IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-1696

BETWEEN	SKIDS PROGRAM MANAGEMENT LIMITED First Plaintiff
AND	SKIDS HOLDINGS LIMITED Second Plaintiff
AND	SAFE KIDS IN DAILY SUPERVISIONS LIMITED (FORMERLY KNOWN AS SKIDS NEW ZEALAND LIMITED) Third Plaintiff
AND	BARBARA WINSOME MCNEILL First Defendant

Hearing: 19 December 2011

Counsel: M Karam for the Plaintiffs
K Quinn for the Defendants

Judgment: 20 December 2011

JUDGMENT OF WOODHOUSE J
(Stay of execution)

This judgment was delivered by me on 20 December 2011 at 4:45 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Counsel:
Mr M Karam, Barrister, Auckland
Mr K Quinn, Barrister, Auckland
Instructing Solicitors:
Mr P Kemps, Kemps Weir, Solicitors, Auckland
Mr S L Germann, Stewart Germann Ltd Office, Solicitors, Auckland

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AND	MCNEILL ENTERPRISES LIMITED Second Defendant
AND	NATASHA MAY-BABETTE MCNEILL- O'KEEFFE Third Defendant
AND	AATA BAYKIDS LIMITED Fourth Defendant
AND	KIDS CHOICE LIMITED Fifth Defendant

[1] The plaintiffs have applied for an order staying execution of a costs judgment in favour of the defendants. The defendants oppose the application.

[2] Because of time constraints Mr Karam, for the plaintiffs, agreed to an accelerated timetable for a response to the defendants' affidavits in opposition. I acknowledge the responsible way in which this was agreed to with a further affidavit and submissions being filed at short notice. Both counsel also agreed to have the matter dealt with by telephone conference.

[3] The substantive judgment was issued on 20 April 2011. In broad terms, it deals with questions relating to the plaintiffs' claims that the defendants were subject to restraint of trade provisions and that some of the defendants breached the plaintiffs' copyright and obligations of confidence owed by the defendants to the plaintiffs. The defendants succeeded in most respects, save for a finding that the first defendant deliberately copied parts of the plaintiffs' documents.

[4] An appeal against the substantive judgment was filed and served on 20 May 2011. The costs judgment was delivered on 28 October 2011. I concluded that the defendants were entitled to costs. Counsel have agreed that the sum for costs calculated in terms of that judgment is $55,610. In practical terms the order for costs is in favour of the first defendant and the third defendant. References to "the defendants" will, in general, mean the first and third defendants.

[5] The plaintiffs filed their application for stay of execution of the costs judgment on 25 November 2011.

[6] The appeal is set down for hearing on 23 May 2012.

Principles

[7] Counsel referred to the commentary on r 12 of the Court of Appeal (Civil) Rules 2005 in *McGechan on Procedure* at CR12.01. There was reference, in particular, to the summary in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola*

Enterprises Ltd[1] of factors to be taken into account. The factors noted in *Dymocks* are:

(a) Whether the appeal may be rendered nugatory by the lack of a stay.

(b) The bona fides of the applicant as to the prosecution of the appeal.

(c) Whether the successful party will be injuriously affected by the stay.

(d) The effect on third parties.

(e) The novelty and importance of questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience.

[8] This summary was approved by the Court of Appeal in *Keung v GBR Investment Ltd*.[2] As noted in *Keung*, the *Dymocks* list does not include the apparent strength of the appeal, but that has generally been recognised as an additional factor.

[9] It needs to be emphasised that these are *amongst* the factors that the Court is likely to consider in determining whether or not to exercise the Court's discretion to grant stay and, if stay is to be granted, to determine what, if any, conditions should be imposed. Each case must be determined on its own circumstances.[3] The list is not determinative. There may be other factors which, in the particular circumstances, warrant more weight than the factors referred to in *Dymocks* and *Keung*. Of the factors that are referred to in *Dymocks* and *Keung*, some may have no application. Of those that do, some may warrant less weight than others.

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[1] *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].
[2] *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11].
[3] See, for example, Gault J in *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

[10] The judgment sought to be stayed in this case is a judgment requiring payment of a sum of money. Mr Karam cited the following observations of Williams J in this Court in 1892 in *McLeod v New Zealand Pine Ltd*.[4]

> The right of plaintiff in the present case is an absolute right to have his money at once. The right of defendants is the right of appeal, and the right in some way or other to have it made certain by this Court that that appeal shall not be fruitless. The duty of this Court is, I think, to reconcile as far as possible the conflicting rights of the plaintiff and the defendants. The way to do that is to follow the English cases, and to say that an order staying proceedings shall be made on payment by the defendants to the plaintiff of the money in question, the plaintiff giving security for the repayment.

[11] I hesitate to differ from an observation of that eminent Judge, but in my opinion it is unwise to introduce what appear to be absolutes when considering the exercise of the discretion that is involved. This includes the Judge's suggestion that the applicant's ability to recover the payment must be "made certain". Removing material risks for the party required to make the payment is obviously an important consideration. But it is not an absolute. This is perhaps implicit in the sentence in which the Judge refers to seeking to reconcile the conflicting interests "as far as possible". The absence of absolutes was addressed in a slightly different way by the Court of Appeal in *Keung*. The Court said that the fact that an appeal will be rendered nugatory if there is no stay is not determinative.[5]

[12] Mr Karam also cited the following observation of Associate Judge Faire in *Contributory Mortgage Nominees Ltd v Harris Road No 10 Ltd & Anor*:[6]

> [8] From a practical point of view, where the subject matter of an application for stay pending the determination of an appeal is a money judgment, the general rule referred to in *Sims Court Practice* at 700,311, namely:
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> > An order staying proceedings will be granted upon payment by the defendant to the plaintiff of the money in question, the plaintiff giving security for repayment[7]

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[4] *McLeod v New Zealand Pine Ltd* (1892) 11 NZLR 493 at 494-5.

[5] *Keung v GBR Investment Ltd* [2010] NZCA 396 at [21], following *Cousins v Heslop* [2007] NZCA 377, (2007) 18 PRNZ 677.

[6] *Contributory Mortgage Nominees Ltd v Harris Road No 10 Ltd & Anor* (2006) 22 NZTC 19,752; HC Auckland, CIV-2005-404-3078, 31 January 2006.

[7] The commentary in the current edition of Sims is at CAR12.6 and is as follows: "As a general rule, an order staying proceedings will be granted upon payment by the defendant to the plaintiff of the money in question or the plaintiff giving security for repayment." Presumably the word "or" should be "on".

> will often be appropriate. In many instances, that approach best meets the two principles which have to be considered.

[13] The authors of *Sims Court Practice*, rather than the Judge, refer to this as a "general rule".[8] Where the judgment sought to be stayed requires payment of money it may often be both possible and appropriate to direct that payment be subject to the party's receiving payment providing security for repayment. But I consider it is preferable not to refer to a "general rule". This is essentially for the reasons already noted; exercise of the discretion will depend on the particular circumstances of the particular case. The decision must be a principled one, but the discretion is not constrained by general rules.

The facts

[14] The broad background to this application is contained in the substantive judgment of 20 April 2011. I do not intend to repeat matters contained in that judgment.

[15] The appeal is against numbers of findings. However, there is no appeal against the judgment in favour of the third defendant that she was not bound by any restraint of trade provision.

[16] The unchallenged evidence for the plaintiffs is that they are capable of paying the costs judgment and can pay in full, without delay, if required to do so.

[17] The unchallenged evidence for the first and third defendants is, in essence, that both of them are in straitened financial circumstances caused, in considerable measure, by the cost of defending the claims. The total legal expenses to date are around $100,000. I will note some of the facts in relation to the first and third defendants.

[18] The first defendant's only income is national superannuation. She put her modest savings of $13,840 into the fifth defendant. This was intended to provide working capital but "virtually all" was used to meet legal expenses. In June 2010

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[8] See the preceding n 7.

she borrowed $20,000. Most of this was used to pay legal expenses. She has reduced the debt to $16,800. The weekly payments on the loan are $132. This loan is secured over two vehicles.

[19] The third defendant has paid a greater proportion of costs incurred by the defendants than the first defendant. In November 2010 the third defendant refinanced two personal loans secured over vehicles. The refinancing was to borrow additional money to pay legal expenses. One refinancing, from PSIS, was to borrow an additional $18,000 for legal fees. Some of the original PSIS loan of $25,000 had also been used for legal fees. The total of the new loan in November 2010 was $43,000. The amount now owing is around $37,000. There are fortnightly payments of $472.70. The other refinancing in November 2010 was for a total of approximately $31,800, of which around $24,800 was for legal fees. This loan from GE Money is secured over two other vehicles. The amount now owing is around $29,000. There are fortnightly payments of $350.

Submissions

[20] The initial position of the plaintiffs was that they would pay the costs, by instalments, to a solicitor to be held in trust pending determination of the appeal. However, during the hearing Mr Karam advised that the plaintiffs did not take a fixed position on the question as to whom the payment should be made provided adequate security was available for repayment if required following the appeal. Mr Quinn indicated that the difficulty in this regard is that the first and third defendants are unlikely to be able to provide much by way of security. The only security that could be offered would be over some of the vehicles and that could only be achieved by repaying two of the loans in full. The difficulty with that course from the defendants' perspective is that they would then have no surplus to pay legal fees still owing.

[21] Mr Karam submitted that, if the costs sum is paid to the defendants, the money will be "dissipated" and a successful appeal by the plaintiffs on the question of costs would be rendered nugatory because the defendants would have no means of

repaying the costs. Mr Quinn submitted that the appeal would not be rendered nugatory. The appeal is directed to a number of matters, most of which will be unaffected by payment of the costs sum to the defendants. Specifically in relation to the costs, Mr Quinn rejected the proposition that the defendants financial circumstances mean that a successful appeal on costs would be rendered "nugatory". The position would not be altered irrevocably, which is what is meant by nugatory. The financial pressures on the defendants do not mean that they would not repay the costs if required. And, he submitted, the evidence of the efforts of the defendants to date indicates that, if they are required to repay the costs, they will find the means to do so.

[22] There were submissions on some other points. To the extent necessary I will note them in the discussion.

Discussion

[23] Were it not for the defendants' present financial difficulties I consider that the appropriate order would be for payment of the costs in full, to the defendants, and possibly with some provision to provide a degree of security to the plaintiffs. This cannot be achieved unless the defendants are directed to use the money to clear existing debts in order to provide security. I do not consider that an application for stay by the plaintiffs, who have been unsuccessful, should result in directions to that effect to the successful defendants. Bound up with these considerations is the fact that the financial difficulties have, in reasonable measure, been caused by the legal expenses they have incurred in defending the claims, and in most respects defending the claims successfully. In other words, it may be said that, to a considerable extent, it is the plaintiffs' actions which have put the defendants into a position which the plaintiffs now rely on to argue that the defendants may not be entitled to receive money which the Court has ordered the plaintiffs to pay. In my opinion it would not be just if these circumstances resulted in no payment being made at this stage to the defendants.

[24] As earlier noted, the fact that an appeal may be rendered nugatory does not mean that stay must be granted. In any event, I am not persuaded that the appeal in

this case will be rendered nugatory. The present application relates, of course, to the judgment for costs. And there is now, in effect, an appeal against that decision. However, the primary appeal is directed to the substantive decision and that appeal is undoubtedly the primary focus of the plaintiffs. Counsel debated the motive for the appeal, but that is not a relevant consideration. What is relevant is that, if the defendants are paid the costs in full, this will have no material impact on the plaintiffs' ability to obtain the benefit of the appeal on the substantive issues if the plaintiffs succeed.

[25] In relation to the costs judgment, payment to the defendants, without any conditions, may give rise to some risk for the plaintiffs in recovering the money if the appeal means they are entitled to recover the costs. But risk simply means that recovery may be more difficult in this case than it might be in another case. This does not render the appeal on costs nugatory. In addition, I am satisfied from the evidence available that, if the defendants are directed to repay some or all of the costs sum, they will find the means to do so.

[26] Brief submissions were made on the merits of the appeal. I do not consider it necessary to discuss this issue in any detail in relation to the range of findings that are challenged. The central consideration here is that there is no appeal against the finding that the third defendant was not bound by any restraint of trade provision. There was a substantial claim against her for damages for breach of the restraint of trade provision. She successfully resisted that claim and the judgment in her favour in that regard will be unaffected by the appeal. The third defendant is entitled to costs in her own right. The costs awarded were not allocated as between the first and third defendants. I do not propose to make an allocation now, but on a broad brush basis I do consider that the third defendant would be entitled to at least half of the total that was awarded.

[27] There is evidence of material prejudice to the defendants if a stay is granted. These are the matters earlier outlined in respect of financial pressures on them. The prejudice to the plaintiffs if the stay is not granted is the degree of risk or difficulty in recovering the payment, as earlier discussed. In my judgment the prejudice to the defendants substantially outweighs the prejudice to the plaintiffs associated with the

risk. Into this balancing exercise may be added the elementary fact that the defendants at this point have succeeded, with the plaintiffs' prospects of reversing the challenged decision being uncertain, with other decisions being unchallenged.

Conclusion

[28] My conclusion, from these considerations, is that the appropriate orders on the application for stay are as follows:

(a) The application for stay of the judgment in favour of the third defendant is dismissed in respect of a sum of $28,000. In consequence, the third defendant is entitled to immediate payment of the sum of $28,000, without condition.

(b) The application for stay of the judgment in favour of the third defendant is dismissed in respect of a sum of $14,000, being a sum in addition to the sum of $28,000 referred to in the preceding paragraph (a). In consequence, the first defendant is entitled to immediate payment of the sum of $14,000 without condition.

(c) The application for stay in respect of the balance of the costs judgment is granted subject to that balance, $13,610, together with interest due on the total costs judgment of $55,610 from the date of the judgment to the date of payment of the $13,610, being paid into the trust account of the defendants' solicitors to be held in trust in the names of the plaintiffs and the first and third defendants, on interest bearing deposit, pending further order of the Court. Payment is to be made to the solicitors for the first and third defendants, or as otherwise directed by the first and third defendants, by 5:00 pm on Friday, 23 December 2011. If payment is not made by that time and date the order for stay will automatically lapse.

(d) Pending further order of the Court the first defendant is not to sell or otherwise dispose of the Toyota Estima DGN860 and Toyota Hiace

BCM678 registered in her name and the third defendant is not to sell or otherwise dispose of the three Toyota Hiace vehicles, registered numbers DJB273, ZE8827 and CPL74, and the Honda Odyssey DFQ552 registered in her name.

(e) If the sums of $28,000 and $14,000 referred to in sub-paragraphs (a) and (b) are not paid to the solicitors for the first and third defendants, on behalf of the first and third defendants, or as directed by the first and third defendants, by 5:00 pm on Friday, 23 December 2011, the stay of execution in respect of the sum referred to in sub-paragraph (c) and the restraining order in sub-paragraph (d) will automatically lapse.

[29] The defendants have sought costs on this application. In the usual way they are entitled to costs which I fix on a 2B basis.

Woodhouse J