUPERVISION OF THE PARTIES WOULD BE REQUIRED BY THE COURT

One traditional objection to the decree of either specific performance or an injunction restraining breach of a contract of employment was that to compel the existence of an employment relationship would require the court to supervise the conduct of both parties to that relationship (i.e. where the parties would have recourse to the court for determinations of the rights and wrongs) on a continuing basis.[49]

The House of Lords recently reiterated this objection in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*[50] in the context of a claim for final injunctive relief, and refused to order that an anchor tenant in a large shopping centre reopen its supermarket and conduct its business. Patricks sought to rely upon such authority. However, the instant case was distinguished from the *Argyll* decision on the basis that where an interim order is being sought, it can be varied or discharged much more easily than a final order, and thus can be more effectively supervised by the court.[51]

In addition, the problem of supervision of the employment relationship has arisen, so as to preclude an injunctive or specific performance order, where industrial difficulties would be encountered if the employee was re-employed at the workplace.[52] However, in the instant case, any employers' apprehension about this possibility was forced to dissipate in light of the undertakings given by the employees not to engage in industrial activity until the trial of the matter.

Further, as North J noted, much commercial litigation requires numerous interlocutory applications of discovery and other matters, which are not refused simply because many interlocutory hearings may be involved.[53]

In the final word upon this factor, the High Court said that "the concept of 'constant supervision by the court' by itself is no longer an effective or useful

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49 *Turner v Australasian Coal and Shale Employees Federation* (1984) 55 ALR 635 at 649; *J C Williamson Ltd v Lukey* (1931) 45 CLR 282 at 293.

50 [1997] 3 All ER 297.

51 (1998) 153 ALR 602, 619. A majority of the High Court further noted that the reservation of liberty to apply to the Federal Court which North J had granted was in no way out of the ordinary in the exercise of equitable jurisdiction, and that this was not a case where the undertakings or orders left the parties not knowing what was expected of them: (1998) 153 ALR 643, 670 (per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ). On the other hand, Callinan J (dissenting) considered that the observations in the *Argyll* case which rejected specific performance of an agreement to carry on a business were equally (and probably more) apposite to the interlocutory injunctions which the MUA employees were seeking, given that the practical effect of the orders of North J were to compel the employers to employ only their then current workforce: at 706.

52 *Gregory v Philip Morris Ltd* (1988) 80 ALR 455, 482.

53 (1998) 153 ALR 602, 620.

criterion for refusing a decree of specific performance."[54]

LENGTH OF TERM OF THE INJUNCTION

The longer the duration of the prospective injunctive order, the less likely is equity to grant the relief. In the context of employment contracts where final relief is being sought, courts have taken the view that the longer the period left to run under the contract, the more likely is the effect of an injunction to drive the parties to perform the contract rather than persist in the breach.[55]

In the instant case where interlocutory, rather than final, relief was being sought, North J acknowledged that the potential duration of the injunction depended upon the speed with which the interlocutory steps could be completed by the parties.[56] However, given that the court was prepared to hear the matter expeditiously once it was ready for trial, the duration of the injunction was not proposed to be too lengthy, certainly not too long a period so as to tip the balance of convenience in favour of Patricks.

TYPE OF BREACH COMMITTED

Both English[57] and Australian[58] authorities indicate that an injunction is more likely to lie in favour of an innocent party to a personal services contract where the breach on the part of the defendant contract-breaker is flagrant and dishonest. This is a relevant factor when determining the balance of convenience.

Although the employees alleged that Patricks had "acted dishonestly and with stealth"[59], North J considered it undesirable to express an opinion on that, and in light of the other factors referred to above and below, it was not necessary to do so.[60]

WHETHER A LARGE CORPORATION, WHETHER EMPLOYEE ANONYMOUS

An order which has the effect of specific performance is more likely where the employer is a large corporate enterprise, or where the precise identity of the employee performing a particular task is immaterial to the employer.[61] In the

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54 (1998) 153 ALR 643, 670 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

55 For example: *Page One Records Ltd v Britton* [1967] 3 All ER 822; *Warren v Mendy* [1989] 3 All ER 103.

56 The employees - seeking the injunction - considered that the matter could be ready for trial within one month of the interlocutory hearing. The employers' legal representatives, in seeking to oppose the injunction, stated that a timetable of a further eight months was reasonable: at 620.

57 *Warren v Mendy* [1989] 3 All ER 103, 107.

58 *Curro v Beyond Productions Pty Ltd* (1993) 30 NSWLR 337, 348.

59 (1998) 153 ALR 602, 622.

60 *Ibid.*

61 *Turner v Australasian Coal and Shale Employees Federation* (1984) 55 ALR 635, 648.

Patricks litigation, the employee applicants numbered some 1,400. The significance of interpersonal relationships between the litigants is considered to be less than in the case of a small organisation or a senior employee.[62] Therefore, this factor did not preclude equitable relief.

MATTERS OF PUBLIC POLICY AND PUBLIC INTEREST

Another factor that distinguished the Patricks litigation from the House of Lords decision in the *Argyll* case was that litigants in the latter case were two large businesses whose interests at stake were purely financial, i.e. whether or not it was cheaper to breach the covenant to trade and close the supermarket. In contrast, North J noted that the instant case -

> ... concerns employees whose interest is primarily a personal interest in retaining employment free from discriminatory conduct [on the ground of union membership]. In a case seeking to vindicate such personal rights, a court should be more ready to make orders than it would be in a case involving purely financial interests.[63]

CONCLUSION

Although the weight of the ten factors considered above appears to leave the issue in little doubt that the balance of convenience favoured the granting of an injunction in favour of the MUA employees, it must be remembered that this litigation concerned contracts of personal services, and in that regard, North J noted that to award injunctive relief, as His Honour was prepared to do, made this an "exceptional case."[64]

Indeed, Callinan J in his dissenting judgment indicates that real doubts about the intervention of equitable remedies in the employment context still exist:

> The scheme contemplated by the orders made by North J in this case is an elaborate, if not to say tortuous one, and depends upon many imponderables. On that account also, attempts to implement it are likely to lead to numerous undesirable attempts to invite the court to intervene to solve what are in truth, industrial and business problems, and to impose arrangements which really require mutuality... Despite all the ingenuity that Courts of Equity may and should bring to the moulding of injunctions to remedy (or halt) unlawful activities, there are situations in which the impracticability and inappropriateness of the supervision by the court of orders intended to achieve that end are such that the parties must be left to their remedies in damages. In my opinion, this is such a case."[65]

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62 See also *Powell v London Borough of Brent* [1988] ICR 176, 194.

63 (1998) 153 ALR 602, 620.

64 *Id.* 621.

65 (1998) 153 ALR 643, 709.

Nevertheless, the views of the remaining judges who heard the Patricks litigation indicate the preparedness for Australian courts exercising equitable jurisdiction to intervene to preserve the status of a personal employment relationship.

Perhaps, as the Full Federal Court indicated, previous reservations expressed by the High Court[66] - that specific performance of a contract for personal services will generally not be granted - cannot be assumed to apply so quickly to contracts of employment that are regulated by the *Workplace Relations Act 1996*.[67] Perhaps the Patricks litigation represents merely the latest link in an authoritive line of Australian decisions in which equity has been said to be flexible enough to overcome the traditional objections of compelling the maintenance of personal service contracts. Whichever is the case, it appears that a successful recipe for equitable relief to maintain a labour agreement (certainly at an interlocutory hearing) will require most, if not all, of the ten factors outlined above, plus a dash of common sense by the parties, and a handful of goodwill and mutual cooperation - an unlikely mix given the very existence of litigation between the parties, but as the Patricks litigation demonstrates, by no means an impossibility.

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66 See *JC Williamson Ltd v Lukey* (1931) 45 CLR 282.

67 *Supra* n. 14.