

BETWEEN MINERAL RESOURCES (NZ)  
LTD

Plaintiff

AND JOHN PHILIP BARBARICH

Defendant

Hearing: 7 August 1984

Counsel: Mr Curry and Mr M.I. Jackson for  
Plaintiff  
Mr Clark and Mr D.A. Johnston for  
Defendant

Judgment: 8 August 1984

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(ORAL) JUDGMENT OF HILLYER J

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This is a motion by the plaintiff ("Mineral Resources") against the defendant ("Mr Barbarich.") in which the plaintiff seeks orders against the defendant either requiring the defendant to comply with certain alleged contractual obligations, or restraining him from breaching those obligations.

Mineral Resources is a publicly listed company active in exploring for precious and base metals in New Zealand. It is involved in various joint ventures with other mining and business groups, and both directly and through associated companies, is interested in a range of mining and prospecting interests in New Zealand. It has been active in prospecting for coal.

Mr Barbarich was employed by Mineral Resources as its managing director for about 12 years until 15 August 1983, when he resigned in accordance with an agreement which is

contained in two telexes. The first sent by Mr Barbarich to Mineral Resources dated 30 June 1983, and the second in reply from the directors of Mineral Resources accepting the terms of the agreement suggested by Mr Barbarich. Mr Barbarich remained a director of Mineral Resources until 27 July 1984.

The retirement agreement provided that in return for Mr Barbarich agreeing to an early retirement, Mineral Resources would first pay him a retirement allowance, second pay him a retainer for each of two years, with Mineral Resources having the right to retain him for a further year under a consultancy agreement, and third would pay him a finder's fee in relation to new projects introduced by him, or through his consultancy company, John Philip Consultants Ltd, provided those new projects were accepted by Mineral Resources.

The retirement agreement contained also in paragraph 3.2 a covenant that:

"While under retainer to MR should he (Mr Barbarich) desire to enter into any other mining or prospecting venture, that he 'JPB' will give in writing to MR a 14 day right of refusal together with all relevant information, such that a decision can be reasonably made. If within 14 days of being so offered involvement or investment in such a venture, and receiving the relevant information, MR or its associated companies do not advise JPB in writing of their intentions to proceed with that venture, JPB may proceed on whatever basis he wishes without further obligations to MR."

The clause is not elegantly phrased, but attempting, as the court must, to give business efficacy to a contract made in a commercial matter, it seems to me that the intention of that clause was that if Mr Barbarich intended himself to enter into any mining venture, he should give Mineral Resources the right first to enter into that venture on the same terms as Mr Barbarich was going to.

and would give Mineral Resources such information as was necessary to enable it to assess the worth of the venture. Mineral Resources would then have the opportunity of taking over that venture and acting in the way that Mr Barbarich was going to. Failing Mineral Resources notifying Mr Barbarich within 14 days of being given such information of their intention to take over that venture, Mr Barbarich would then have the right, and only then, to proceed with that venture, with no further obligations to Mineral Resources.

It seems to me also that implicit in that agreement was an agreement that Mr Barbarich would not proceed with any mineral mining or prospecting venture without giving Mineral Resources the right to take it over.

In other words, in my view the clause included both a positive and an implied negative covenant on Mr Barbarich's part. It is similar to the clause considered in Manchester Ship Canal Co v Manchester Racecourse Co. [1901]2 Ch.37. In that case an agreement between a racecourse company and a canal company contained a clause that if a racecourse should be proposed at any time to be used for dock purposes, the racecourse company should give the canal company the "first refusal" thereof.

It was held by the Court of Appeal that "first refusal" imported either a fair and reasonable offer to sell to the canal company, or that the price at which the racecourse company were to give the canal company the first refusal was a price which the racecourse company would accept from other would-be buyers in the event of the refusal of the canal company to buy at that price. That is that the canal company had "a right of pre-emption." It seems to me that this was what was contemplated by the agreement made between Mr Barbarich and Mineral Resources, ie that Mineral Resources would have a right to pre-empt any venture contemplated by Mr Barbarich.

Mineral Resources duly paid Mr Barbarich his retiring allowance, and since his resignation has paid him the agreed retainer through his consultancy company, John Philip Consultants Ltd.

In my view where an agreement of that nature is made, and where a former employee continues in a relationship with his former employer and is paid for remaining in that relationship, the former employee owes a duty of good faith to his former employer. It is a relationship which imposes a high obligation on the former employee to comply with the spirit of the agreement. He should not, while taking money from his former employer for the purposes of a consultancy, use any opportunities that he may have for his own benefit, avoiding his obligations and the matters for which he has been paid, by devices such as entering into contracts not on his own behalf, but on behalf of some company which is composed of his daughters and his son.

I make those comments because that is what it seems possible Mr Barbarich has done in this case.

That arises in these circumstances. In June 1984 Mr Barbarich became interested in acquiring the Benneydale Coal Mine, operated by Hughes Brothers Benneydale Coal Mining Co Ltd at Mangapehi, and the coal mining licences held by Mr Joseph Hughes in relation to that coal mine. One of Mineral Resources' companies, Pike River Coal Co Ltd, had been interested in acquiring the Benneydale coal mine, and the licences relating to it since at least June 1983. There had been certain negotiations which however, from Mr Hughes' point of view, had broken down, and I certainly do not suggest in any way that Mr Hughes was under any obligation either to Pike River or to Mineral Resources.

Mr Barbarich however, approached Mr Joseph Hughes and Hughes Bros and informed them that he was interested in acquiring their Benneydale interests on behalf of his family. He told them that he intended to incorporate a company to purchase their interests, if an agreement could be reached, and that although he would not be a shareholder in the company, he would stand behind it and give his personal guarantees to any arrangement that could be completed between Mr Joseph Hughes, Hughes Bros and the company to be formed.

The full details of exactly what was done by Mr Barbarich did not emerge in this case until Mr Barbarich filed an affidavit, which is dated Monday 6 August 1984, the case starting before me yesterday. The exact nature of the arrangement made by Mr Barbarich therefore was not apparent to the plaintiff until that time.

In those circumstances, the applications that have been made by Mineral Resources do not exactly fit the factual situation as it is now understood. In particular the company that was formed by Mr Barbarich for this purpose, is not a party to these proceedings.

Mr Barbarich in the affidavit I mentioned, has exhibited a copy of the agreement, and he says that it was always his intention that the purchase should be by him as an agent or trustee for a company to be formed, and that the shareholders of such company would be the members of his family referred to in paragraph 6 of the affidavit. Those are his wife, Phyllis June Barbarich, his son Peter John Barbarich, and his two married daughters, Jacqueline Anne Dragicevich and Sharon Dawn Marinovich. The agreement however, exhibited to the affidavit is made between Joseph Hughes, Hughes Bros Benneydale Coal Mining Co Ltd and John Philip Barbarich on behalf of a company intended to be incorporated under the name King Country Coal Ltd, or such other name as may be approved by the

Registrar of Companies with personal liability of John Philip Barbarich.

Exactly what is meant by the expression "with personal liability of John Philip Barbarich" is a little obscure, but it is submitted by Mr Curry for Mineral Resources that that does demonstrate that Mr Barbarich has some involvement in the transaction. In particular Mr Curry suggests that the purchase price of \$1,500,000 set out in the agreement is likely to be found, not only from Mr Barbarich's family's own personal resources, but also from Mr Barbarich's resources.

The agreement that I have referred to is dated 29 June 1984, and it provides as is necessary, that settlement is to be subject to the consent of the Minister of Mines being obtained, but that subject to that consent, settlement is to be effected on 24 August 1984. It would be possible, therefore still, for Mr Barbarich to give Mineral Resources the 14 days right of pre-emption contemplated in the original retiring agreement, and Mr Curry for Mineral Resources suggests that this would be a proper thing at this stage for Mr Barbarich to be required to do.

King Country Coal Ltd, however, was subsequently incorporated, on or about 26 July 1984, and its shareholders subsequently formally adopted the agreement. As is clear, Mr Barbarich did not before entering into the agreement give Mineral Resources in writing the 14 days right of refusal, together with relevant information in respect of the Benneydale coal mine and the licences relating to it.

There is some suggestion in the letters exchanged by the solicitors before this matter came before the court, that the retiring agreement did not apply to coal mining ventures. It was suggested that it applied only to

metals, either precious or base. I do not read the agreement in that way, and indeed that suggestion was not pursued before me. It does seem that the purchase of the Benneydale Coal Mine, and its licences comes within the phrase "A mining or prospecting venture." A venture is defined in the shorter Oxford dictionary as "A commercial enterprise in which there is considerable risk of loss as well as chance of gain... That which is ventured in a commercial enterprise or speculation."

Clearly therefore, the acquisition of a coal mine would come in my view, within the term "a mining venture." It would also seem clear that Mr Barbarich should have given Mineral Resources the right of refusal of this project.

In those circumstances, Mineral Resources have brought this action before the Court, seeking interim injunctions in the following terms :

- A. Directing the defendant to give to the plaintiff in writing a 14 day right of refusal in respect of the mining venture relating to the Benneydale Coal Mining licences No.s CML 37 027 and CML 37 029, and all relevant information such as will enable the plaintiff to make a reasonable decision whether it or any of its associated companies wish to become involved with or invest in that venture; and
- B Restraining the defendant from entering further into or acting, directly or indirectly, with a view to furthering the mining venture in respect of the Benneydale Coal Mining licences until and unless he has given to the plaintiff in writing a 14 day right of refusal in respect of that venture and given all relevant information such as will enable the plaintiff to make a reasonable decision whether it or any of its associated companies wish to become involved with or invest in that venture.

Alternatively, if the defendant has not yet entered into a mining venture in respect of the Benneydale Coal Mining licences, but only desires to do so :

C Restraining the defendant from entering into the mining venture in respect of the Benneydale Coal Mining licences, unless he has given to the plaintiff in writing a 14 day right of refusal in respect of that venture and all relevant information such as will enable the plaintiff to make a reasonable decision as to whether it or any of its associated companies wish to become involved with or invest in that venture and 14 days have elapsed from the giving of the right of refusal without the plaintiff exercising a right to invest or become involved in that venture."

As I have said, those orders were sought prior to full information being in possession of Mineral Resources as to the exact nature of the transaction in which Mr Barbarich was involved, and it is now clear that the coal mining venture has been entered into by King Country Coal Ltd, and that that company has the right to purchase from Joseph Hughes and Hughes Bros the licences and the undertaking. King Country Coal Limited, not being a party to this action, I cannot of course require it to give the 14 days right of refusal contracted for by the parties.

There is further a difficulty in that such a requirement would be a mandatory injunction. That is what is sought in order A set out above. The bases on which the court will grant a mandatory injunction in interlocutory proceedings are much more restricted than those on which the court will grant a restraining injunction.

It is said in Halsbury, Vol.24, para 948:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not normally be granted."

The matter is dealt with also in de Falco v Crawley Borough Council [1980] 1 QB, and in Shepherd Homes Ltd v Sandham (1971) in the Shepherd Homes case, Megarry J



first set out what he described as the well known statement by Lord Cairns in Doherty v Allman (1878).3AC.709.720:

"If parties for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury - it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves."

At P.351 His Honour (Megarry J) went on:

"I may summarise my conclusions as follows. First Lord Cairns's statement of principle prima facie applies to mandatory injunctions; but it does not apply in its full width. The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a 'fair result', and this involves the exercise of a judicial discretion.

Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction."

To the same effect is London Borough of Hounslow v Twickenham Garden Developments Ltd [1971]Ch.233

In considering therefore whether a mandatory injunction should be granted in terms of the prayer A set out above, I am conscious both of those principles and of the difficulty in requiring Mr Barbarich now to do something which may be only in the power of a company of which he is neither a director nor a shareholder. I am not prepared to grant such a mandatory injunction in terms of paragraph A.

As I have said however, in my view the contract between Mr Barbarich and Mineral Resources contains both a positive and a negative covenant, and the problem that I have set out in relation to paragraph A does not apply with relation to paragraph B. It may be that Mr Barbarich has nothing further to do. If that is the case then an injunction in the terms sought, prohibiting him from entering further into or acting directly or indirectly with a view to furthering the mining venture in respect of Benneydale Coal Mining Licences, will be of no effect. If however, as Mr Curry submits, it is a reasonable inference that Mr Barbarich has still a substantial part to play in the pursuit of the venture for which he has set up this company, composed of his wife and children, a prohibitory injunction will have the effect of preventing him proceeding further with it. It may be that he has still some rights to acquire an interest and if that is the case, then those rights at least in terms of his agreement, should be offered to Mineral Resources.

This is of course a motion at an early stage of proceedings. Discovery has not been made, and I am dealing with the matter only on affidavit evidence and sparse evidence at that. It may be that when the matter comes to trial it will be demonstrated that what Mr Barbarich has done, he was quite entitled to do. It may be when the matter comes to trial it will be held he was in breach of his contract. If he was then it would seem possible that Mineral Resources would be entitled to damages for breach of contract.

At this stage, however, it seeks an interim injunction prohibiting Mr Barbarich from acting further in the matter. The terms upon which prohibitory injunctions are granted are of course so well known that it is unnecessary for me to do more than refer to the cases of American Cyanamid Co v Ethicon Ltd [1975] AC 396 Eng Mee Yong v Letchumanan [1980] AC 331, approved by the NZ Court of Appeal in Consolidated Traders Ltd v Downes [1981] 2 NZLR.274.

There is in my view obviously a serious question to be tried, as to whether Mr Barbarich is entitled to go on further acting in the mining venture in respect of Benneydale Coal Mining Licences.

That being the case, the principles require me to consider first whether if an injunction is granted, damages would be an adequate remedy for Mr Barbarich. First on the affidavit evidence that has been presented to me it is clear that Mineral Resources is a company of standing, and would have the ability to meet any claim for damages that might be made. Secondly, although it would be difficult to assess damages that Mr Barbarich might suffer from not being able to proceed with any further activity he might have, the courts have continually to grapple with problems of that nature, and I have no doubt that if Mr Barbarich became entitled to damages, the court would be able to assess them.

On the other hand, I must look also at the question of whether Mineral Resources would be adequately compensated by damages if an injunction was refused. Mr Barbarich went on with the transaction, and Mineral Resources were to lose whatever rights they may still have. This in my view would be a more difficult matter than assessing the damages that would be payable to Mr Barbarich. The loss of a right of refusal would be so dependent upon the way

in which the transaction might appeal to Mineral Resources' advisers and directors, that an attempt to assess what such a right was worth, or more particularly what the loss of such a right was worth would be an extremely difficult matter.

Although it would seem from the fact that Mr Barbarich is able to convince Mr Hughes and Hughes Bros that he or his family have the resources necessary to complete a purchase for a sum of \$1,500,000, there is before the court no evidence of Mr Barbarich's assets or ability to pay any damages that may be awarded to Mineral Resources.

I am entitled to take into consideration also the question of the status quo and its maintenance. In my view the status quo would be the situation prior to Mr Barbarich entering into any transaction, and that would involve the granting of an injunction to prevent his taking further action, contrary to his undertaking in the agreement made between himself and Mineral Resources.

I am therefore prepared to grant an injunction in the terms in paragraph B of the motion. That involves Mr Barbarich being restrained from continuing further with the transaction or acting directly or indirectly with a view to furthering it and the proposition that if he has rights still in respect of the venture, those should be offered to Mineral Resources. It is in the light of that understanding that the condition regarding the 14 day right of refusal must be read.

Paragraph C of the motion, I do not think applies, since certainly to some extent Mr Barbarich has entered into a mining venture, and that paragraph C is phrased to apply only if the defendant has not yet entered into a mining venture, but desires to do so.

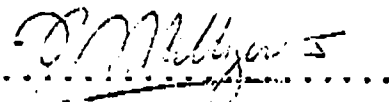
I think that the provision in paragraph B preventing him from entering further into the mining venture covers the situation if there is anything further that he can do.

There will be an order granting the injunction as set out. Costs will be reserved.

Having delivered this judgment in open court, Mr Clark courteously and respectfully indicated that his client, having had in mind the possibility that such an order might be made, had instructed him to ask for a stay of execution of the order in terms of rule 35 of the Court of Appeal Rules. This was to enable an application to be made by way of appeal to the Court of Appeal against the order.

It was clear to Mr Clark as I intended it to be, that the order was in wide terms, and would for example prevent Mr Barbarich from transferring to his family, money to enable King Country Coal Co Ltd to complete the transaction.

I am of the view that if such a stay were to be granted, Mr Barbarich would in the period of even 7 days, be able to make such arrangements as would nullify the order of the Court, and I am therefore not prepared to grant a stay of execution. The order is to take effect immediately.

  
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P.G. Hillyer J ..

Solicitors:

Russell McVeagh McKenzie Bartleet & Co for plaintiff  
Earl Kent & Co for defendant.