

**IN THE HIGH COURT OF NEW ZEALAND  
HAMILTON REGISTRY**

**CIV 2008-419-1495**

BETWEEN	WATSON & SON LIMITED Plaintiff
AND	ACTIVE MANUKA HONEY ASSOCIATION INCORPORATED First Defendant
AND	GOLDEN HILLS NEW ZEALAND LIMITED Second Defendant
AND	COMVITA NEW ZEALAND LIMITED Third Defendant
AND	HONEY NEW ZEALAND (INTERNATIONAL) LIMITED Fourth Defendant

Hearing: 31 July 2009 (by telephone)

Counsel: M S King for Comvita New Zealand Ltd  
D M Hughes for Watson & Son Ltd

Judgment: 31 July 2009

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**(ORAL) JUDGMENT OF HEATH J**

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Solicitors:  
Sharp Tudhope, Private Bag 12020, Tauranga  
Kensington Swan, Private Bag 92101, Auckland

[1] Watson & Co Ltd sue a number of parties, including Comvita New Zealand Ltd. The proceeding relates to the honey industry. A substantive judgment on an interim injunction application was delivered yesterday by Wild J, in this proceeding. The background to the general disputes are set out in that decision.

[2] On 28 July 2009, Mr King, for Comvita New Zealand Ltd, filed and served an application seeking an urgent hearing on an application to strike out the causes of action against Comvita New Zealand Ltd. Some urgency was required because a statutory demand had been issued by Comvita New Zealand Ltd against Watson & Co Ltd, which was being defended on the basis that a substantial dispute existed arising out of the amount claimed in the current proceeding. An application to set aside the statutory demand was set down for hearing on 13 August 2009, in Tauranga, before Associate Judge Doogue.

[3] Yesterday, the Associate Judge vacated that hearing date on the basis that there was a separate application to be dealt with by this Court on the same day, namely the strike out application. Mr Hughes, for Watson and Son Ltd advises me that his firm was not instructed on the statutory demand proceeding and the memorandum to Judge Doogue seeking an adjournment on that basis was unknown to him until Mr King filed a second memorandum late yesterday afternoon.

[4] I record that position lest there be any thought that Mr Hughes misled the Court in his initial opposition to the urgent hearing being allocated. I accept that Mr Hughes had no knowledge of what was occurring on the statutory demand proceeding.

[5] Comvita New Zealand Ltd has sought an order striking out the substantive claim on the grounds that Watson and Son Ltd has sued the wrong party. While denying liability, in any event, Mr Coulter, the Chief Executive Officer of Comvita New Zealand Ltd, deposes that the New Zealand company does not trade in the English market, and the proper defendant is Comvita UK Ltd. It does not appear from Mr Coulter's affidavit that he is authorised to speak on behalf of the English company.

[6] Comvita New Zealand Ltd seeks an urgent hearing to resolve whether the claims in statutory demand proceedings can stand. The concern is that if the strike out application were not successful, the existence of the current proceeding would probably be enough to demonstrate that there is a substantial dispute about the debt claimed by Comvita New Zealand Ltd from Watson & Son Ltd, under the statutory demand.

[7] Mr Hughes initial opposition was on the grounds that the statutory demand proceeding was going ahead and, alternatively, on the basis that preparation time for the hearing would be inadequate. There was also a separate issue relating to Mr Hughes having sworn an affidavit filed in the proceeding, which may be relevant to the current application.

[8] On the latter point, Mr King has advised me that there is nothing contentious in Mr Hughes affidavit, for strike out purposes. On that basis I grant leave for Mr Hughes to appear on the application to strike out, even though he has sworn an affidavit in the proceeding and may be cross-examined, if the claims went to a substantive hearing.

[9] I am prepared to grant the application for an urgent hearing. The issue is within short compass and does not need much preparation.

[10] To succeed on its strike out application, Comvita New Zealand Ltd must show that the Court's jurisdiction to terminate a proceeding summarily should be exercised. To do that it must demonstrate that the claim is so clearly untenable that it cannot possibly succeed as pleaded: see *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 (CA) at 317-318.

[11] In addition, affidavit evidence on a strike out application will rarely be determinative: see *CED Distributors (1988) Ltd v Computer Logic Ltd (In Rec)* (1991) 4 PRNZ 35 (CA). The Court of Appeal emphasised that such an application turns on whether the causes of action pleaded are sustainable. Affidavit evidence will generally only bolster any argument on that score if it provided undisputed evidence that undermined the causes of action in issue.

[12] A suggestion has been made of the need to obtain answers to an interrogatory involving Comvita New Zealand Ltd's involvement in the UK market. I have indicated to Mr King that an affidavit sworn by an authorised representative of the UK company may be required to demonstrate whether that company accepts that it was dealing with Watson & Son Ltd, and, if so, what its stance is in relation to the claim. I make no direction in that regard but leave it to Mr King to consider whether such an affidavit should be filed. Nor am I expressing a considered view on this issue.

[13] Because the issue to be dealt with on the strike out application is within short compass and can be readied for hearing promptly, I grant the application and make the following orders:

- a) Any further affidavits in support of the strike out application shall be filed and served by midday on 3 August 2009.
- b) Any affidavits in opposition shall be filed and served by 5pm on 6 August 2009.
- c) Submissions in support of the application shall be filed and served by 5pm on 7 August 2009.
- d) Submissions in opposition shall be filed and served by 5pm on 11 August 2009.

[14] The application is set down for hearing before me at 10am on 13 August 2009, in the Hamilton Registry of the Court. One half day has been allocated for the hearing.

[15] Costs reserved.

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P R Heath J