Pickering p. 1985 Bulletin p.5

Winstone Wallboards v. Canterbury Stores Union

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.308/84

(LABOUR)
Copy1

BETWEEN WINSTONE WALLBOARDS LIMITED and VICTOR PLASTERS LIMITED

Plaintiffs

A N D CANTERBURY AND WESTLAND STORES, PACKING AND WAREHOUSE WORKERS' INDUSTRIAL UNION OF WORKERS

First Defendant

A N D P. PIESSE

Second Defendant

A N D D. BLOOMFIELD

Third Defendant

A N D S. BLACK

Fourth Defendant

A N D W. McDONNELL

Fifth Defendant

A N D I. LUSCOMBE

Sixth Defendant

A N D H. ADAMS

Seventh Defendant

A N D J. CRAWFORD

Eighth Defendant

Hearing: 23 November 1984

Counsel: G.P. Curry for Plaintiffs
J.G. Fogarty and T. Weston for Defendants

Judgment: 30 November 1984

JUDGMENT OF HOLLAND, J.

I am delivering this judgment orally because the urgency of the situation requires it. I have been sitting constantly in Court since the hearing and have been unable to devote the time to achieve the literary worth expected of a reserved judgment in the High Court. I am indebted to counsel on both sides for the thoroughness and moderation of the legal argument presented which has greatly assisted me in giving a prompt judgment. I do not refer in the judgment to all the cases to wh ich my attention was drawn by counsel but I have considered them all. Although I am delivering judgment in haste I have had ample time to consider the issues and am in no doubt as to the proper course to be taken.

The plaintiffs apply for an interim injunction against the first defendant, a Trade Union, the Secretary of the Trade Union as second defendant, and six former employees as 3rd to th defendants restraining all defendants from future picketing activities outside their factories. The dispute is an industrial one, essentially of a demarcation nature involving the question whether the New Zealand Carpenters' Union or the defendant Stores Packing and Warehouse Union is the appropriate union to represent a proportion of the employees of the first plaintiff. It is recognised by all the parties that the ultimate determination of that issue is an appropriate question for the Arbitration Court and not an appropriate question for this Court.

An injunction is sought in this Court because the activities of the defendants are alleged to be on the verge of financially crippling both plaintiffs and there is stated to be no means of a speedy solution in the Arbitration Court. I have been informed on enquiry of counsel that if the papers were presented

I am delivering this judgment orally because the urgency of the situation requires it. I have been sitting constantly in Court since the hearing and have been unable to devote the time to achieve the literary worth expected of a reserved judgment in the High Court. I am indebted to counsel on both sides for the thoroughness and moderation of the legal argument presented which has greatly assisted me in giving a prompt judgment. I do not refer in the judgment to all the cases to wh ich my attention was drawn by counsel but I have considered them all. Although I am delivering judgment in haste I have had ample time to consider the issues and am in no doubt as to the proper course to be taken.

The plaintiffs apply for an interim injunction against the first defendant, a Trade Union, the Secretary of the Trade Union as second defendant, and six former employees as 3rd to 8th defendants restraining all defendants from future picketing activities outside their factories. The dispute is an industrial one, essentially of a demarcation nature involving the question whether the New Zealand Carpenters' Union or the defendant Stores Packing and Warehouse Union is the appropriate union to represent a proportion of the employees of the first plaintiff. It is recognised by all the parties that the ultimate determination of that issue is an appropriate question for the Arbitration Court and not an appropriate question for this Court.

An injunction is sought in this Court because the activities of the defendants are alleged to be on the verge of financially crippling both plaintiffs and there is stated to be no means of a speedy solution in the Arbitration Court. I have been informed on enquiry of counsel that if the papers were presented

before the Arbitration Court next month it is unlikely that the dispute could be considered by that Court within twelve months. Notwithstanding that there might be a period of twelve months' delay for the final hearing of the dispute, I believe that there are procedures within the framework of the Industrial Relations Act 1977 that enable orders to be made temporarily and speedily resolving disputes of this nature and returning people to work pending the final determination of the dispute. These aspects however were not explored with counsel and it may be that the existing machinery in the industrial sphere is inadequate. If it is inadequate then it is time that the position was rectified so that the appropriate Court can deal speedily and justly with a dispute of this nature without the necessity of applying to the High Court.

An application to this Court seeking that it exercise its inherent jurisdiction to grant an injunction should usually be a last resort step after all other steps have been taken and have been shown to be ineffectual to achieve justice. There is no doubt that the principles in American Cyanamid Co. v Ethicon Ltd (1975) A.C. 396 must be applied on an application for an interim injunction, but there may well be an additional factor in the case of an industrial dispute whereby the Court in its discretion will refuse to exercise its jurisdiction in relation to injunctions until all other actions have been demonstrated to be incapable of providing justice. This applies particularly where the dispute is one of a nature for which the High Court is ill equipped to provide final solutions and in respect of which there is an Arbitration Court designated especially for the purpose. I was minded to decline to investigate the merits of the matter for this very reason but have concluded that it would

be unjust to do so. The issue has not been presented before the Court by either side on that basis and the alternative machinery available, if any, has not been the subject of argument from counsel. Having now considered the merits I am satisfied that the financial losses to the plaintiffs and the loss of employment to six of the eight defendants together with the substantial inconvenience and loss to the public at large is so very much out of all proportion to the dispute involved that it is necessary for this Court to interfere when its assistance is sought by at least one of the parties if the activities are demonstrated to be unlawful or even likely to be unlawful.

I turn now to the facts as disclosed in the affidavits. I emphasise that it is to the facts disclosed in the affidavits because this Court must make its decision on the evidence before it. It is highly unlikely in a dispute of this nature that all relevant evidence is before the Court or indeed that the real matters in issue between the parties have probably been disclosed to the Court.

The first plaintiff is a wholly owned subsidiary of Winstone Ltd, a large New Zealand public company operating a substantial group of companies. I shall refer to it in future as Winstones. The second plaintiff is an associate company in the Winstone group being 50% owned by Winstone Ltd and presumably the remaining 50% of shareholding being owned independently of the Winstone group. Winstone manufactures and supplies gibraltar board products in Christchurch. It is the only South Island manufacturer of gibraltar board and supplies the entire South Island. It employs 27 employees including five salaried staff, two office workers and

two part-time workers. Of the remaining 18, 5 are in the fitting shop of whom 4 are members of the Engineers Union. The remaining 13 comprise 8 production staff and 5 despatch staff, all 13 having been members of the New Zealand Carpenters' Union. For 23 years Winstone has operated pursuant to an industrial instrument with the Carpenters' Union covering both the manufacturing and despatch aspect of the company's operations.

In March 1984 there was apparently some disruption in the despatch section of Winstones. This appear to have arisen from a visit to the Winstones factory by the Secretary of the Storeman and Packers Union to investigate whether or not some of the employees who had expressed dissatisfaction with their representation by the Carpenters' Union were employed as storemen. The Secretary was ordered off the property. The dispute simmered for some months and there was apparently discussion between the Carpenters' Union, the Federation of Labour and the Storeman and Packers Union. On 3 October 1984 the Secretary of the Storeman and Packers Union forwarded to Winstones a request that 9 members of the staff of Winstones who had joined the Storeman and Packers Union should have their Union fees deducted from their wages. This brought a reply that Winstones recognised the award with the Carpenters' Union and the obligation to deduct and remit fees to that Union and further recognised the right of any person including their employees to join any Union but that it did not recognise that it was under any obligation to remit Union membership fees to any Union other than the Carpenters' Union.

This was clearly the commencement of battle. Winstones obviously did not wish to have the Storeman and Packers

Union have anything to do with their operations. The Storeman and Packers Union were not willing to accept this rebuff. There is some dispute on the affidavits as to whether or not a picket line was formed on 6 November. But it is clear that on 7 November six of the nine employees concerned refused to load vehicles and railway wagons at the direction of management and indicated that there was a load-in and load-out ban. They carried on, however, with other work which had previously been scheduled for them. On 8 November the men again reported for work. They were asked to carry out normal duties including loading out vehicles and railway wagons and they refused. They were dismissed for refusing to carry out their duties. The other three of the original nine agreed to carry out their normal work.

From that day on a picket line has been formed outside the entrance to Winstones factory. The picket was manned by the six defendants and officers and members of the Storeman and Packers Union. The picket is directed not only at Winstones but also at Victor Plasters Ltd, the other plaintiff which shares its entrance with Winstone Ltd and which is a company providing Winstones with plaster of paris. It is the only company in New Zealand manufacturing plaster of paris with one plant in Auckland and the other in Christchurch. The manager of Winstones says that the picketing is now having a critical effect on the company's operations. Seven railway wagons have been loaded at the railway siding but railway men have refused to move them. In his first affidavit the manager of Winstones says that no vehicles have been able to enter or leave the company premises since the picket was established. It is clear that this statement is an exaggeration and

that in fact some trucks within a day or two of the hearing had broken the picket line and taken the gibraltar board away. The matter is clarified in a later affidavit.

The injunction sought by both plaintiffs is wide in its terms. It is to the following effect:-

"A. RESTRAINING them and each of them by themselves, their officers, agents, servants or otherwise from:

(i) doing any acts which induce, procure, cause or threaten to cause any breach, or interference with, the performance of any contract or proposed contract between either of the plaintiffs and its suppliers, customers, employees or any other party, and from interfereing with the economic interests of either of the plaintiffs;

(ii) participating in or implementing or maintaining or organisng or directing or encouraging any ban, obstruction or picketing or strike or any other action which has the effect of or is intended to induce, procure, cause or threaten to cause any breach, or interference with, the performance of any contract or proposed contract between either of the plaintiffs and its suppliers, customers, employees or any other party, or to interfere with the economic interests of either of the plaintiffs.

B. REQUIRING them to revoke, cancel or cause to be revoked, cancelled or withdrawn any instructions, directions, advice, threats, inducements, procurement or acts of persuasion or intimidation that have been made by or on behalf of any of them, whether to either of the plaintiffs or its suppliers, customers, employees or any other party, which have been intended to cause any breach, or interference with, the performance of any contract or proposed contract between either of the plaintiffs and its suppliers, customers, employees or any other party, or to interfere with the economic interests of either of the plaintiffs.

AND FOR A FURTHER ORDER directing that the costs of this motion be reversed.

AND FOR ANY FURTHER ORDER as may appear just

UPON THE GROUNDS:

(a) that any such action by the defendants or any of them constitutes an inducement of breach of contract and/or unlawful interference with the economic interests of the plaintiffs and/or a nuisance; and

(b) irreparable harm would be and is being done to the plaintiffs by such action; and

(c) there are no other sufficient remedies available to the plaintiffs."

It is first necessary to consider whether an arguable case has been made by the plaintiffs that the defendants are acting wrongfully in such a way as to entitle the plaintiffs to the issue of an injunction. In their statement of claim the plaintiffs plead four causes of action: (1) inducement of breach of contract with traders; (2) inducement of breach of contract with employees; (3) unlawful interference with economic interests of plaintiffs; (4) private nuisance.

All of the causes of action relied on by the plaintiffs arise from the activities of the defendants in picketing. The legality of picketing and similar activities has been considered at length by this Court in Pete's Towing Services Ltd v Northern Drivers Union (1970) N.Z.L.R. 32; Flett v Northern Drivers Union (1970) N.Z.L.R. 1050 and more recently in Columbus Maritime Services Ltd v N.Z. Seamens Union (Barker J., unreported 8 August 1983 No. 730/83 Auckland Registry). Authority at a higher level in this field is contained in the decision of the Court of Appeal in Northern Drivers Union v Kawau Island Ferries Ltd (1974) 2

N.Z.L.R. 617. It is clear that picketing as such is not unlawful but it may well become unlawful if it is designed to harm others and does cause harm to others in the exercise of the rights of those others. It is clear that there is nothing unlawful in picketing solely for the purpose of demonstrating to the public generally that a dispute exists, describing the nature of the dispute and pleading the picketers' cause. The unlawfulness arises when the activities of those picketing amount to deliberate interference with the contractual rights of others without lawful excuse.

The evidence from the affidavits demonstrates that the picket line is designed much more than merely to inform the public and those dealing with the plaintiff companies that the defendants have a complaint with the plaintiffs. The affidavit evidence and in particular the lack of affidavit evidence from the defendants to the contrary and in denial of the partially hearsay evidence of the plaintiffs persudes me that the plaintiffs have not only an arguable case but a strong prima facie case that the purpose of the picket line is both to endeavour to persuade those either with contractual commitments to the plaintiffs not to carry out those contractual commitments and to endeavour to prevent those intending to enter into contractual arrangements with the plaintiffs so to do.

The precise categories of economic torts are not well defined. It is undoubtedly a developing field. The affidavit evidence on this interlocutory application shows a strong prima facie case or a good arguable case that the actions of the defendants have induced actual breaches of contract of the laintiffs with others and that the actions are likely to continue

with future inducement of breaches of contract. The evidence presently before me is not very specific as to those contracts but is sufficient to show that there is deliberate interference by the defendants in that the defendants know generally of the existence of contracts and intend them to be breached. The evidence also supports the argument that there is a good arguable case that the activities are designed to induce a breach of contract with the plaintiffs and their employees if only to the extent that the plaintiffs will be unable to provide work for their employees. The plaintiffs have established a further arguable case for the alleged tort of unlawful intereference with economic interests by deliberately interfering with the plaintiffs' interests by unlawful means. The existence of such a tort in New Zealand was recognised in Van Camp Chocolates Ltd v Aulsebrooks Ltd (1984) 1 N.Z.L.R. 354. The tort of intimidation has not been pleaded but the facts disclosed must raise a possibility of that tort also having been committed.

There is direct and specific evidence of inducement of breach of contract contained in paragraph 12 of Mr Smith's first affidavit where he refers to the picketline stopping the delivery to Winstones of engineering equipment required for maintenance of the factory. A representative of the first defendant told the manager of the engineering company who was then present at Winstones "that if the driver crosses the picketline his Union would place a black ban on the engineering company". Apparently this threat persuaded the driver not to cross the picketline and deliver the equipment.

There is evidence that the defendants are aware that the predominant distribution of Winstone products through the

South Island is by rail and there is a rail siding at the plant. The siding has been marked with a placard indicating the existence of the picketline and has succeeded in preventing railway men taking delivery of the railway wagons loaded with Winstones products and in respect of which it must be clear that there is a contract between the railways and Winstones for such delivery.

It must likewise be known to the defendants that Victor Plasters Ltd supplies Winstones with plaster and that must be pursuant to a contractual arrangement. The picketing of the premises of Victor Plasters Ltd clearly has prevented Victor Plasters Ltd from obtaining supplies and this is done obviously with the intention of preventing Victor Plasters Ltd carrying out its contractual obligations to Winstone Wallboards Ltd. The evidence also discloses that work for the present employees of Winstones is running out because of the picketing activities. This must interfere or be likely to interfere with the relations between Winstones and its employees.

The day may not yet have been reached when a picketline designed to prevent third parties entering into new contracts with the plaintiffs is in itself a tort. That action standing alone may well never be a tort but the evidence in this interlocutory application prima facie shows that the picketing is coupled with a threat to those contemplating breaking the picketline that such action will result in industrial stoppages organised by the trade union movement against the firms or persons involved. In the general contractual situations which must be known to the defendants this action shows a deliberate intention to cause breaches of contract between third parties and their employees, and

vice versa, and at the very least, to cause serious financial harm to third parties. It is undesirable on an interlocutory application with only brief affidavit evidence to delve deeply into the legal position or the factual position. Sufficient has been raised, however, to show that the defendants by their actions have probably committed a tort or torts of some nature under the general heading of economic torts and that there is a substantial risk that unless restrained from so doing they will continue to commit the torts.

Counsel for the defendants rightly submitted that the plaintiffs by seeking the exercise of the Court's jurisdiction in equity must establish to the Court that they come to the Court with clean hands. Essentially the argument here is that Winstones have acted in a very high handed manner and have simply refused to have anything to do with the Storeman and Packers Union. It is submitted that under the general principles of the Industrial Relations Act 1977 the plaintiffs should have accepted the intervention of the Storemen and Packers Union and referred the dispute to the Arbitration Court to determine whether or not that Union has standing. It may be that under the provisions of the Industrial Relations Act there is room for both Unions to have the right to represent and negotiate terms for different employees of Winstone. It may be that there should only be one Union. It is unnecessary for this Court to establish that fact at this stage. The issue at first instance is for the Arbitration Court.

The submission, however, ill becomes the defendants. For more than 23 years the workers concerned at the plant of Winstones have been represented by the Carpenters Union and Winstones have negotiated from time to time with that Union. If the

general purpose of the Industrial Relations Act is to avoid direct action then it would seem that it was the Storemen and Packers Union who endeavoured to force the issue by insisting that certain workers should be represented by them. There appears to be no reason why that Union could not have stood back and applied for a ruling from the Arbitration Court before it endeavoured to take the matter into its own hands. Even if after all the facts are disclosed it is held that Winstones were wrong in refusing to recognise the Storemen and Packers Union I am not satisfied that their conduct is of such a nature in the circumstances as to deprive them of relief to which they would otherwise be entitled from the Court in the exercise of its equitable jurisdiction.

It is necessary now to turn to the balance of convenience. It is apparent that the financial loss to the plaintiffs is considerable. It is the type of loss which would be difficult to assess and for which, if the tort is finally established, an injunction would be the appropriate remedy. Damages would be an inadequate remedy. On the other hand if it should transpire that an interlocutory injunction should not have been granted the plaintiffs are undoubtedly in a position adequately to compensate the third to eighth defendants pursuant to the undertaking as to damages required of them and it seems difficult to imagine what damage the first and second defendants might suffer except possible loss of Union fees for a period. These damages could easily be assessed.

In an industrial dispute of this nature one of the principal factors in considering the balance of convenience must be the maintenance of the status quo. Counsel for the plaintiffs

submits that the status quo that is to be maintained is the situation which existed at the commencement of the proceedings. Such was undoubtedly the case in the Northern Drivers Union case: (see p624). The precise timing of the status quo will vary from case to case. It is usually the situation existing immediately prior to the wrongful act which is to be enjoined. In the present case the wrongful act complained of arose from the picketing activities after the six last named defendants were dismissed but justice in this case requires, so far as it is within the Court's power, the restoration of the parties to their position before the dispute causing the wrongful act arose. It is argued for the defendants that the wrongful act commencing the dispute was the action of Winstones in refusing to recognise the Storemen and Packers Union. It is further argued that the next wrongful act was he unjustified dismissal of the six defendants which incidentally is also a matter capable of resolution in the Arbitration Court. It will clearly be many months and maybe a year before this matter is resolved in the Arbitration Court and probably even further time before the present proceedings come for final determination by this Court. The restoration of the true status quo can be obtained by imposing conditions. The position to be restored is that existing before the Storemen and Packers Union and the defendants commenced direct industrial action.

Victor Plasters Ltd would seem to be entitled to an interim injunction in terms of the motion pending the further order of the Court without any conditions. In the case of the first

plaintiff, Winstone Wallboards Ltd, the appropriate order should be an interim injunction in terms of the motion pending the further order of the Court but conditional upon Winstone Wallboards Ltd re-engaging the third to eighth defendants (inclusive) or the refusal of such defendants to accept such re-engagement.

It was submitted on behalf of the defendants that such an order would be unjust to the defendants as they will be without Union representation if the Storemen and Packers Union is not permitted to represent them. The representation of the defendants by the Storemen and Packers Union can await the determination of the dispute by the Arbitration Court. The defendants concerned will not be without Union representation. They are entitled to rejoin the Carpenters Union if they so wish. Otherwise they are in the same position as other employees who elect under the present law not to join a Union. That is the position that they were in before this dispute commenced and it is the position in which they should remain until the dispute is resolved before the proper tribunal. I also make no order in respect of pay during the period between the dismissal and re-engagement. In that respect I am not holding that the defendants are not entitled to back pay but it is not an appropriate matter to deal with by way of a condition to an interim injunction in this Court.

An interim injunction by its very nature is only until the further order of the Court and it is thus unnecessary to reserve leave to apply. I certainly do not wish to encourage the parties to apply but should difficulties arise that are incapable of solution without reference back to this Court then the matter can be referred to the Court.

The formal order of the Court is:-

1. The motion for abridgement of time for the hearing of the application is granted.
2. An interim injunction is to issue against all defendants in terms of paragraphs A and B of the Notice of Motion.
3. The costs of and incidental to this application are reserved.
4. In the event of an affidavit being filed deposing that any of the 3rd to 8th defendants inclusive has not been offered to be re-employed by Wihstone Wallboards Limited as from Monday 3rd December 1984 on the same terms and conditions as existed as at 5th November 1984 that part of the injunction relating to Winstones Wallboards Limited, its suppliers, customers and employees is to be immediately discharged.
5. Leave is reserved to any party to apply.

D. Holland J.

Solicitors:
Russell McVeagh McKenzie Bartleet & Co, Auckland, by its agents
Duncan Cotterill & Co, Christchurch, for Plaintiffs
Weston Ward & Lascelles, Christchurch, for Defendants

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.308/84

BETWEEN WINSTONE WALLBOARDS LIMITED and VICTOR PLASTERS LIMITED

Plaintiffs

A N D CANTERBURY AND WESTLAND STORES, PACKING AND WAREHOUSE WORKERS' INDUSTRIAL UNION OF WORKERS

First Defendant

A N D P. PIESSE

Second Defendant

A N D D. BLOOMFIELD

Third Defendant

A N D S. BLACK

Fourth Defendant

A N D W. McDONNELL

Fifth Defendant

A N D I. LUSCOMBE

Sixth Defendant

A N D H. ADAMS

Seventh Defendant

A N D J. CRAWFORD

Eighth Defendant

JUDGMENT OF HOLLAND, J.

30-11-84