IN THE COURT OF APPEAL OF NEW ZEALAND

CA438/2014
[2014] NZCA 536

BETWEEN	DANONE ASIA PACIFIC HOLDINGS PTE LIMITED First Appellant
	NUTRICIA LIMITED Second Appellant
	DUMEX BABY FOODS CO LIMITED Third Appellant
	DANONE DUMEX (MALAYSIA) SDN BHD Fourth Appellant
	DUMEX LIMITED Fifth Appellant
	DANONE VIETNAM COMPANY LIMITED Sixth Appellant
	DANONE NUTRICIA EARLY LIFE NUTRITION (HONG KONG) LIMITED Seventh Appellant
	NUTRICIA AUSTRALIA PTY LIMITED Eighth Appellant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Respondent

Hearing:	15 October 2014
Court:	White, French and Cooper JJ
Counsel:	D J Goddard QC and J H Stevens for Appellants A R Galbraith QC and D R Kalderimis for Respondent
Judgment:	7 November 2014 at 12.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are to pay the respondent's costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by White J)

[1] The appellants, collectively called Danone, have claims against the respondent (FCGL) and two of its wholly owned subsidiaries, Fonterra Ltd (Fonterra) and Fonterra Australia Pty Ltd, for damages for the manufacture and supply of nearly 2,000 metric tons of an alleged defective milk powder product (WPC80), an ingredient in Danone's baby formula.

[2] Danone issued this proceeding against FCGL in the High Court at Auckland on 9 January 2014. Danone seeks damages projected to exceed EUR 630,000,000 on the basis of four causes of action: breach of s 9 of the Fair Trading Act 1986 (FTA); breach of s 13 of the FTA; negligent misstatement; and "product liability", in relation to the defective WPC80 which Danone claims was produced and supplied outside the scope of a Supply Agreement between the first appellant (Danone AP) and Fonterra (the Supply Agreement). Mr Goddard QC for Danone notes that the "product liability" cause of action is a novel one based on *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]*.[1]

[3] Simultaneously with issuing this proceeding, Danone issued a notice of arbitration to the subsidiaries, under the Supply Agreement. Danone seeks similar damages under the Supply Agreement for breach of the Agreement in the manufacture and supply of the defective WPC80. In addition Danone alleges in its notice that the subsidiaries' "conduct was tortious and violated applicable statutory

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1 *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297.

law".

[4] As required by the terms of the Supply Agreement, the arbitration is to take place in Singapore and in accordance with English law. The parties accept that the claims in the High Court proceeding, including the claims under the FTA and for negligent misstatement, can properly be raised and determined in the arbitration. Fonterra concedes that the actions of the relevant FCGL employees are legally attributable to Fonterra. One of the issues in the arbitration will be whether Fonterra's liability is limited to AUD 30,000,000 under the terms of the Supply Agreement.[2]

[5] On the application of FCGL, the High Court has temporarily stayed Danone's proceeding pending resolution of the Singapore arbitration.[3] The order staying the proceeding provides that it is made until further order of the Court and leave is expressly reserved for Danone to seek to lift the stay in the event Fonterra delays the arbitration process. The stay is therefore conditional on Fonterra pursuing the arbitration expeditiously.

[6] In granting the temporary stay the High Court Judge, Venning J, accepted that in the absence of an arbitration agreement between Danone and FCGL, the provisions of sch 1, art 8(1) of the Arbitration Act 1996, which would have enabled FCGL to have required the dispute to be determined by arbitration, did not apply.[4] The Judge decided, however, that the Court had a discretionary power to stay the High Court proceeding. He was satisfied that this was one of those rare and compelling cases where the circumstances required a stay because to require FCGL to respond to the allegations raised by Danone would, in the circumstances where the claims arose out of the performance of the Supply Agreement by Fonterra, be oppressive to FCGL, unnecessarily duplicative and contrary to the interests of justice.[5]

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2 Clause 14.5 of the agreement provides for a limit of AUD 10,000,000 per default and a claim limit of AUD 30,000,000 per year but these limits are expressed not to apply to liability arising from Fonterra's breach of the supply specifications under cl 8.3.

3 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 1681 [the High Court stay decision].

4 At [33].

5 At [97].

[7] Danone accepts that the Judge had power to grant the temporary stay, but appeals against his decision on the ground that he should not have exercised his discretion to do so in the circumstances of this case. In essence Danone submits that in granting the stay, Venning J erred in failing to:

(a) apply correctly the test for the exercise of the Court's power under r 15.1(3) of the High Court Rules or its inherent jurisdiction to grant a stay of this nature; and

(b) address Danone's argument that there was no risk of injustice to FCGL in permitting the High Court proceeding to continue at least through all the normal pre-trial steps pending the resolution of the arbitration.

[8] Since the temporary stay was granted on 17 July 2014, there has been significant progress with the Singapore arbitration. The arbitral tribunal has been appointed. Comprehensive timetable directions have been made leading to a three week substantive hearing scheduled to commence on 8 February 2016. All documents and evidence relevant to the issues in the arbitration are to be disclosed before the hearing.

[9] While maintaining Danone's primary position that Venning J erred in granting the temporary stay, Mr Goddard, in the course of oral argument before us, acknowledged that:

(a) the Singapore arbitration will inevitably be resolved before the High Court proceeding;

(b) most, if not all, of the issues between the parties will be determined by the arbitration in which case the High Court proceeding may well not need to proceed;[6] and

(c) Danone's concerns will be met if the terms of the temporary stay are

[6] Danone accepts that, while the arbitration involves the subsidiaries, the outcome of the arbitration will have a significant impact on FCGL's position as well.

amended to require FCGL to file its statement of defence, provide "targeted discovery" and address at a case management conference any further interlocutory issues arising from those steps.

[10] Mr Goddard submits strongly that, as it is possible that the High Court proceeding may still proceed, FCGL must be required to take these further steps in the proceeding in order to avoid any further delay when the arbitration award is released in mid 2016. Mr Goddard points out that, if these steps are not taken until mid 2016, Danone's High Court proceeding will have effectively been delayed by some 18 months to two years. That delay would unjustifiably deprive Danone of its right of access to the Court for the prompt hearing and determination of its bona fide claim.

[11] Mr Goddard also submits that there will be no risk of injustice to FCGL in being required to take these steps, especially as there is no evidence from FCGL of any prejudice, and any unnecessary costs incurred by FCGL could ultimately be met by an adverse costs order against Danone.

[12] For FCGL, Mr Galbraith QC opposes any amendment to the terms of the temporary stay. He submits that FCGL ought not to be required to take any further interlocutory steps in the High Court proceeding at the same time as Fonterra is involved in the Singapore arbitration.

[13] In view of the progress being made in the Singapore arbitration and Mr Goddard's acknowledgments, we are able to deal with this appeal shortly because the only real issue for us now is whether the terms of the temporary stay should be amended so as to require FCGL to take the procedural steps identified by Mr Goddard. Once it is accepted that the Singapore arbitration will inevitably be resolved first and may well result in the High Court proceeding becoming superfluous, the only practical issue is what steps, if any, FCGL should be required to take in the High Court proceeding at this stage. This issue requires us to focus on the nature of the terms of the temporary stay rather than on whether there should be a stay at all.

[14] This narrow issue does not require us to address Mr Goddard's submission that this appeal is not simply against the exercise of a discretion because the High Court was required to determine a threshold issue, namely whether there were rare and compelling circumstances sufficient to justify the grant of a stay, which involved matters of evaluation and judgment.[7]

[15] For the purpose of this appeal, however, we accept Mr Goddard's submission that we should approach the narrow issue on the basis that the onus is on FCGL to establish that there would be a real risk of injustice to it in being required to take the further procedural steps identified by Mr Goddard in the High Court proceeding.[8]

[16] For the following reasons, taken together, we are satisfied that FCGL has discharged that onus:

(a) Danone's current statement of claim in the High Court proceeding will inevitably require significant amendment once the Singapore arbitration has been resolved. Even the fourth cause of action is likely to be affected by the outcome of the arbitration because it will probably determine the scope of the Supply Agreement. There is therefore no compelling reason for FCGL to file a statement of defence in the High Court proceeding at this stage.

(b) It is not at all clear what is meant by "targeted" discovery. There will be significant disclosure of relevant documents in the Singapore arbitration. To the extent that further discovery may be required in the High Court proceeding, the nature and scope of that discovery will also depend on the issues, if any, remaining following the resolution of the arbitration. The imposition of High Court discovery obligations on FCGL at this stage is therefore premature and potentially onerous.

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7 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

8 *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 (CA); *Panton v Financial Institutions Services Ltd* [2003] UKPC 86, [2004] 2 LRC 768; and *Shanghai Construction (Group) General Co Singapore Branch v Tan Poo Seng* [2012] SGHCR 10 at [11]–[26].

(c) A case management conference to address any further interlocutory issues arising from FCGL's statement of defence and targeted discovery would also be premature and potentially unnecessary in view of the Singapore arbitration. As Mr Galbraith points out, once the door is open to Danone to raise further interlocutory issues, there would effectively be no real stay at all.

(d) FCGL and its subsidiaries are entitled to avoid having to face and defend two overlapping cases simultaneously, especially when there are reasonable prospects that the first in time (the Singapore arbitration) may well resolve all the issues between the parties, including critical issues relating to the interpretation and application of the Supply Agreement which will have implications for the High Court proceeding. The obligations proposed in respect of pleadings and discovery in the High Court proceeding are consequently of no evident benefit at this stage and may prove unnecessary.

(e) The timetable for the Singapore arbitration is tight with the parties required to meet deadlines for the disclosure of documents, provision of factual and legal arguments and all evidence by September 2015. While we accept that FCGL, with its resources, would be able to employ sufficient lawyers to run both cases simultaneously and that any unnecessary costs incurred might ultimately be the subject of an adverse costs order against Danone, we also accept that as far as FCGL and Fonterra are concerned these steps would inevitably involve a significant burden for the particular employees responsible for the manufacture and supply of WPC80 and hence the defence of both cases. An adverse costs order would not compensate FCGL for the unnecessary time and effort expended by those employees.

[17] The cumulative effect of these reasons is that there would be a real risk of injustice to FCGL and its subsidiaries if they were required to be diverted from the Singapore arbitration by taking the further steps suggested by Mr Goddard in the

High Court proceeding, especially when those steps may well prove to be unnecessary, costly and effectively undermine the temporary stay which should remain in place. Here the unnecessary duplication of proceedings gives rise to injustice for FCGL.

[18] This conclusion is supported by the general principle that a party and its privies should not be twice vexed in the same matter.[9] When the Court is satisfied the principle is engaged because the matter has already been resolved, the second proceeding will be struck out as an abuse of process of the Court or stayed permanently. When the two proceedings are being pursued simultaneously, the Court will usually grant a temporary stay of one of them.

[19] For completeness, we note that we do not accept Mr Goddard's submission that our decision not to amend the terms of the temporary stay will, as a result of delay in the High Court proceeding, deprive Danone of its right of access to the courts. Danone's High Court proceeding has not been struck out or stayed permanently. It has only been stayed on a temporary basis pending expeditious resolution of the Singapore arbitration. It will, if necessary, be able to be pursued after the resolution of the arbitration. Any cost to Danone as a result of the delay in the High Court proceeding will be able to be met by an appropriate order for interest in the event that the claim for damages is ultimately successful.

[20] The appeal is therefore dismissed.

[21] The appellants are to pay the respondent's costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
Bell Gully, Wellington for Appellants
Chapman Tripp, Auckland for Respondent

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9 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31 per Lord Bingham and at 60 per Lord Millett; *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [62]; *Commissioner of Inland Revenue v Bhanabai* [2007] 2 NZLR 478 (CA) at [60]–[61]; and *Beattie v Premier Events Group Ltd* [2014] NZCA 184, (2014) 11 NZELR 755 at [42]–[49].