IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 236
EMPC 331/2014

IN THE MATTER OF	an application for an injunction
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	RAIL AND MARITIME TRANSPORT UNION INCORPORATED Defendant

Hearing:	(in chambers on Sunday, 21 December 2014) Heard at Wellington
Appearances:	T Clarke and G Stacey-Jacobs, counsel for plaintiff P McBride and G Ballara, counsel for defendant
Judgment:	22 December 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This decision resolves an application for an urgent interim injunction. Lyttelton Port Company Limited (LPC) contends that members of the Rail and Maritime Transport Union Incorporated (RMTU) should be restrained from being party to, directing, encouraging, or inducing those of its members who are employed by LPC to participate in strike action, at the Port of Lyttelton. The key issue is whether, as is contended on behalf of the Union, the employees have reasonable grounds for believing that their action is justified on the grounds of safety or health.

[2] The matter has been dealt with under conditions of considerable urgency. The proceeding, which included the application for an interim injunction and an application for urgency, was filed late on Saturday, 20 December 2014. Initially,

LPC sought a decision from the Court that evening so as to restrain what was asserted to be an unlawful strike which would take effect from midnight, 20 December 2014 to 6.00 am, 21 December 2014. LPC's application had been served on lawyers for RMTU, but the application at that stage would have to have been considered on an ex parte basis since RMTU had not had an opportunity of responding to it. I convened an urgent telephone directions conference with counsel for both parties in the course of that evening; it was agreed that the matter would proceed on an urgent inter partes basis; a timetable was imposed for the filing of evidence and submissions; and the hearing proceeded at 6.00 pm on Sunday, 21 December 2014.

[3] At the time of the telephone directions conference, and indeed until late in the hearing, it was assumed that the alleged strike action which had occurred from midnight, 20 December 2014 to 6.00 am, 21 December 2014 and again the following night, would continue on a daily basis. As a result of questioning from the Court, and after counsel for the plaintiff took confirmatory instructions, it emerged that the alleged strike action related to two weekend shifts only. There is no evidence that statutory days will be affected by the issue which the Court is required to consider. Whilst, therefore, it appears that the potential for further instances of withdrawal of work may not arise until next weekend, it is nonetheless imperative that the Court's decision be issued as a matter of urgency, so that the parties can organise their affairs in light of the Court's findings.

Background

[4] LPC employs members of the RMTU, pursuant to the Lyttelton Port Company Limited Combined Unions' Collective Employment Agreement 2011/2014 (CEA), the parties to which include the plaintiff and the defendant. That CEA expired on 7 September 2014, since which time the parties have been engaged in bargaining for an intended collective agreement.

[5] On 2 December 2014, a notice was given to LPC by RMTU, on behalf of the Union's members of an intended strike. The 14-days notice stated that there would be a ban on the performance of over-time, that the strike would be continuous, and that it would continue until withdrawn by written notice from RMTU.

[6] LPC contends that on 20 December 2014 at 12.00 am RMTU and its members took strike action by withdrawing their labour and not performing their normal duties at the Lyttelton Container Port.

[7] At 11.00 pm on 19 December 2014, Mr B Samuelsson, the Terminal Manager at LPC, addressed the foreman and cargo handlers at the Lyttelton Port rostered to work on the shift which was about to commence. He advised that there would be no mechanics or boilermakers/fitters on duty during the upcoming shift. He referred to a Risk Assessment which the company had prepared, and to a further document entitled "Procedure for Managing Breakdown Situations in LCT when Workshop Personnel May Not Be Available" (the Procedure). He advised the staff that the company had not been able to identify any risks posed by working without maintenance staff on duty.

[8] At midnight, Mr L Collins, a Crane Driver and Health and Safety Representative presented a "red card" to the Logistics Officers, and asked for all work to stop as he considered continuing to work to be unsafe.

[9] The company contends that members of the RMTU accordingly took strike action by withdrawing their labour and not performing their normal duties. This also resulted in strike action by those members of the Maritime Union of New Zealand Incorporated (MUNZ) who are employed by LPC as cargo handlers and in other positions. This was also because there was an absence of maintenance staff.

[10] The company alleges that there is a strike which is unlawful because:

a) the members of RMTU do not have reasonable grounds for believing that the strike is justified on the grounds of health and safety; and

b) the strike is obstructive in nature; it interferes with LPC's employment agreements with its employees; it has induced breaches of employment agreements; and it significantly affects its commercial contracts with its clients such as shipping lines.

[11] The company contends that there is no genuine issue of health and safety held on reasonable grounds given:

a) That LPC carried out a detailed Risk Assessment to determine the risk level of work without having workshop personnel on shift.

b) It consulted with its workers, workshop staff, the foreman, cargo handlers and health and safety managers. As a result, it revised its Risk Assessment on two further occasions.

c) It has concluded that the level of risk of not having maintenance staff on shift is acceptable, and does not pose any imminent danger or expose workers to significant risk of serious harm.

d) The striking workers have said they do not agree with LPC's risk assessment, but the company says the workers failed or refused to explain why they considered the work was unsafe.

e) RMTU has simply rejected LPC's position and has made no attempt to explain why the Union considers the work to be unsafe and why the strike is justified on health and safety grounds.

f) The real reason for the workers' refusal to work appears to be aimed at supporting RMTU's bargaining claims, rather than being based on genuine health and safety concerns.

[12] For its part, RMTU contends that:

a) There is a significant history to the health and safety issues which have arisen.

b) The Union and affected employees genuinely believe that it is not safe to work without the workshop staff.

c) Such a belief is reasonable and is supported by the opinion of a health and safety specialist who has been involved in working with RMTU on health and safety issues at the port.

d) The Union is not a party to any strike, and is not aiding and abetting an illegal strike.

Strike

[13] Counsel for RMTU submitted that what had in fact occurred was discontinuance of certain work by employees. However, it was accepted by counsel that it was arguable that the actions of the employees constituted a strike, either on the basis that there was a reduction in the normal performance of work[1] or on the grounds that there was a refusal to accept engagement for work in which the employees were usually employed.[2] This decision proceeds therefore on that basis.

Status of the Union

[14] As mentioned, counsel for RMTU submitted that the Union was not a party to the strike, and had not aided and abetted it. The implication of this submission was that if LPC wished to take action, then it needed to do so against individual employees and not the Union.

[15] The circumstances which have arisen have their genesis in part in bargaining for an intended collective employment agreement. It was in that context that notice of strike action was given by a representative of RMTU, on behalf of its members who are covered by the bargaining.

[16] The maintenance staff are unavailable during the subject shifts, because otherwise they would have been undertaking overtime which is banned under the strike notice.

[17] Whilst it was the employees themselves who produced a red card on safety grounds and thereafter withdrew their labour, that was an action that clearly arose in the context of the notified strike, in which RMTU is involved.

[18] The Union had also been involved in issues relating to safety at the port. As will be amplified later, the Union had become concerned regarding those issues,

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1 Employment Relations Act 2000 s 81(1)(a)(i).
2 Section 81(1)(a)(iv).

caused on analysis of certain safety issues to be undertaken and recently wrote to the company to seek engagement over their concerns.

[19] I find that RMTU is involved in the circumstances giving rise to the present application. For these reasons it was appropriate to join it as a party. Whether, however, the actions of RMTU are such that it should be the subject of an interim order is a separate issue which will be analysed below.

Relevant principles

[20] In light of the findings made to this point, the central issue is obviously whether the strike action is lawful on the grounds of safety. This requires a consideration of s 84 of the Employment Relations Act 2000 (the Act) which provides:

> **84 Lawful strikes and lockouts on grounds of safety or health**
>
> Participation in a strike or lockout is lawful if the employees who strike have, or the employer who locks out has, reasonable grounds for believing that the strike or lockout is justified on the grounds of safety or health.

[21] That issue must be considered in light of interim injunction principles. A convenient summary of these is found in *Counties Manukau District Health Board v Public Service Assoc Inc*, where Chief Judge Colgan said:[3]

> There are three tests to be applied to the question of whether an interlocutory injunction should issue. The first is whether the plaintiff has an arguable case of illegality of the strike. Second, if so, the Court must determine where the balance of convenience lies between the parties before the case can be heard and decided substantively. Put another way, the Court must determine whether the injustice of prohibiting industrial action that may turn out to be lawful is outweighed by the injustice of allowing what may be found to be an unlawful action to continue, perhaps for up to several months. Finally, the remedy of injunction being discretionary, the Court must stand back from the detail of the first two tests and ascertain where the overall justice of the case lies at this stage.

[22] The evidence is untested, and has been assembled urgently. However, the Court must nonetheless assess the relative strength of each party's case. In doing so it must adopt a robust approach in assessing the truth of allegations and counter-

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[3] *Counties Manukau District Health Board v Public Service Assoc Inc* [2002] 2 ERNZ 968 (EmpC) at [2].

allegations. There is no presumption that either side's assertions of fact will be established at trial.[4]

[23] On an application for an interim injunction restraining a strike under s 84, the employer must show that it is at least arguable that the employees concerned are unlikely to be able to show reasonable justification for the strike on grounds of safety or health.[5]

[24] However, once the employer has demonstrated an arguable case in that respect, the burden of proof is on the party alleging the lawfulness of the strike to show, on the balance of probabilities, that there are reasonable grounds for the workers' belief that their strike was justified on safety or health grounds.[6]

[25] The question of onus is addressed in the Act. Section 85(2) provides that where a party alleges that participation in a strike is lawful by virtue of s 84, that party has the burden of proving that allegation. The defendant does not have to prove, however, that the action was justified. Rather, there must be proof that the person or persons taking the action believed it was justified, and that the belief was held on reasonable grounds.[7]

[26] LPC submitted that the section requires the Union to establish that there was and is an imminent danger to workers, or that they would be at significant risk of serious harm. This submission was based on dicta of the Court in *Tranz Rail Ltd v Rosson.*[8]

[27] On some occasions, an "imminent danger" test has been regarded as appropriate.[9]

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4 *Wellington Free Ambulance Service Inc v Adams* [2010] ERNZ 128 (EmpC) at [10]-[14].
5 *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* (1997) 5 NZELC 98,469 (EmpC).
6 *New Zealand Woollen Mills etc IUOW v Christchurch Carpet Yarns Ltd* [1988] NZILR 1537 (LC).
7 *Spotless Services (NZ) v Service & Food Workers Union (No 2)* [2008] ERNZ 609 (CA) at [46].
8 *Tranz Rail Ltd v Rosson* EMC Wellington WC30/03, 30 September 2003 at [22]-[23].
9 See for example *Mount Cook Group Ltd v Airline Stewards and Hostesses of New Zealand IUOW* [1989] 1 NZLIR 718 (LC) at 3.

[28] However, I respectfully agree with Judge Finnigan's observations in *Fletcher Development and Construction Ltd v New Zealand Labourers IUOW* that whilst such a test may be of assistance in some instances, the prime test is the language of the section itself. He commented:[10]

> … [T]he test may or may not be an 'imminent danger' test in one or other case … [T]he prime test is set out in [s 84] … [S]ometimes an imminent danger test will satisfy that test, but there are other tests as well which may satisfy it…

[29] In *Griffin v Attorney-General*, Chief Judge Goddard, when dealing with an issue where prison officers had taken strike action and believed that a shift was "undermanned," remarked:[11]

> [There] was perhaps too much emphasis on the absence of evidence of danger that was imminent instead of on danger that was real as opposed to farfetched but in practical terms the difference is one of degree and may not be significant.

[30] Also relevant is s 28A of the Health and Safety in Employment Act 1992 (the HSE Act). Sub-section (5) provides that an employee may not refuse to do work that, because of its nature, inherently or usually carries an understood risk of serious harm, unless the risk has materially increased beyond the understood risk.

[31] This provision is relevant in the present context, because both the employer and employees have relevant obligations and rights with regard to this workplace arising from that statute; and s 28A(8) of the HSE Act specifically provides a cross-reference to the Act, when it states, for the avoidance of doubt, that a question about the application of s 28A to a particular situation is deemed to be an employment relationship problem for the purposes of the Act.

[32] Section 84 must be construed according to not only its text, but also its purpose. An understanding of purpose is assisted by s 28A(5) of the HSE Act. I approach the question of threshold for the purposes of this case by considering whether the risk has materially increased beyond the understood risk. The

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10 *Fletcher Development and Construction Ltd v New Zealand Labourers etc IUOW* [1990] 2 NZILR 222 (LC) at 227.

11 *Griffin v Attorney-General* [1995] 1 ERNZ 119 (EmpC) at 148.

assessment of risk made by employees must be real and not far-fetched, and must be sufficiently serious as to justify participation in a strike.

Arguable case

[33] LPC states in its evidence that it has undertaken a consolidated Risk Assessment, the effect of which is that the absence of maintenance staff does not pose any imminent danger or expose workers to significant risk of serious harm. It has also given evidence as to the development of the Risk Assessment. There is a dispute as to whether adequate consultation occurred in developing the Risk Assessment, and the Procedure.

[34] The company's evidence is that the Risk Assessment identifies each risk which could arise from the maintenance staff not being available, assesses the likelihood of a range of risks occurring, and the severity of any harm that could be suffered. It summarises control measures that could be put in place to eliminate, substitute, isolate or minimise the hazard, and the emergency response. The likelihood level is multiplied against the severity level to arrive at a rating for a risk matrix. It is contended for the company that the risk matrix shows that each risk identified is at an acceptable level, and that there is no material change in risk to which workers would be exposed as a result of the absence of workshop personnel. Specifically, the exercise does not identify any imminent danger or significant risk of serious harm. The essence of the Risk Assessment and the allied Procedure is that in the event of a breakdown, work is to stop until workshop personnel next become available; and if the breakdown involves an emergency, the situation is to be dealt with by emergency services.

[35] The Union, however, states that the Risk Assessment and Procedure were only introduced to staff shortly before the commencement of the subject shift, not long before midnight on 19 December 2014. Thus:

a) Mr Collins states that he was first introduced to the Procedure at this time, and considered its contents to be flawed. He told Mr Samuelsson at the time that WorkSafe New Zealand (WorkSafe) needed to be involved. He conferred with other workers and it was their view that

the procedures were not adequate, which is why he produced the red card. It was his conclusion that operating machinery without workshop staff being available as the first responders was unsafe.

b) Mr R Spain, a Crane Driver and an RMTU Delegate, said that the first time he saw the Risk Assessment and Procedure was also late on 19 December 2014. He said that if there was an emergency or an accident, and workshop staff were unavailable, there would not be anybody appropriate to respond. As a Crane Driver he is fully reliant on workshop personnel when he is in a crane or a straddle.

c) Mr M Brown, an Electrician and potentially a first responder, said he first saw the Risk Assessment and Procedure about 11.00 pm on 19 December 2014; he had not been consulted with regard to its production. He regarded the Assessment as inadequate, because it did not distinguish between the presence or absence of workshop/electrical staff adequately. Reliance on external emergency services was not appropriate for reasons which he elaborated.

d) Mr M Benecke, a Cargo Handler, said that he also had not seen the document until late on 19 December 2014. It was his evidence that foremen had not been consulted with regard to the production of the document.

[36] Although there appears to have been some consultation by LPC, I find that it is arguable for RMTU that there was not adequate consultation with affected staff – including relevant health and safety representatives – as to the processes which would apply in the event of a breakdown or emergency response if workshop personnel were not available.

[37] It is next necessary to consider the adequacy of the Risk Assessment. Counsel for LPC submitted that the Union's case did not deal with the issue of likelihood of risk. It was his submission that the Union's evidence did not assess imminent dangers, but rather focused on the adequacy of response.

[38] Mr S Marsh, a Cargo Handler, stated in his evidence there are a range of emergency or urgent incidents such as where two straddles collide accidentally, or where there is a mechanical incident caused by a hydraulic leak, or an engine cut-out. He says that such incidents are common, with breakdowns or collisions with containers occurring daily. He then said:

> Every day there is an accident or incident in the yard that we need to deal with. Up to 10-12 a day where a mechanic is called out regarding a straddle or crane or other machinery. This is not a one-off or rare thing we're talking about – these are real safety issues and I do not believe the work is safe as LPC now claims.

[39] In its Risk Assessment, LPC assessed five situations. Two of the five situations are rated as being "likely" ("straddle stuck on box"; "straddle v straddle").

[40] On the evidence before me, I am satisfied that there is a real likelihood of incidents where the assistance of workshop personnel would normally be utilised.

[41] The real question is whether, through the absence of those personnel, the risk has increased and if so to what extent.

[42] The company's Risk Assessment suggests that the increased risk is not significant and is manageable by particular operations ceasing until relevant personnel are available.

[43] This is strongly contested by RMTU. Evidence was presented from Ms H Armstrong, who has relevant health and safety expertise and who has had some involvement in advising with regard to health and safety issues at the Lyttelton Port. She was asked to consider the Risk Assessment, at short notice. She has provided detailed evidence to support her contention that the assessment is "quite flawed". Included in her criticisms are that:

- The acceptable level of risk in the Risk Assessment is too high.

- The risk descriptions are inadequate, and do not seem to take into account the perception of workers exposed to the risk and their assessment, which should be the case.

- The controls do not address the elimination of relevant risks, or address how, for instance, an injured person would be extracted from a straddle or crane during an incident.

- Although one of the five situations results in a residual risk level which is rated as "unlikely", it is one which nonetheless requires medical treatment.

- The responsibility for the risks is described as "all" and the monitoring frequency "daily", which is suggestive of all staff being required to make constant judgments, and the risk being ever present.

- It was unclear whether any emergency simulation had been undertaken using the actual circumstances of no workshop personnel being available; that is, the posed scenarios had not been trialled.

- There was no effective difference between risk assessments of individual situations where specialist-trained personnel were available to respond, and in the same situation where they were not. That in itself appeared to suggest the assessment was inadequate.

- Finally, the assessment did not address factors which needed to be addressed such as human factors, risks caused by shift work, interruption to circadian rhythms, and the actual environment, including that the port has suffered some earthquake damage.

[44] These concerns were echoed by evidence filed by individual employees. For instance, Mr S Clements, a Mechanic – and also a Health and Safety Representative – considers the detail contained in the LPC documents to be impracticable. He says that the layout of the yard has not been considered and there could be issues if emergency services were called, since those personnel would lack the specialist knowledge held by mechanics.

[45] Another Health and Safety Representative, Mr Marsh states that the Risk Assessment is not consistent with present training on hazard management; and that the machinery involved is in his opinion unsafe without the correct support.

[46] The totality of the evidence placed before the Court satisfies me that it is arguable that the risks involved in not having the maintenance staff available have significantly increased beyond the understood risk which would normally arise when those staff are on duty.

[47] As mentioned earlier, LPC submits that the real reason for the expression of these concerns and for the withdrawal of labour is to support the Union's bargaining claim; in effect it is submitted the expressed concerns are not genuine.

[48] This issue needs to be assessed in light of workplace history. Mr Marsh described an incident which occurred on 6 November 2014, when there was an issue because no mechanical or workshop staff were working. The cargo handlers discussed the situation and informed employer representatives that they were not available for work that would involve driving machinery, although they were available for other duties. It was his evidence that LPC did not question this, and there was a short cessation of work whilst an alternative mechanic was made available. The Union suggests that this confirmed that LPC had accepted the importance of having a mechanic available at all times.

[49] Information regarding this incident was provided to Ms Armstrong, who had by that time become involved in safety issues at the port. She had been instructed to assist in achieving what she described as positive changes in health and safety at the site. This was in part a response to a series of tragic deaths and injuries which had occurred in the workplace.

[50] Ms Armstrong obtained from WorkSafe copies of 26 Improvement, Prohibition and Warning Notices issued over the previous year. She undertook an audit against those notices and made certain recommendations to the RMTU.

[51] The General Secretary of RMTU, Mr W Butson, alluded also to the safety issues which had arisen at the port. The extent of the fatalities over the period of a year, as well as WorkSafe interventions, was of significant concern to the Union. He also considered that there were major infrastructure issues arising from the Canterbury earthquakes, so that the workplace, he said, revealed uneven surfaces, potholes, restrictions as well as other issues that employees had to contend with. He said the situation had reached the point where the Chief Executive had stated that if any worker considered there was a genuine health and safety issue, they were entitled to pull a "virtual red card" and stop work; and that this would be supported by the employer. It was his evidence that the Union was and is devoting considerable effort addressing health and safety issues. On 8 December 2014, he wrote to the Chief Executive on the basis of the various issues which arose from Ms Armstrong's audit. Although no formal response has as yet been given, he had been advised that a meeting would be established in the New Year. However he considered that the health and safety issues being raised were not being given an adequate priority.

[52] As an aspect of the issue as to whether the beliefs held are genuine, it is necessary to consider the assertion that the Union directed, encouraged, induced or otherwise caused employees to participate in strike action. Mr J Kerr, a Union Organiser from RMTU, was consulted late on 19 December 2014 by Mr Collins, and advised him that if he had a genuine belief on reasonable grounds that he or his fellow workers were at risk of serious harm he or they had the right to refuse to work on tasks that were exposed to an elevated level of risk; and that this was the employee's call. Mr Kerr made it clear that it was not his place to debate the matter.

[53] Although it is obvious that the particular issues which the Court has been required to consider have arisen in a bargaining context, the Union and its members are able to assert that they are genuinely concerned about safety issues. On this occasion, those concerns have arisen in the context of an over-time ban. That ban has been imposed in a bargaining context, but by means of a strike notice which is lawful.

[54] The criticisms advanced by Ms Armstrong relate to concerns held not only by her, but also by relevant employees. I do not consider that her evidence is an attempt to bolster the opinions of employees for the purposes of establishing thereby that reasonable grounds exist under s 84. But her evidence does confirm there is a reasonable basis for the employees' beliefs.

[55] In summary, I consider that RMTU has discharged its onus to establish that it is arguable that the affected employees do have reasonable grounds for believing that their strike was justified on the grounds of safety. It is arguable that the risk of working without maintenance staff on duty has increased the understood risk so that it is sufficiently significant as to justify participation in a strike. Although there is a bargaining context, it is also arguable that the expressed concerns are genuine.

Balance of convenience

[56] Mr Monk, the Operations Manager of LPC, has provided evidence as to the effect of the strike on the company's commercial contracts, such as shipping lines. It is his evidence that the absence of maintenance staff has interfered with LPC's performance of commercial contracts and has disrupted the normal operation of the port generally. An example is given of a container vessel which was berthed on 19 December 2014; it was able to be tied up, but as a result of the strike the vessel's departure would be delayed resulting in increased fuel costs. He also states that the company's work-schedule would be interfered with, particularly because advance bookings would be disrupted if ships are not worked as scheduled.

[57] He considers there could also be flow-on consequences for costs of labour booked but not able to be utilised, estimated at $11,200 per affected shift. He says there is a risk of loss in stevedoring revenue, which on a per vessel basis would be approximately $100,000. There is a risk of shipping lines reacting by seeking alternative ports. There is also a possibility of LPC not being able to obtain revenue from berthage and pilot and tug fees which would be difficult to charge if a vessel could not be worked.

[58] For present purposes, I accept that the company faces potentially serious operational consequences and potential losses of profit. In this proceeding, LPC seeks an inquiry as to damages. An award of damages could constitute an adequate remedy, although that would not wholly address the company's difficulties in operating the port. I also accept that the interests of affected shipping lines have to be considered, since they would be inconvenienced by continued strikes of this nature.

[59] For RMTU, reference is made to the personal interests of Union members who are employees at the port, affected employees of MUNZ, and the families of those employees who are naturally concerned about family members. It is submitted that these factors are at least as strong as those of the commercial parties involved.

[60] I consider that the assessment of the various factors which must be weighed in considering the balance of convenience comes down to the question of whether issues of safety should outweigh operational consequences and potential loss of profits.[12]

[61] I am satisfied that on this occasion the safety issues should prevail. The balance of convenience favours the RMTU, and to the extent that they are third parties its members, as well as the affected members of MUNZ. All of these parties have a relevant interest in ensuring safety obligations are properly met.

Overall justice

[62] I referred earlier to the clarification which emerged at the end of the hearing, to the effect that the health and safety issue which is the subject of this matter affects only two shifts in each weekend. I consider that is a further issue which favours the Union's position. Although the strike action impinges significantly on the employer's operational requirements and could potentially affect profits, it is not a daily occurrence. No evidence has been provided as to whether, with appropriate forward planning, these issues may or may not be manageable.

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[12] See for example *Mount Cook Group Ltd* above n 8, at 720.

[63] Taking all factors to which I have referred into account, I conclude that the overall justice of this case requires the application for interim injunction to be declined.

Conclusion

[64] The application is dismissed; I reserve costs.

[65] Mr Monk's affidavit stated that LPC would be making arrangements to try to address the areas of disagreement about risk. I requested further information about this; a memorandum was accordingly filed on behalf of LPC earlier today. I am advised that LPC has directed its Senior Health and Safety Manager to facilitate a review of the Risk Assessment. This is to involve the employees who originally participated in the development of the Risk Assessment who are members of both RMTU and MUNZ. The Container Terminal Manager and the Plant and Coal Manager will participate, as well as other health and safety representatives. It is hoped to establish a meeting to begin this facilitative process today.

[66] There is also a willingness on the part of both parties to attend mediation on the health and safety issues, and to involve WorkSafe in the dispute.

[67] Given that willingness, I do not consider it necessary to make any formal directions as to mediation or otherwise, although I strongly urge all parties to engage constructively in these processes with a view to resolving their outstanding differences.

[68] As regards the future of this proceeding, I reserve leave for either party to apply on notice for directions as to its future conduct.

B A Corkill
Judge

Judgment signed at 5.00 pm on 22 December 2014