

**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: 13 August and 22 September 2009

Counsel: 13 August 2009  
M King and K S McLeish for Comvita NZ Ltd (in support)  
T Cooley and K van Houtte for Watson & Son Ltd (to oppose)  
22 September 2009  
M King for Comvita NZ Ltd (in support)  
T Cooley and K J Scott for Watson & Son Ltd (to oppose)

Judgment: 29 September 2009

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**JUDGMENT (NO. 2) OF HEATH J**

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*This judgment was delivered by me on 29 September 2009 at 4.00pm pursuant to Rule 11.5 of the High Court Rules*

***Registrar/Deputy Registrar***

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### The application

[1] Comvita New Zealand Ltd (Comvita NZ) seeks an order striking out a claim brought against it by Watson & Son Ltd (Watson). Comvita NZ advances two grounds in support of its application:

- a) The claim has been brought for improper purposes.
- b) There is no reasonable cause of action pleaded.

### Background

[2] Watson’s claims arise out of allegations that it has used a registered trade mark “UMF” (Unique Manuka Factor) contrary to the terms of a licence given in its favour by the Active Manuka Honey Association Inc (the Association). The Association owns the trade mark. The trade mark is used to communicate to consumers the antibacterial strength of the Manuka honey.

[3] Watson brought proceedings against the Association to challenge termination of the licence. Watson’s concern was that unaccredited scientific testing had wrongly found that the level of antibacterial activity fell below that required on an

assay testing method, devised by Professor Peter Molan at the University of Waikato. The proceeding was issued in October 2008.

[4] The termination notice required Watson to rectify (within 10 working days) alleged breaches of the licensing agreement between the Association and Watson. In order to rectify, the Association had required Watson to recall batches of product that had already been tested and by re-testing all other batches in the market.

[5] Watson sought an injunction to prevent the Association from acting on that notice. On 22 October 2008, Gendall J made an *ex parte* interim injunction in those terms. Watson's application came before Panckhurst J, on notice, on 18 November 2008.

[6] At that stage, Watson's Statement of Claim contained two causes of action:

- a) The Association had committed an anticipatory breach of contract. Watson contended that the testing was unreliable and ought not to be relied upon to provide a basis to terminate the licence.
- b) The Association had, improperly, interfered with Watson's contractual relations with third parties; namely, Watson's sales of batches of honey to (intermediary) distributors in the United Kingdom.

[7] For reasons given in a judgment delivered on 5 December 2008, Panckhurst J dismissed the application. While Panckhurst J found that Watson had an arguable case "but hardly a strong one" (at para [48]) on the issue of the testing methodology, he held that an injunction until trial would incur greater risk of injustice, to third parties, to the value of the trade marks and to New Zealand's image abroad, if sub-standard products were to remain on overseas markets (at paras [58]-[59]).

[8] Watson appealed against Panckhurst J's decision. The appeal was heard urgently, on 15 December 2008: *Watson & Son Ltd v Active Manuka Honey*

*Association* [2008] NZCA 566. Giving the judgment of the Court of Appeal, on 18 December 2008, Arnold J said:

[22] There are difficult issues to be resolved at trial on the question of liability. For example, at first sight there appears to be some force in [Association's] contention that the parties have agreed a particular testing methodology and are bound by the results it produces. Equally, however, there is clearly some doubt about [Association's] power to order or undertake recalls given that the licence is silent on the point. Consequently, both sides are at risk of adverse findings on particular points.

[23] That said, we do not consider that the issues can sensibly be addressed, even on a preliminary basis, at this interlocutory stage. Overall, we are not persuaded that the Judge's assessment on the serious question issue was one that he could not properly have made.

[24] On the balance of convenience, two factors are of particular significance. The first is that, even accepting that the testing method has deficiencies, there is significant evidence that some Watson product in the United Kingdom is not true to label. This may, as Watson claims, be an historical problem, but that does not mean it is a problem that can be ignored. Apart from anything else, there are the interests of consumers to be considered. This is a powerful factor against granting the orders sought.

[25] The second is that there is no evidence before the Court to show that Watson is able to meet its undertaking as to damages. Mr Stewart said that an independent accountant, Mr Pettersen, had been given access to Watson's financial data and was able to verify that Watson could meet its undertaking. He said that the relevant material had not been made available in the High Court out of a concern about confidentiality, but it would be provided to us if we were minded to allow the appeal and make the orders sought. That is an unusual approach. The courts frequently deal with confidential material and we see no reason why Watson's financial data was not made available in the High Court, with suitable arrangements to preserve its confidentiality.

[26] We accept that there is no evidence to show that [the Association] would be able to meet an award of damages if one were to be made against it. Apparently, none of its members has agreed to indemnify it if such an award is made. Plainly that is an important consideration in the balance of convenience assessment. But Watson was the applicant in this case. It sought orders in its favour, and so had the initial obligation to give an undertaking as to damages. Given that its ability to meet its undertaking was not self-evident, it should also have provided sufficient financial information to enable the Court to assess the worth of the undertaking. It did not do so.

[9] Before the hearing in the Court of Appeal, Watson and Comvita NZ had settled a separate dispute between themselves. On 16 December 2008 Comvita NZ served a statutory demand against Watson claiming \$319,900.80, in relation to the alleged settlement. On 18 December 2008, Watson applied to the High Court at Tauranga to set aside the demand.

[10] On 23 January 2009, Comvita NZ filed a notice of opposition to the application to set aside the statutory demand.

[11] In February 2009, an initial case management conference was held, in the present proceeding, before Associate Judge Faire. At that conference, counsel for Watson signalled an intention to file and serve an Amended Statement of Claim and to join additional parties. The Judge ordered that any amended claim be filed and served by 23 March 2009.

[12] On 25 March 2009, Watson filed and served an Amended Statement of Claim, joining Comvita NZ as a party. Other parties were also joined but Watson has since discontinued those claims.

[13] The Association sought an order striking out the amended claim and an injunction to restrain Watson from using the UMF trade mark pending determination of the substantive proceeding. On 30 July 2009, Wild J granted an injunction but adjourned the strike-out application because inadequate time was available to hear argument on it.

[14] In the meantime, Watson's application to set aside Comvita NZ's statutory demand was set down for hearing in the High Court at Tauranga on 13 August 2009. Attempts to resolve differences had proved unfruitful. Nevertheless, for reasons into which I need not go, Comvita NZ withdrew the original statutory demand and issued a new one. The 13 August 2009 hearing was vacated.

[15] On 23 July 2009, Comvita NZ applied to be struck out of this proceeding, on the grounds that it had been improperly joined and no reasonable cause of action against it had been pleaded. That application was made against the backdrop of the scheduled hearing of the original application to set aside a statutory demand, on 13 August 2009. Comvita NZ believes that the claim against it in this proceeding has been brought in a cynical endeavour to manufacture a cross-claim, sufficient to set aside the statutory demand it has issued for an undisputed sum: see s 290(4)(b) Companies Act 1993.

[16] On 31 July 2009, I heard an application to expedite the hearing of the application to strike out. I acceded to that application, thinking (wrongly) that the issue was “within short compass and [did] not need much preparation”: para [9] of my judgment of 31 July 2009. The hearing was scheduled, coincidentally, for 13 August 2009.

[17] Before 13 August 2009, Watson filed an application to set aside the second statutory demand. That application is scheduled to be heard before an Associate Judge, on 15 October 2009. A complicating factor is that the solicitors representing Watson in this proceeding do not represent Watson on the statutory demand application.

[18] The present strike out application was heard before me on 13 August 2009. It was based on a draft Amended Statement of Claim tendered to the Court two days earlier, by Watson.

[19] After the morning adjournment, I indicated to counsel that it would be preferable for the draft to be put into a final form because, among other things, there were significant problems with the looseness of language employed in the draft before the Court at that stage. Over opposition from counsel for Comvita NZ, I adjourned the application, on terms as to costs, and required a final form of draft Amended Statement of Claim to be submitted to the Court before hearing resumed. I adjourned the hearing to 19 August 2009.

[20] On 17 August 2009, a further draft Amended Statement of Claim was filed. Material aspects of the new claim differed from those set out in the earlier draft, on the basis of which the hearing had begun. It was necessary for the proposed hearing on 19 August 2009 to be adjourned. The hearing was completed on 22 September 2009.

[21] The way in which the claim against Comvita NZ has evolved is relevant to an assessment of the reasonableness of the ultimate causes of action that Watson wishes to pursue. For that reason, I discuss the three iterations of the claim in some detail.

## **Watson's claims against Comvita NZ**

### ***(a) Version 1: the original claims***

[22] In the First Amended Statement of Claim of 25 March 2009 Watson pleaded that Comvita NZ had breached s 27 of the Commerce Act 1986 by entering into “an arrangement or understanding with the Association to interfere” in Watson’s business. This arrangement is alleged to have occurred in early 2008.

[23] The particulars of the “arrangement or understanding” were set out in para 64 of that version of the claim:

64. In or around early 2008, [the Association] and members of its Executive committee entered into an arrangement or understanding to interfere in [Watson’s] business affairs.

#### **Particulars**

- a. In or around March 2008, Comvita purchased large quantities of [Watson] products from stockists in the United Kingdom and had them tested at the non-accredited laboratory in Cardiff.
- b. On or about 11 August 2008, Comvita sent the test results from four batches of honey to at least one of [Watson’s] customers, Cannons & packers.
- c. In or around August 2008, Comvita sent the same test results to [the Association] and requested a further audit of [Watson’s] products.
- d. [The Association] insisted that [Watson] recall all products from the following batches:
  - i. 07/004033, 07/006373 and 07/011734 by way of a ‘soft recall’ in May 2008. In July 2008, [the Association] required that this be a ‘hard recall’.
  - ii. 08/116 in September 2008.
  - iii. 08/116, 08/049, NZL07/91228, 08/013B and 08/003 in October 2008.
- e. [The Association] demanded that [Watson] undertake extensive testing of all remaining batches in circulation in October 2008.

- f. [The Association] contacted [Watson's] distributors and customers directly.

[24] Watson pleaded that the “arrangement or understanding” had the purpose or was likely to have the effect of “substantially lessening competition in the market” because:

- 65. The arrangement or understanding has the purpose, or has or is likely to have the effect, of substantially lessening competition in the market.

**Particulars**

- a. [The Association] has failed to act reasonably or proportionately and has failed to display the impartiality expected of an industry body.
  - i. [The Association] assumed a more extensive policing role than is permitted under the Licence.
  - ii. [The Association] made demands of [Watson] for recall of product no longer within its control. Such demands are not authorised by the Licence.
  - iii. [The Association] has not audited any other member to the same extent as it has [Watson]. It has not required any other member to recall product.
- b. The timing of [The Association's] extensive audit of [Watson] products coincides with [Watson] changing its operations from that of a wholesaler of manuka honey, to a direct marketer and exporter of manuka honey, in competition with Comvita and Honey NZ.
- c. Members of [the Association] Executive have taken advantage of confidential information belonging to [Watson], obtained through the Executive committee, for commercial advantage.
  - i. Comvita contacted [Watson's] customers immediately after the Termination Notice was issued. That Termination Notice was later revoked by [the Association].
  - ii. Moira Haddrell used her knowledge of [the Association's] investigation of [Watson] and of its relationship with Lifeplan, to secure her own business relationships with Lifeplan.



[25] In an affidavit sworn on 24 July 2009, for the purposes of the statutory demand proceeding, the solicitor on the record for Watson, in this proceeding, deposed that damages against Comvita NZ had been quantified at approximately \$3,400,000. However, in the draft Statement of Claim made no reference to the amount sought from Comvita NZ.

***(b) Version 2: the August 2009 claims***

[26] The second version of the claim was tendered to the Court on 11 August 2009, two days before the date scheduled for the hearing of the strike out application. This version proposed adding Comvita UK (Comvita UK), as another defendant. Comvita UK distributes, in the United Kingdom, Manuka honey exported from New Zealand by Comvita NZ.

[27] Watson alleged that the Association, Comvita NZ and Comvita UK unlawfully interfered with contracts entered into by Watson for the supply of Manuka honey to the English market. The contracts in issue were with Lifeplan Products Ltd, Cannery & Packers Ltd and Brightwake Ltd. Each of those companies was responsible for distributing Manuka honey (exported by Watson) to retailers throughout the United Kingdom, for example Tesco supermarkets.

[28] Watson alleged that the Association, Comvita NZ and Comvita UK interfered with the contracts with the intention of disrupting sales carried out on behalf of Watson. Those allegations were based on the following particulars:

**Particulars**

- a. On 11 August 2008, Simon Potheary, on behalf of Comvita, contacted Cannery & Packers stating that Comvita had obtained test results of [Watson] products at a laboratory in Cardiff.
- b. On 13 August 2008, Mr Potheary contacted Lifeplan and advised that Comvita had been collecting samples of 'Spirits Bay' honey and that [Watson] 30+ and 25+ honey was not even 'manuka honey' and that test results showed the actual rating to be less than 16+.
- c. In or around November 2008, Comvita contacted Brightwake and discredited [Watson's] product quality.

- d. [The Association] by its agent, Simon Kingston, contacted Holland and Barrett on 2 June 2009 claiming that [Watson] was in breach of the Unfair Commercial Practices Regulations in the UK.
- e. Further particulars to be provided following discovery.

In those particulars reference is made to “Comvita”. In substance, Comvita Ltd is the holding company for both Comvita UK and Comvita NZ. Despite that, the fundamental allegation made by Watson was that Comvita UK was under the control of Comvita NZ.

[29] The second cause of action, against the Association, Comvita UK and Comvita NZ was based on s 27 of the Commerce Act 1986. On this occasion the “arrangement or understanding to interfere” in Watson’s “business affairs” was to be on the basis of activities undertaken by Comvita UK:

**Particulars**

- a. In or around July 2008, Comvita UK purchased large quantities of [Watson] products from stockists in the United Kingdom and had them tested at a non-accredited laboratory in Cardiff.
- b. On or about 11 August 2008, Comvita UK sent the test results from four batches of honey to at least one of [Watson’s] customers, Canners & Packers.
- c. In or around August 2008, Comvita UK and Comvita NZ sent the same test results to [the Association] and requested a further audit of [Watson’s] products.
- d. [The Association] insisted that [Watson] recall all products from the following batches:
  - i. 07/004033, 07/006373 and 07/011734 by way of a ‘soft recall’ in may 2008. In July 2008, [the Association] required that this be a ‘hard recall’.
  - ii. 08/116 in September 2008.
  - iii. 08/116, 08/049, NZL07/91228, 08/013B and 08/003 in October 2008.
- e. [The Association] demanded that [Watson] undertake extensive testing of all remaining batches in circulation in October 2008.
- f. [The Association] contacted [Watson’s] distributors and customers directly.

[30] No specific damages were claimed, on either cause of action. Rather, an inquiry into damages was sought.

*(c) Version 3: the September 2009 claims*

[31] I shall refer to the final form of the draft claim as the September version, even though it was tendered to the court on 17 August 2009. It was the basis on which the September hearing was conducted. Watson pleads four causes of action against Comvita NZ:

- a) The tort of unlawful interference with Watson's economic interests.
- b) The tort of unlawful interference with contractual relations.
- c) Section 27 of the Commerce Act 1986.
- d) Section 9 of the Fair Trading Act 1986.

[32] The thrust of Watson's claim is that Comvita NZ controls Comvita UK and caused that company to conduct itself in a manner designed to thwart competition, by interfering with contracts into which Watson had entered with buyers of the Manuka honey product in the United Kingdom. In short, it is alleged that Comvita NZ deliberately directed Comvita UK to submit Watson's product (in the United Kingdom market) for testing, by an unaccredited laboratory, and to publish unfavourable results in an endeavour to undermine competition in the market and to gain an illegitimate commercial advantage.

[33] Mr Cooley, for Watson, accepted that the central tenet of Watson's claim is that Comvita NZ acted, for all purposes, as the principal of Comvita UK and, in that capacity, directed (controlled) all actions taken by Comvita UK in the United Kingdom.

[34] As I apprehend it, the factual allegations in respect of the two torts and the s 9 Fair Trading Act claim are the same. Each alleges that Comvita NZ directed

Comvita UK to take steps to damage Watson's business interests in the United Kingdom. The s 27 Commerce Act claim is designed to bring into the scope of the claim a substantial lessening of competition in the markets for the production, manufacture and exporting of Manuka honey in New Zealand.

[35] A significant change to the pleading, through its three iterations, has been the joining and withdrawing respectively of claims against Comvita UK. Mr King, for Comvita NZ, asks me to draw the inference that the absence of any claim against Comvita Ltd (the holding company) and Comvita UK is deliberate and that the only claim that Watson wishes to raise is against Comvita NZ, for the sole purpose of defeating the statutory demand and delaying payment of an undisputed debt.

### **Legal test on strike out application**

#### ***(a) No reasonable cause of action***

[36] Rule 15.1(a) of the High Court Rules provides the source of jurisdiction for an application to strike out a cause of action. The Supreme Court has recently affirmed the principles to be applied on an application to strike out causes of action pleaded in a Statement of Claim: see *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] 3 NZLR 725 (SC) at para [33]. Delivering the judgment of herself and Anderson J, Elias CJ said:

[33] It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. *The case must be "so certainly or clearly bad" that it should be precluded from going forward.* Particular care is required in areas where the law is confused or developing. And in both *X (Minors) v Bedfordshire County Council* [[1995] 2 AC 633] and *Barrett v Enfield London Borough Council* [[2001] 2 AC 550] liability in negligence for the exercise or non-exercise of a statutory duty or power was identified as just such a confused or developing area of law. Lord Browne-Wilkinson in *X* thought it of great importance that such cases be considered on the basis of actual facts found at trial, not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike-out [at p 741]. Lord Slynn in *Barrett* was of the same view [at p 574]:

“ . . . the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved.” (my emphasis)

In making those observations, the Chief Justice referred, with approval, to *Attorney-General v Prince* [1998] 1 NZLR 262 (CA). The remaining members of the Supreme Court, in *Couch*, did not demur from that approach.

[37] I gave leave for affidavit evidence to be filed in support of the application. That was done because Mr King submitted that evidence could be adduced which would affirmatively demonstrate that some of the pleaded facts were untenable. The most authoritative statement on this issue can be found in *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566:

... The Court is entitled to receive affidavit evidence on a striking-out application, and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, 645-646, *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further. ....

**(b) “Improper” joining of a party**

[38] Rule 4.56(1)(a) of the High Court Rules provides:

**4.56 Striking out and adding parties**

(1) A Judge may, at any stage of a proceeding, order that—

(a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or

....

[39] Mr King submits that Comvita NZ has been joined “improperly”.

[40] This is a jurisdiction that must be exercised sparingly. While there appears to be no direct authority on point (certainly, none was cited by counsel), the term “improperly” suggests an ability to inquire into the motives of a claim to ascertain whether it is or is not genuine. In my view, it would be a rare case in which jurisdiction under this rule would be exercised, if a tenable cause of action were

pleaded. On the other hand, facts from which an “improper purpose” might be inferred may necessitate a more robust analysis of the particulars pleaded to support the claim.

## **Agency**

### ***(a) The basis of the “agency” allegation***

[41] Mr Cooley submits that the nature and scope of any agency relationship between Comvita NZ and Comvita UK is a question of fact and degree into which this Court ought not to inquire on a summary application to strike out the claim. He accepts that proof of this allegation is fundamental to Watson’s claims against Comvita NZ.

[42] Watson gives particulars of the alleged “agency” in para 18 of its most recent draft Statement of Claim:

18 At all material times Comvita UK operated under the direction, mandate, influence and control of Comvita NZ such that Comvita UK was acting as an agent for Comvita NZ.

#### **Particulars**

- a. Comvita NZ is the trading and operation entity within the Comvita Group that is responsible for producing, marketing and exporting Comvita NZ products into overseas markets, including the United Kingdom.
- b. Comvita NZ is the only company within the Comvita Group that is licenced to sell active manuka honey displaying the UMF trademark in New Zealand, the United Kingdom and other overseas markets.
- c. Comvita UK does not produce active manuka honey and is not licensed by [the Association] to sell active manuka honey displaying the UMF trademark in the United Kingdom.
- d. There is no formal distribution agreement between Comvita NZ and Comvita UK in relation to the distribution of Comvita NZ products in the United Kingdom.

- e. Mr Brett Hewlett is the Chief Executive Officer of Comvita NZ and is also a director of every company within the Comvita Group, including Comvita NZ and Comvita UK, except for Comvita Japan Co Limited. Mr Hewlett is also a substantial shareholder of Comvita Limited.
- f. Mr Scott Coulter is the Chief Marketing Officer of Comvita Limited and is also a director of four companies within the Comvita Group being Comvita HK Limited, Comvita Holdings HK Limited, Comvita Japan Co Limited and Greenlife (New Zealand) Product Limited. These companies are responsible for the distribution of Comvita NZ products in Asia.
- g. Mr Coulter also has direct knowledge and involvement in the operational decisions and activities of both Comvita NZ and Comvita UK:
  - i. Mr Coulter has deposed in an affidavit dated 28 July 2009 that he is authorised to give evidence in this proceeding on behalf of Comvita NZ;
  - ii. Mr Coulter has deposed in affidavits dated 3 and 7 August 2009 that he is authorised to give evidence in this proceeding on behalf of Comvita UK.
- h. Mr Simon Pothecary is the General Manager of Comvita UK and reports directly to Mr Scott Coulter. Mr Pothecary is also a director of Comvita UK.

***(b) The corporate structure of the Comvita Group***

[43] Indisputable evidence adduced on the application demonstrates that the Comvita Group trades globally, through various individual companies, in the manufacture and distribution of health products, including Manuka honey.

[44] The ultimate holding company is Comvita Ltd. That company is listed on the New Zealand Stock Exchange. It has approximately 18 direct subsidiaries.

[45] The directors of Comvita Ltd are elected by the shareholders of the listed company. It is apparent that some of the senior management group are responsible for activities carried out by companies in other jurisdictions. For example, Mr Hewlett, the Chief Executive Officer of Comvita NZ, is also a director of Comvita

UK. Mr Coulter, the Chief Marketing Officer, employed by Comvita Ltd, is responsible for global marketing arrangements. However, while Mr Hewlett is one of the directors of both Comvita NZ and Comvita UK, he is not a director of Comvita Ltd.

[46] Comvita NZ is a wholly owned subsidiary of Comvita Ltd. Its functions include the manufacture and export of Manuka honey from New Zealand to other markets, including the United Kingdom.

[47] Comvita UK is wholly owned by Comvita Holdings UK Ltd, itself a wholly owned subsidiary of Comvita Ltd. Therefore, in substance, Comvita Ltd is the parent company of Comvita UK.

[48] Comvita NZ holds a licence from the Association, in the same terms as that held by Watson, to use the UMF trade mark in various territories, including the United Kingdom. Watson's case is that Comvita UK is nothing more than Comvita NZ's distribution agent in the United Kingdom. Mr Cooley submits that the particulars of agency pleaded (see para [42] above) support that conclusion.

[49] Although Mr Coulter has made affidavits in this proceeding in which he deposes that "Comvita NZ operates at arm's length from Comvita UK" and sells its UMF products "to Comvita UK which sells those products in the united Kingdom", I am not prepared to treat that assertion as an undisputed fact for the purpose of the present application. In my view, evidence of that type goes beyond the type of affidavit evidence that may properly be adduced, in terms of *Attorney-General v McVeagh*.

**(c) Analysis**

[50] The two grounds on which Comvita NZ seeks to be struck out as a party to this litigation are intertwined. Fundamentally, the allegation is that Watson is abusing the processes of the Court by manufacturing a claim against Comvita Ltd to delay the need to pay a substantial and undisputed debt demanded of it. The chronology of events (in particular, the timing of service of the statutory demands



and the steps taken to have the present applications resolved, as to which see paras [22]-[35] above) must be considered in conjunction with the nature of the agency allegation.

[51] I would have no difficulty concluding that Comvita Ltd, as the ultimate parent company, might have exercised control over the activities of Comvita UK to ensure that the latter acted in a manner consistent with the commercial objectives of the Group, as a whole. Plainly, an inference can be drawn from the pleaded facts that it was in the interests of the Comvita Group for Watson's product in the United Kingdom to be tested to ascertain whether it met the required level of antibacterial content. But, can the same be said when the allegation is made against Comvita NZ?

[52] As the corporate structure makes clear, there is no direct link between Comvita NZ and Comvita UK. While there is some evidence adverse to the interests of the Comvita Group as a whole, that Mr Hewlett and Mr Coulter were engaged in business decisions involving Comvita UK's activities, there is nothing in the particulars of agency from which an inference could safely be drawn that Comvita NZ directed Comvita UK to act on its behalf to secure competitive advantages by deliberately acting to destroy Watson's reputation in the market.

[53] For example:

- a) The fact that Mr Hewlett is the Chief Executive Officer of Comvita NZ and a director of other Comvita companies proves nothing at all.
- b) Likewise, Mr Coulter's differing roles prove nothing of substance to the claim.

[54] The allegation of agency is founded, purely and simply, on the basis that Comvita NZ was likely to gain some advantage from the activities of Comvita UK. That, in my view, is simply not enough to justify a pleading that Comvita UK, at all times, "operated under the direction, mandate, influence and control of Comvita NZ such that Comvita UK was acting as an agent for Comvita NZ".

[55] When the paucity of primary facts alleged to prove agency is taken together with the attempts, over a period of only three months, to find a way in which a claim could be brought against Comvita NZ, the *bona fides* of Watson's claim can be justifiably questioned. The proximity of joinder to the hearing of applications to set aside statutory demands and the way in which the claims have varied through their three iterations suggests to me that the claims have not been brought for genuine purposes. The present claims have all the hallmarks of an attempt to defeat the statutory demand.

[56] Having said that, I base my decision solely on the ground that the draft Amended Statement of Claim discloses no tenable cause of action. Comvita NZ's application must succeed.

[57] Having regard to my conclusion on the agency point, it is unnecessary for me to consider, independently, the pleaded causes of action.

## **Result**

[58] Comvita NZ's application to strike out the claims against it is granted. I order that Comvita NZ be struck out as a defendant to this proceeding.

[59] Counsel asked that I reserve question of costs. I do so. I establish the following timetable for submissions:

- a) Submissions in support of any application for costs shall be filed and served by Comvita NZ by 5pm on 23 October 2009.
- b) Submissions in opposition shall be filed and served by 5pm on 27 November 2009.
- c) Submissions in reply shall be filed and served by 5pm on 4 December 2009.

Submissions on costs shall not exceed five pages in length.

[60] Unless one of the parties requests an oral hearing, I will deal with questions of costs on the papers. If an oral hearing were requested, counsel should contact the Registrar to arrange a telephone conference with me.

[61] I thank counsel for their assistance.

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P R Heath J

Delivered at 4.00pm on 29 September 2009

Solicitors:

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