IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2017-054-000602
[2017] NZDC 27923

BETWEEN	WRIGHT TANKS LIMITED Plaintiff
AND	MJ CUSTOM ENGINEERING LIMITED Defendant

Hearing:	6 December 2017
Appearances:	G Mason for the Plaintiff P Drummond for the Defendant
Judgment:	11 December 2017

DECISION OF JUDGE L C ROWE
[On application for contempt orders]

---

[1] The plaintiff, Wright Tanks Limited, has, for the last three years, manufactured concrete water tanks at 878-880 Napier Road, Palmerston North.

[2] The defendant, MJ Custom Engineering Limited, owns the Napier Road premises, is the plaintiff's landlord in respect of these premises and occupies part of the premises for its own engineering business.

[3] The defendant built moulds for the plaintiff in or about 2013 for the manufacture of the plaintiff's tanks. The plaintiff alleges that the defendant has itself started manufacturing tanks using the plaintiff's intellectual property in the tanks and has secured the services of one of the plaintiff's former employees to do so.

[4] The plaintiff's IP solicitors have written to the defendant requiring the defendant to cease making the tanks. The defendant has responded that it does not consider it as breaching any IP and will continue to make tanks.

[5] The question of whether the former employee has breached any obligations to the plaintiff is presently before the Employment Court.

[6] On 20 November 2017 the plaintiff's staff were denied access to the premises and the power supply was disconnected by the defendant on the premise that the defendant had "major safety concerns". It was alleged, amongst other things, that the electrical supply was unsafe and that a gantry crane was being used on the site by untrained employees of the plaintiff.

[7] At a meeting between the plaintiff's managing director, Andrew Wright and the defendant's managing director, Matthew Howard, on 21 November, Mr Howard advised that he was going to fill in a sump used by the plaintiff since 2014 because the plaintiff was not "using or emptying the sump regularly enough". The same day, the sump and surrounding drains were filled with concrete making them unusable.

[8] The plaintiff's evidence is that the sump was designed so that it would filter out particles from waste water to not contaminate waterways, and was the plaintiff's only method of removing waste materials discharged from the production of tanks.

[9] There is further evidence that sometime between 21 November and 24 November further concrete was placed in and around the sump, and in drains leading to the sump.

[10] The plaintiff applied for an ex parte interim injunction which I granted on 23 November 2017. The relevant terms of the interim injunction are as follows:

> a. The Defendant, M.J.CUSTOM ENGINEERING LIMITED, and its directors, agents and employees are to allow the Plaintiff and its directors, agents, employees and invitees full and unrestricted access to the premises leased by it at 878-880 Napier Road, near Palmerston North;
>
> b. The Defendant, M.J. CUSTOM ENGINEERING LIMITED, and its directors, agents and employees are to allow the Plaintiff and its directors,

agents, employees and invitees, quiet possession of its leased premises at 878-880 Napier Road, near Palmerston North;

c. The Defendant, M.J. CUSTOM ENGINEERING LIMITED, is to restore and not disturb the electricity supply to the Plaintiff's leased premises at 878-880 Napier Road, near Palmerston North;

d. The Defendant, M.J. CUSTOM ENGINEERING LIMITED, and its directors, agents and employees are to allow the Plaintiff, its directors, agents, employees and invitees, unrestricted use of the amenities at 878-880 Napier Road, near Palmerston North including wastewater sumps (removing any obstacles or concrete as may be required to restore full use) and the Plaintiff's own workshop shed in the location it was on 20 November 2017;

[11] In granting the interim injunction, I considered that the orders were necessary to preserve the status quo until substantive proceedings for damages could be determined. Depriving the plaintiff of use of its business premises and amenities, established and used for the previous three years, risked the plaintiff's business, the position of its 35 employees and its future viability. The balance of convenience clearly favoured the granting of the injunction.

Alleged breaches of the injunction

[12] The plaintiff alleges the defendant has breached the injunction in four ways:

a) By taking no steps, or insufficient steps, to remove concrete from the wastewater sump to restore it to full use (clause d. of the injunction).

b) By blocking a hose from an air compressor and, when the blockage was removed, the hose leaked to the extent that it was unusable (said to be a restriction on the use of "amenities" in breach of clause d. of the injunction).

c) By turning off or restricting water supply in the weekend of 25/26 November which interfered with the plaintiff's ability to make tanks during that weekend (a further alleged failure to supply amenities in breach of clause d.).

d) On 27 and 28 November, placing some of the plaintiff's steel mesh onto the plaintiff's concrete pad so that the plaintiff was unable to pour a tank on 28

November (said to be a breach of the plaintiff's quiet possession of its leased premises – clause b. of the injunction).

[13] There are other complaints about the defendant's conduct, or that of its managing director, Mr Howard, which are not necessarily advanced as breaches of the injunction but provide some context. An example is an allegation that Mr Howard, on 1 December, began digging concrete from the sump but, before doing so, used his digger to push the plaintiff's gantry crane out of the way, tripping a fuse in the crane that had to be reset before the crane could be used.

[14] Overall, the plaintiff's position is that, apart from allowing the plaintiff's employees back on site, the defendant did not comply with the requirements of the injunction, served on Mr Howard during the afternoon of 23 November, until 1 December. This was after Mr Howard had spent a brief period in custody on 30 November for contempt of court, and Mr Howard then took legal advice. Even then, the plaintiff says that repairs or remedial work, for example to the sump and the hose, were inadequate and a continual breach of the injunction.

The sump

[15] There is contrasting evidence for the plaintiff and defendant about the nature of the sump and whether the sump complies with the plaintiff's resource consent and the Regional Council's wastewater discharge requirements.

[16] The plaintiff says the sump was built for it by the defendant specifically as a system whereby wastewater from the manufacture of tanks could be discharged, contaminants would be filtered out and uncontaminated water could then be discharged.

[17] The defendant's position is that the sump was not cleaned out properly by the plaintiff to the extent that it discharged contaminants into the storm water system. The defendant has produced correspondence from the Regional Council to the effect that discharge of contaminants into wastewater drains is not permitted and any such activity is to cease immediately.

[18] The following facts however are not in dispute:

a) The plaintiff had been using the sump for the discharge of wastewater from its tank manufacturing business for the previous three years.

b) The defendant filled in the sump with concrete between 21 and 24 November to render it unusable.

c) The defendant did nothing about trying to remove the concrete from the sump prior to 1 December i.e. eight days after the injunction was served on the defendant.

[19] There is a suggestion that more concrete was poured into the sump after the injunction was served on Mr Howard on 23 November which was noticed by the plaintiff's employees on 24 November. While there may be some suspicions about this, there is no safe basis to say that the evidence clearly establishes that extra concrete was poured on the sump after the injunction was served. It may, for example, have been poured on 22 November, or earlier on 23 November.

[20] While the defendant began digging concrete out of the sump on 1 December, the plaintiff complains that only some of the concrete has been removed and the sump remains unusable. The defendant suggests however that the sump is unusable only because the plaintiff has failed to remove its material from the sump.

[21] In any event, the defendant claims that the sump does not comply with Regional Council requirements as to the discharge of contaminants and should not be used by the plaintiff.

[22] Whatever the competing positions on the state of the sump, and whether it complies with Regional Council requirements, the parties agreed at the hearing of the contempt proceedings on 6 December that the sump would be repaired or replaced by the defendant on a "best endeavours basis" by Monday 11 December, but in any event no later than Wednesday 13 December to the point that the sump would be fully

functional. It would then be a matter of inspection by the Regional Council whether the sump complies with wastewater discharge requirements.

[23] I accordingly proceed on the basis of the agreed facts up to 1 December. The issue then is whether the defendant's failure to take any steps in relation to the sump prior to 1 December was a breach of the injunction and, if so, what if any penalty ought to be imposed.

[24] The defendant argues that the defendant did not breach the interim injunction because the injunction, as to the removal of concrete from the sump, was mandatory in its terms, in which case the injunction ought to have specified a timeframe within which the defendant was required to act. The defendant relies on a passage from *Halsbury's Laws of England*, Fourth Edition, volume 24, para 1069 which says:

> **1069. Form of mandatory injunction.** It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the positive form. When granting a mandatory injunction, except in certain cases, the order must specify the time after service of the order (or some other time) within which the act is to be done. Even if a time has been specified, the court may specify another time and where it does not specify any such time it may do so subsequently. A copy of the order must be served personally on the person required to do or abstain from doing the act. Where an act is required to be done the copy must be served before the expiration of the time specified for the act. the copy order must be indorsed with a notice as to the consequence of neglect to obey within the time specified. (Footnotes omitted)

[25] Based on this authority, the defendant complains that clause d. of the injunction, to the extent it required the defendant to remove concrete from the sump, did not give a timeframe for removal of the concrete, and was therefore deficient or ambiguous.

[26] The passage from *Halsbury's* relied upon by the defendant is not a reliable statement of the law as it applies to injunctions in New Zealand, or necessarily in the United Kingdom.

[27] The up-to-date edition of *Halsbury's* contains a corresponding paragraph at Volume 12, para 1133 which now reads:

1133. Form of mandatory injunction.

> It was formerly the practice of the Court of Chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the positive form; the likely practical consequences of the actual injunction are more important considerations. When granting a mandatory injunction, except in certain cases, the order must specify the time after service of the order (or some other time) within which the act is to be done. The consequences of failure to do an act within the time specified may be set out in the order. (Footnotes omitted)

[28] This passage from *Halsbury's* cites several authorities but, in particular, the relevant UK Civil Procedure Code which does not apply in New Zealand. One of the cases helpfully referred to however is the decision of Hoffman J in *Films Rover International Ltd & Ors v Cannon Film Sales Ltd*[1]. In that decision, His Honour discussed the reasons for the traditional caution in granting mandatory injunctions[2] including that an order requiring someone to do something is usually perceived as more intrusive than an order requiring them temporarily to refrain from action. The Court is traditionally more reluctant to make such an order against a party who has not had the protection of a full hearing at trial[3].

[29] Hoffman J observed however that such considerations were less relevant when the mandatory injunction was needed to preserve the status quo. In such cases, a "dynamic status quo" may exist to the extent that the defendant may be required to carry out an action that restores the parties to their previous positions until the substantive proceeding is resolved[4].

[30] The test now routinely applied in New Zealand when contemplating enforcement remedies for an injunction, whether it be mandatory or otherwise, is:

a) That the terms of the original order were clear and unambiguous;

b) The defendant had proper notice of those terms; and

---

[1] *Films Rover International Ltd & Ors v Cannon Film Sales Ltd* [1986] 3 All ER 772.
[2] A caution that applies in New Zealand – see *Soft-Tech International Pty Ltd v Ball* (1990) 3 PRNZ 683, and *McDonald Motors Ltd v Christchurch International Airport Ltd* (1991) 4 TCLR 407.
[3] *Films Rover International Ltd & Ors v Cannon Film Sales Ltd* at p 781.
[4] Ibid at pp 781 and 782.

c) The terms have been breached by the defaulting party.[5]

[31] These elements ought to be established beyond reasonable doubt before the more onerous civil penal sanctions would apply such as arrest, sequestration of property or a fine. Further, the defaulting party's conduct would need to be a wilful and inexcusable disregard of the order[6].

[32] Proof on the balance of probabilities may however be all that is required when the defaulting party's conduct is due to inadvertence or carelessness, or where the appropriate remedy is costs or damages only.[7]

[33] When assessing whether the terms of the order are clear and unambiguous, the Court is entitled to have regard to the context in which the order has been made, and which is either undisputed or demonstrably well known to the parties[8].

[34] Here the relevant context is established by the undisputed position set out at para [18] above. The defendant knew what the plaintiff had used the sump for during the previous three years of its tank building operation. The defendant had filled the sump with concrete rendering it inoperable. The injunction, in its terms, required the concrete to be removed "to restore full use". The defendant knew that every day which passed was another day that the plaintiff would not have use of the sump such that the plaintiff would either be unable to carry on manufacturing water tanks, or would need to incur the expense of making alternative arrangements for disposal of wastewater and contaminants off-site.

[35] When Mr Howard attended the first hearing of this application on 30 November 2017 before Judge Smith, his position was that he did not have to comply with the Court's order because he considered discharge via the sump was a breach of the Regional Council's requirements. He did not advance the position that he was

---

[5] See for example *Brand Developers Ltd v Kanji Corporation Ltd*, HC Auckland CIV-2007-404-6154, 31 March 2008, Winkelmann J at [10]; and *Horowhenua 11 (Lake) Part Reservation Trust v Taueki* [2017] NZHC 4 at [3].

[6] Ibid, and see also *Country Colours Ltd v Resene Paints Ltd*, HC Auckland, CP 2153/91, Anderson J at pp 3 and 4.

[7] *Country Colours Ltd* at pp 4 and 5.

[8] *Wilson v Davis*, HC Rotorua, CIV-2006-463-921, 12 June 2007, Fogarty J at [13].

under any misapprehension as to the terms of the order and what it required of him i.e. the removal of the concrete. In short, he did not comply with the order because he did not consider he had to.

[36] In context, clause d. of the injunction was unambiguous and clear. It required restoration of the status quo, namely for the defendant to restore to the plaintiff the use of the sump by removal of the concrete that the defendant had deliberately placed in the sump and that this must occur as soon as reasonably practicable. A delay of eight days from when the defendant was served with the order before the defendant began complying with clause d. is, in context, a clear breach of the clause. I am sure that the defendant wilfully and deliberately failed and refused to comply with clause d. until 1 December.

[37] Whether discharge of waste water via the sump, once it was restored to full use, complied with the Regional Council's requirements is beside the point. Without the sump being restored to full use (i.e. resumption of the status quo) the plaintiff was not going to be in a position to have its compliance with the Regional Council's discharge requirements assessed by the Regional Council.

[38] It may be that the steps taken by the defendant on 1 December and afterwards, were also in breach of the defendant's obligations under clause d. That position remains in dispute and I consider is more appropriately assessed at present as a matter for damages at the substantive hearing. The plaintiff's application in relation to the defendant's failure to take any steps until 1 December however, is made out.

The air hose

[39] There is no dispute that one of the amenities the defendant previously provided to the plaintiff was compressed air via an air hose that ran from the defendant's premises.

[40] There is also no dispute that the defendant inserted a bung into the air hose to cut off the air supply to the plaintiff's business on or about 21 November.

[41] The defendant did not remove the bung from the hose until 1 December after taking legal advice. The plaintiff complains however, that the defendant removed the bung but replaced the previous hose with an inferior hose that leaked to the point that the supply of air was inadequate. The plaintiff says it had to arrange an alternative means of supplying compressed air.

[42] The defendant says it did not understand the supply of air to be one of the amenities covered by the injunction, but removed the bung out of an abundance of caution. The defendant contends that it fully restored the supply of air on 1 December.

[43] At the hearing on 6 December, the defendant agreed to ensure that the air hose was fully operational by 7.00 am the following morning. I did not take this as a concession by the defendant that the supply of air between 1 December and 7 December was inadequate but rather the defendant undertaking to ensure that there was no dispute about the matter.

[44] The defendant had supplied compressed air to the plaintiff for the previous three years. The placement of a bung in the air supply hose was, on the face of it, designed to interfere with the plaintiff's business. In context, the purpose of the injunction was to restore the status quo and the defendant ought to have appreciated that restoration of the air supply was required sooner than 1 December.

[45] The compressed air supply was not specifically mentioned in the injunction however and, giving the defendant a substantial benefit of the doubt, I am prepared, for the purposes of this application, to accept that there was room for some confusion on the defendant's part as to the specific terms of the injunction.

[46] I consider that the appropriate remedy for any failure to continue the air supply is a matter for assessment of damages at trial, if this part of the claim is made out by the plaintiff. I therefore do not uphold the plaintiff's application in relation to the compressed air supply.

[47] The defendant has notice from this point on, however that ongoing supply of air is part of the status quo covered by the injunction and is an amenity that must

continue to be supplied, without interruption, until the substantive proceedings have been resolved.

Interference with water

[48] The defendant says that the interference with water supply on 25 November occurred because the defendant was irrigating a nearby property which reduced water pressure to the leased premises. The defendant further notes that the plaintiff's resource consent does not permit the plaintiff to undertake tank building activities during weekends. The plaintiff is restricted to its manufacturing activities on Mondays to Fridays between specified hours. The defendant says the plaintiff had no reasonable expectation of an uninterrupted water supply outside the terms of its resource consent.

[49] The plaintiff for its part says the defendant knew the plaintiff routinely manufactured tanks on Saturdays and, in this case, had to do so to make up for lost production due to the defendant's previous interference.

[50] The position in relation to the supply of water on 25 November is different to the position in relation to the sump in that the use of the sump may be an activity permitted by the Regional Council, and the relevant resource consent, whereas manufacturing tanks in the weekend appears, on the face of it, to be an unpermitted activity.

[51] I have not heard oral evidence to resolve the disputed positions of the parties as to the supply of water in the weekends. For the purposes of this application however, I do not need to resolve the matters in dispute. As a matter of principle, it would be wrong to impose a penalty for the non-supply of an amenity which prevented the plaintiff from undertaking an activity in breach of the terms of its resource consent. The extent to which the defendant's failure to supply water is a breach of its contractual obligations can be properly assessed as a matter of damages, for which the resource consent may not be as relevant.

[52] The plaintiff's application in relation to the non-supply of water is accordingly not upheld.

Dumping of steel mesh

[53] The parties agree that the plaintiff had previously stored steel mesh to one side of a concrete pad used as part of the plaintiff's tank making operation. The defendant says the storage of steel was on part of the property occupied by the defendant and not covered by its lease to the plaintiff. Whether that is so, it appears the steel was stored there without complaint previously.

[54] The defendant says it simply placed the mesh on the concrete pad and it was capable of being moved within 15 minutes. The plaintiff says the mesh was damaged, took at least two hours to remove and meant that production had to be halted while this occurred so that a tank was unable to be made that day.

[55] Mr Drummond conceded on behalf of the defendant that dumping the steel mesh on the concrete pad without prior consultation or warning was an interference with the plaintiff's quiet enjoyment of its premises. He submitted however that no remedy should be available as the dumping of steel was not formally pleaded in the application seeking relief for breach of the injunction.

[56] Mr Mason's response on behalf of the plaintiff is that the breaches of the injunction have been a "movable feast" and that the dumping of the steel had been part of the plaintiff's evidence, and complaint, since 1 December.

[57] I consider that the defendant has been given a fair opportunity to consider the complaint in relation to dumping of the steel and respond to it. I consider the dumping of the steel to be a breach of the injunction, particularly the requirement that the plaintiff be allowed quiet possession of its leased premises. The plaintiff's claim in relation to this alleged breach is upheld.

Remedies

[58] Given the above analysis, I uphold two of the complaints brought by the plaintiff of breach of the interim injunction.

[59] Mr Mason, on behalf of the plaintiff submits that the appropriate remedy is payment of the plaintiff's costs on a solicitor/client basis for having to bring the enforcement application. He contends that this has required urgent compilation of evidence and responses to developing breaches including an urgent response to the late filing of evidence by the defendant.

[60] He advises that the plaintiff's costs and disbursements for bringing the contempt application are $20,906.92 which include his fee, the private investigator's fee, the fee of a barrister, Jonathan Haig, who appeared at the 30 November hearing before Judge Smith, the filing fee and GST.

[61] Mr Mason's fee for preparing documents and obtaining the interlocutory injunction are separately invoiced in the sum of $9,295.52. While Mr Mason also sought payment of these costs, Mr Drummond correctly observes that they are costs in the substantive proceedings and not in the enforcement application. Those costs are reserved accordingly.

[62] The documents filed by the plaintiff in this enforcement application include:

(a) A statement of claim,

(b) memorandum of counsel,

(c) list of documents relied upon,

(d) affidavits of the private investigator Douglas Jones dated 24 November, 30 November, and 1 December 2017,

(e) affidavits of the plaintiff's employee, James Blincoe, dated 30 November, 1 December and 6 December 2017,

(f) affidavits of Mr Mason's personal assistant, Lisa Tyler, dated 24 November, and 30 November 2017, and

(g) affidavits of Andrew Wright dated 27 November and 6 December 2017.

[63] Mr Mason contends that the plaintiff should not be out of pocket because of the defendant's refusal or failure to obey Court orders.

[64] The defendant's position is that the costs claimed are excessive, they were incurred unnecessarily, particularly following 1 December when the defendant set about remedying matters, and Mr Howard, the managing director of the defendant company, had already served a substantial penalty when he was remanded in custody for two and a half hours on 30 November by Judge Smith for contempt.

[65] I consider that payment of a substantial proportion of the plaintiff's costs is an appropriate penalty in all of the circumstances of this application. Clearly, but for the plaintiff's enforcement application, Mr Howard would have continued to believe he was entitled to interfere with facilities and amenities provided to the plaintiff, and thereby interfere with their business.

[66] I do not consider Mr Howard's brief custodial remand on 30 November is relevant to the level of costs that ought to be imposed. Judge Smith held Mr Howard in contempt because of his then unrepentant position that he was entitled to breach the interim injunction because of what he considered the Regional Council's water discharge requirements were.

[67] I consider the evidence supplied by the plaintiff was necessary to respond to the fluid situation created largely by the defendant's actions from 21 November onwards. Having said that, the plaintiff has not been wholly successful in its application and I also consider that Mr Howard has now constructively modified his position in terms of his undertakings to fully restore the sump and the air supply.

[68] I am also prepared to give Mr Howard the benefit of the doubt that he may not have appreciated the peril he had created for himself and his business until he took legal advice on the afternoon of 30 November and from 1 December onwards.

[69] I consider Mr Haig's costs were properly incurred. While Mr Mason's unavailability for the 30 November hearing was not of the defendant's making, the

circumstances that led to the urgency of that hearing were. Mr Mason was left with no choice but to engage other counsel.

[70] The refusal to unblock the sump, filled in by the defendant, until 1 December was a substantial and serious breach of the interim injunction. The dumping of mesh on the plaintiff's concrete pad is a more transitory, but nevertheless disruptive breach of the interim injunction.

[71] I assess the defendant's contribution to the plaintiff's costs for these breaches, and having to bring the application to enforce the interim injunction, at $15,000. This is the sum that Judge Smith ordered the plaintiff to pay into Court on 30 November. Those funds have been paid into Court by the defendant and I order they be released to the plaintiff forthwith.

[72] I conclude by recording my clear expectation that the status quo of the last three years is expected to continue until the substantive proceedings are able to be resolved. The amenities previously provided to the plaintiff are to continue including electricity, water, and compressed air. The plaintiff is entitled to the quiet possession, without impediment, of its leased premises and to go about its business of manufacturing water tanks unimpeded in the meantime.

[73] I note that the substantive proceedings are for mention in the Palmerston North District Court civil list on 18 December 2017.

L C Rowe
District Court Judge