

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2017-404-1185
[2017] NZHC 54**

BETWEEN FLUJO SANGUINEO HOLDINGS PTY
 LIMITED
 Plaintiff

AND MERISANT COMPANY INC
 First Defendant

 MERISANT AUSTRALIA PTY
 LIMITED
 Second Defendant

 MERISANT COMPANY 2 SARL
 Third Defendant

 NEW ZEALAND SUGAR COMPANY
 LIMITED
 Fourth Defendant

Hearing: 24 November 2017
 Further submissions 3 and 8 December 2017

Counsel: DL Marriott for plaintiff
 CL Elliott QC and JB Rutter for defendants

Judgment: 5 February 2018

**JUDGMENT OF FITZGERALD J
[As to application to dismiss or stay proceeding]**

This judgment was delivered by me on 5 February 2018 at 4 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Hudson Gavin Martin, Auckland (T Mahoo)
 Kensington Swan, Auckland

Introduction

[1] By statement of claim dated 9 June 2017, Flujo Sanguineo Holdings Pty Ltd (“Flujo Sanguineo”) commenced these proceedings (the “Current Proceedings”) against the defendants (collectively, “Merisant”).¹ The Current Proceedings were commenced against the backdrop of earlier proceedings brought by a company related to Flujo Sanguineo, Flujo Holdings Pty Ltd (“Flujo Holdings”), in relation to the same or similar matters (the “First Proceedings”). Flujo Holdings discontinuing those proceedings on the eve of trial.²

[2] Merisant now applies to have the Current Proceedings dismissed or stayed on the ground they are an abuse of process. In its application and written submissions filed in advance of the hearing, it made two alternative arguments:

- (a) First, an assignment from Flujo Holdings to Flujo Sanguineo of the intellectual property, which is the subject of both the First and Current Proceedings, was in reality an illegal and void assignment of a bare right to litigate. So, Merisant says Flujo Sanguineo has no right to bring the Current Proceedings.
- (b) Second, Flujo Holdings has not yet paid costs ordered against it in the (discontinued) First Proceedings. So, Merisant says that pursuant to r 15.24 of the High Court Rules 2016, Flujo Sanguineo cannot proceed with the Current Proceedings until Flujo Holdings pays the costs of the First Proceedings.³

[3] At the hearing, Mr Elliott QC for Merisant developed a third argument, namely that even if the assignment of intellectual property was valid, given that

¹ Flujo Sanguineo’s claim alleges Merisant engaged in passing off, trade-mark infringement and breaches of the Fair Trading Act relating to packaging of stevia-based sweetener products.

² *Flujo Holdings Pty Ltd v Merisant Company* HC Auckland CIV-2016-404-1019. The defendants in those proceedings were Merisant Company, Sugar Australia Pty Ltd and New Zealand Sugar Company Ltd.

³ Rule 15.24 prevents a plaintiff in a discontinued proceeding from commencing fresh proceedings arising out of the same or similar facts until costs on the discontinued proceedings are paid. The full text of r 15.24 is set out at [30] below. As will be apparent, the plaintiff in the First Proceedings was Flujo Holdings, while the plaintiff in the Current Proceedings is Flujo Sanguineo.

assignment, Flujo Sanguineo was in reality in control of, and was the (or a) plaintiff in, the First Proceedings, at least from the date of the assignment. On this basis, he submits the Current Proceedings are squarely caught by the scope of r 15.24.

[4] As matters transpired, this submission became a focus of Merisant's argument on its application. Given it had not been raised (squarely at least) in Merisant's application or written submissions filed in advance of the hearing, I granted Flujo Sanguineo leave to file supplementary evidence and submissions.

Facts

[5] There is some procedural history to Merisant's application, for which the timing of some events is relevant. I consider it helpful to detail this history by way of a chronology:

- (a) In May 2016, Flujo Holdings commenced the First Proceedings against Merisant Company, Sugar Australia Pty Ltd, and New Zealand Sugar Company Ltd.⁴
- (b) Between July 2016 and April 2017, a series of interlocutory skirmishes occurred in the High Court in relation to these proceedings. These are not of relevance to Merisant's present application.
- (c) On 27 March 2017, Flujo Holdings executed a deed transferring the intellectual property relied on in the First Proceedings (together with all other intellectual property of Flujo Holdings) to Flujo Sanguineo. The deed said it also assigned "any and all of [Flujo Holdings'] rights and remedies in relation to any and all past, present and future infringements" of the assigned intellectual property.

⁴ Similar to these Current Proceedings, Flujo Holdings alleged the defendants engaged in passing off, trade-mark infringement and breaches of the Fair Trading Act 1986 relating to packaging of stevia-based sweetener products. The defendants to the First and Current Proceedings are the same, except Sugar Australia Pty Ltd has been replaced as a defendant by Merisant Company 2 Sarl, a Swiss company. Merisant Company 2 Sarl has filed an appearance under protest to jurisdiction in the Current Proceedings.

- (d) One month later, on Friday, 28 April 2017, Flujo Holdings discontinued the First Proceedings. This was the last working day before the substantive hearing, which was due to be heard by me over a five-day fixture commencing on Monday, 1 May 2017. Flujo Holdings discontinued the First Proceedings after Wylie J had refused to grant an adjournment of the substantive hearing the previous day.⁵
- (e) On Monday, 1 May 2017, the defendants in the First Proceedings applied to vary Flujo Holdings' notice of discontinuance,⁶ and sought increased or indemnity costs in the First Proceedings.
- (f) On 9 June 2017, Flujo Sanguineo commenced these Current Proceedings against Merisant.
- (g) On 12 June 2017, I heard the defendants' application to vary the discontinuance and the application for increased or indemnity costs in the First Proceedings.
- (h) My judgment on the defendants' application was delivered on 18 July 2017. I declined to vary the notice of discontinuance; allowed the defendants a 40 per cent contribution to actual costs incurred in the lead up to the scheduled substantive hearing; but awarded scale costs otherwise.⁷
- (i) On 14 August 2017, Merisant filed the present application (to have the Current Proceedings dismissed or stayed).

⁵ Flujo Holdings had sought the adjournment as it and its counsel were in dispute over fees, with the result counsel had not been paid. Flujo Holdings' counsel had sought and been granted leave to withdraw a few days before the substantive hearing.

⁶ To prevent Flujo Holdings from commencing any fresh proceedings against the defendants arising out the same or substantially the same facts as those giving rise to the First Proceedings.

⁷ *Flujo Holdings Pty Ltd v Merisant Company* [2017] NZHC 1656.

- (j) The parties then filed memoranda as to the costs on the issues in my 18 July 2017 judgment. On 28 August 2017, judgment was issued awarding scale costs to Flujo Holdings, but reduced by 30 per cent.⁸
- (k) On 30 August 2017, the Court sealed a costs order (incorporating both my 18 July and 28 August 2017 judgments) against Flujo Holdings. This was served on 12 September 2017, together with a demand for payment of \$103,978.25. Mr Elliott says that Flujo Holdings is yet to pay any of the demanded sum, and has appealed both my judgments to the Court of Appeal. I was informed at the hearing that the defendants to the First Proceedings are taking enforcement action against Flujo Holdings in Australia in relation to the costs ordered against it.

[6] With that background in mind, I now turn to consider each of the three arguments advanced by Merisant.

Merisant's first argument

Outline

[7] Merisant's first argument is that these Current Proceedings must be dismissed because Flujo Sanguineo has no right to bring them. Mr Elliott submits Flujo Holdings' 27 March 2017 assignment to Flujo Sanguineo was the assignment of a bare cause of action and so the assignment was therefore void.

[8] Relying on Fogarty J's decision *Body Corporate 160361 (Fleetwood Apartments)*, Mr Elliott says "the starting point is that all assignments which contain a right to litigate must be justified."⁹ With reference to *Trendtex Trading Corp v Credit Suisse*, he says an exception relating to assignments of property rights and interests (with ancillary causes of action) does not apply here, as the causes of action were not *ancillary* to the intellectual property rights; rather Flujo Sanguineo took the

⁸ *Flujo Holdings Pty Ltd v Merisant Company* [2017] NZHC 2069.

⁹ *Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd* [2014] NZHC 1514, [2014] 3 NZLR 758.

assignment for the very purpose of obtaining the causes of action.¹⁰ Mr Elliott also says Flujo Sanguineo had no genuine commercial interest in taking, nor in enforcing, the rights assigned to it (being a further “exception” to the general prohibition on assigning a bare right to litigate).¹¹

[9] Mr Marriott for Flujo Sanguineo says that, on the basis of (unchallenged) evidence filed on behalf of Flujo Sanguineo, the assignment was not the assignment of a bare right to litigate, but rather a genuine assignment of intellectual property rights to which the causes of action in the Current Proceedings were ancillary. On that basis, he submits the rule against assigning bare causes of action has no relevance.

Flujo Sanguineo’s evidence

[10] Mr Mark Hanna gave evidence by affidavit as to the assignment. Mr Hanna is the managing director of Flujo Sanguineo. He deposed that the assignment to Flujo Sanguineo was carried out for completely legitimate commercial reasons relating to a restructure of the Flujo group of businesses that had been implemented some 18 months earlier. He says the assignment was not related whatsoever to the dispute with Merisant, and that the only reason it was carried out a month before the discontinuance of the First Proceedings was because “it was a low priority and we did not get around to doing it until then”.

[11] Mr Hanna says Flujo Sanguineo was incorporated in September 2015 “on the recommendation of accountants”, and that it was established as the holding company of new business assets and other intellectual property of the Flujo group of businesses. He notes that the first trademark application to be filed in the name of Flujo Sanguineo was in October 2015 (relating to a new coffee bean business that was in development). He says that “after some time”, he and his business partner, Mr Sam Tew, decided to transfer the original intellectual property and trademarks of Flujo Holdings to Flujo Sanguineo, to consolidate the ownership of the intellectual property into one company.

¹⁰ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL).

¹¹ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL).

[12] Mr Hanna says that on 21 March 2017, he finally instructed his solicitor to arrange the transfer of the trademarks and intellectual property still owned by Flujo Holdings. Messrs Hanna and Tew executed the deed of assignment on 27 March 2017 and returned it to their solicitor. Mr Hanna says he understands this was then sent to the trademarks offices of various countries to have Flujo Sanguineo registered as the trademarks' new owner. He says he is advised that a request to register the assignment against the New Zealand assignments was lodged on 7 June 2017 (two days before the Current Proceedings were filed).

[13] Mr Hanna says the option of discontinuing the First Proceedings was not drawn to his attention until 27 April 2017 (i.e. one month after the assignment). This occurred when the 27 April 2017 adjournment was refused, the adjournment being sought because Flujo Holdings' barrister withdrew due to a dispute about fees.¹²

[14] He says that if the First Proceedings had not been discontinued, the defendants would have been notified of the assignment, and Flujo Sanguineo would have been substituted as a plaintiff once the assignment was registered.

[15] Mr Elliott submits Mr Hanna's evidence is "belated, largely uncorroborated, and dubious" and "difficult to fathom". He says Mr Hanna's claim that the assignment was for a legitimate commercial purpose is a "self-serving and dubious assertion", and the evidence strongly suggests Flujo Sanguineo was set up for "quite a different purpose" but was "roped in" when Flujo Holdings or its legal counsel suspected the First Proceedings were in danger.

Discussion

[16] The law surrounding the assignment of causes in action is somewhat controversial. "A thing in action" is assignable under New Zealand law, with the Property Law Act 2007 specifically providing for such transactions (the Act defining a "thing in action" as "a right to receive payment of a debt").¹³ Indeed, assignments of debts are uncontroversial commercial transactions.¹⁴

¹² The fee dispute has been resolved, albeit after the discontinuance.

¹³ Property Law Act 2007, s 50.

¹⁴ *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [78].

[17] But the law becomes more restrictive when it comes to the assignment of “bare causes of action”. In *Waterhouse v Contractors Bonding Ltd*, the Supreme Court restated the law at a level of principle, noting that such assignments, with exceptions, are not permitted in New Zealand.¹⁵

[57] Assignments of bare causes of action in tort and other personal actions are, with certain exceptions, not permitted in New Zealand. The rule had its origins in the torts of maintenance and champerty but now seems to have an independent existence of its own.

[Footnotes omitted]

[18] The Supreme Court recently reaffirmed this broad statement of principle in *PricewaterhouseCoopers v Walker*.¹⁶ These two cases, however, were decided in the context of litigation-funding arrangements. For reasons I will come to shortly, I do not consider it necessary to conduct a detailed analysis of these decisions.

[19] Both parties drew my attention to the House of Lords’ decision *Trendtex Trading Corp v Credit Suisse*, a leading authority on assignments of causes of action.¹⁷ In that case, a Swiss corporation called Trendtex had sold a large quantity of cement to an English company. The English company had paid for the cement by a credit letter from a Nigerian Bank, that had subsequently failed to honour the credit. So Trendtex sued the Nigerian Bank in England for US\$14 million. Trendtex then assigned the cause of action against the Bank to Credit Suisse (a creditor of Trendtex), who then assigned it to an anonymous third party for US\$800,000. The third party apparently travelled to Nigeria and settled the matter, but none of the settlement funds reached Trendtex. So Trendtex commenced proceedings against Credit Suisse and the third party, claiming (among other matters) that the assignment of the cause of action was void on public policy grounds for offending against the law of champerty and maintenance.

[20] Their Lordships unanimously held that the assignment from Trendtex to Credit Suisse would have been valid, as Credit Suisse (as creditor to Trendtex) had a “genuine and substantial interest” in the litigation against the Bank, but that the

¹⁵ *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [57].

¹⁶ *PricewaterhouseCoopers v Walker* [2017] NZSC 151 at [64].

¹⁷ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (HL).

further assignment to the third party was void as it “savoured of champerty” and involved the trafficking of litigation.

[21] Lord Roskill, who delivered the most comprehensive speech (and with whom Lord Edmund-Davies, Lord Fraser and Lord Keith agreed) elaborated on the matter, noting that an assignment will be effective where the assignment of the cause of action was incidental to the assignment of a property right:¹⁸

My Lords, just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. **Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective.** *Ellis v. Torrington* [1920] 1 K.B. 399 is an example of such a case. Scrutton L.J. stated, at pp. 412–413, that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought. But, my Lords, as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired as, for example, an underwriter by subrogation: see *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101. My Lords, I am afraid that, with respect, **I cannot agree with the learned Master of the Rolls [1980] Q.B. 629, 657 when he said in the instant case that “The old saying that you cannot assign a ‘bare right to litigate’ is gone.” I venture to think that that still remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.**

[Emphasis added]

[22] As Mr Elliott submits, Lord Roskill further elaborated that when assessing the nature of the assignment, the Court should look at the totality of the transaction:¹⁹

The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

¹⁸ At 703. Lord Wilberforce agreed with the result but did not offer comment on this particular point.

¹⁹ At 703.

[23] Moving to New Zealand case law, Gault J considered the assignment of causes of action ancillary to property rights in *First City Corporation Ltd v Downsvie*.²⁰ Although the High Court's decision was overturned on appeal, neither the Court of Appeal nor the Privy Council disturbed the High Court's findings on this particular issue. The facts of *Downsvie* are complex, but for present purposes, it is sufficient to say the relevant question was whether an assignment of a debenture from a parent company to its subsidiary included the assignment of the parent company's actions in tort.

[24] Gault J considered a number of cases, including *Trendtex*, and then summarised and applied his approach to the validity of assignments of causes of action where the assignment is ancillary to the assignment of property rights:²¹

In light of the modern approach to maintenance in general, and paying particular regard to the approach of the House of Lords in *Trendtex*, I conclude that the assignment from First City to First City Finance of the right of action in tort falls within the category of valid transactions. The actions in tort were ancillary to the assignment of the debenture itself - in the words of Scrutton LJ, First City Finance "was not buying in order merely to get a cause of action; [it] was buying property and a cause of action as incidental thereto." The actions in tort are subsidiary matters, assigned with the debenture so that the assignee can protect the property it has received. First City Finance had a genuine commercial interest in the actions, for the reason that as the new debenture holder, it clearly had an interest in protecting the value of the security. Added to this fact is the relationship between First City and First City Finance (parent and subsidiary), and the nature of the restructuring exercise which, to my mind, strengthens the commercial interest involved.

[25] There does not appear to be further New Zealand consideration of the assignment of a right to litigate in the context of assignments of property rights.²² *Waterhouse v Contractors Bonding Ltd* and *PricewaterhouseCoopers v Walker* both concerned litigation funding arrangements. And in *Auckland Council v Auckland Council*, Heath J also undertook a comprehensive review of the matter in the context of leaky building litigation—but focussing on the “genuine commercial interest”

²⁰ *First City Corporation Ltd v Downsvie* [1989] 3 NZLR 710 (HC).

²¹ At 757.

²² In the Federal Court of Australia decision *Re Tasman Investment Management Ltd* [2008] FCA 377, (2008) 250 ALR 274, Gyles J reviewed the law in relation to the assignment of property rights, noting at [30] that there are few Australian and New Zealand decisions on the matter.

exception, rather the assignment of property interests with ancillary causes of action.²³

[26] As noted, Flujo Sanguineo says the assignment was valid because it was one of property rights with ancillary causes of action, and thus was not an assignment of bare rights to litigation. On this basis, Flujo Sanguineo says the assignment falls squarely within the exceptions to the prohibition on the assignment of a cause of action discussed by Lord Roskill and set out above.

[27] Flujo Holdings' assignment does not resemble litigation funding or trafficking in litigation, or otherwise "savour of champerty". There is nothing in the deed or other evidence indicating Flujo Holdings can control these proceedings or is entitled to the proceeds from the litigation. And while Mr Hanna's explanation that the assignments occurred to consolidate Flujo's intellectual property into one company might at first blush appear convenient, I do not think it is possible to disregard his evidence of the background to and reasoning for the assignment. As Mr Marriott notes, the assignment took place one month before the First Proceedings were discontinued, well before Mr Hanna deposes the prospect of discontinuing the First Proceedings had been raised. The assignment was a step (albeit somewhat belated) in the context of an earlier broader restructure of the Flujo group of companies. I also note the deed of assignment assigned *all* intellectual property (and associated rights) belonging to Flujo Holdings, i.e. not limited to the intellectual property and ancillary causes of action at issue in these proceedings. Had it been so limited, there may have been stronger grounds to suggest that the assignment was more connected with the impending problems and ultimate discontinuance of the First Proceedings.

[28] Mr Elliott, quite properly in my view, acknowledged at the hearing the difficulty in the submission that Mr Hanna's evidence should simply be disregarded. Presumably for these reasons, and as noted at the outset of this judgment, Merisant's argument ultimately focused on the second and third arguments summarised at [2](b) and [3] above and to which I now turn.

²³ *Auckland Council v Auckland Council* [2008] 1 NZLR 838 (HC).

Merisant's second and third arguments

Outline

[29] Merisant's second argument is that if the assignment is valid, then the Current Proceedings should be stayed until Flujo Holdings pays its costs in the First Proceedings. Mr Elliott submits that, absent payment, the Current Proceedings have been commenced in breach of r 15.24 and are therefore an abuse of process.

[30] Rule 15.24 provides as follows:

15.24 Restriction on subsequent proceedings

A plaintiff who discontinues a proceeding (proceeding A) against a defendant may not commence another proceeding (proceeding B) against the defendant if proceeding B arises out of facts that are the same or substantially the same as those relating to proceeding A, unless the plaintiff has paid any costs ordered to be paid to the defendant under rule 15.23 relating to proceeding A.

[31] Mr Elliott submits r 15.24 is widely framed and that by applying to "the same and substantially similar proceedings", the rule prevents parties from "gaming the system" by making tactical amendments to their claim. Mr Elliott submits the Current Proceedings arises from the same facts as those relating to the First Proceedings. He says a costs order for the First Proceedings has been made, sealed and served on Flujo Holdings. He says that as an assignee, Flujo Sanguineo can be in no better position than Flujo Holdings was as assignor, and so allowing Flujo Sanguineo to continue a "duplicate" of First Proceedings without Flujo Holdings first paying the costs due would be to sanction an abuse of process, encouraging the use of assignments as convenient devices to circumvent the intent of r 15.24.

[32] Ms Ashley Johnson, an associate employed by Merisant's solicitors, has produced a document comparing the statements of claim in the First and Current Proceedings. Having reviewed this document, I accept the two claims arise out of facts that are "substantially similar", save for the fact the claims involve different plaintiffs (i.e. Flujo Holdings and Flujo Sanguineo) and the substitution of one defendant. In his oral submissions, Mr Marriott properly accepted this point.

Analysis – r 15.24

[33] In my view, there are two main obstacles to Merisant’s reliance on r 15.24.

[34] First, r 15.24 bars the *commencement* of proceedings “unless the plaintiff has paid any costs *ordered to be paid* to the defendant under rule 15.23”. In the present case, neither Flujo Holdings (nor Flujo Sanguineo) was subject to any costs order under r 15.23 when the Current Proceedings were commenced on 9 June 2017. In fact, there was no costs order in force until the time I issued my judgment on 12 July 2017.

[35] Mr Elliott, however, submits the timing should not affect the application of r 15.24 because it would be “against the interests of justice, and inconsistent with the scheme and purpose of the Rule to adopt such an interpretation”. He refers to the decision of *Easton v New Zealand Guardian Trust Company Ltd*, in which Ellis J applied r 15.24 “by analogy”, ordering that no further steps be taken on a subsequent proceeding until a costs order on the earlier proceeding was paid:²⁴

[27] Given that the facts giving rise to the proposed new claim are substantially the same as the facts giving rise to the discontinued claim r 15.24 would, ordinarily, preclude Mr Easton from commencing a new claim unless and until he has paid these costs. **Because there has been some delay in finalising this judgment, however, the new claim has already been filed.** However I agree with Mr Taylor that an application of the rule by analogy is appropriate here; Mr Easton should not be permitted to take any further steps in CIV 2016-485-963 until he has paid the costs awarded against him in the discontinued proceedings, including the costs awarded against him in the Court of Appeal. A copy of this judgment should therefore be placed on the CIV 2016-485-963 file.

[Emphasis added]

[36] In *Easton*, r 15.24 was applied “by analogy”, and given that Ellis J’s decision goes beyond the express wording of r 15.24, it might be inferred that her Honour instead drew on this Court’s inherent jurisdiction to prevent an abuse of process. I will address this inherent jurisdiction point later. However, as Mr Marriott points out, if Ellis J’s decision were based on r 15.24 alone, it would be at odds with other

²⁴ *Easton v New Zealand Guardian Trust Company Ltd* [2016] NZHC 3011.

authorities on this rule. For example, in *Westpac Merchant Finance Ltd v Wainwright*, Master Williams QC, observed in dicta:²⁵

Similarly, there is nothing to prevent a plaintiff who has discontinued one proceeding commencing another against the same defendant, even based on the same cause of action, in advance of the defendant in the earlier proceeding making an application for costs.

[37] Associate Judge Osborne took the same approach in *Rocket Surgery v Goodwin*.²⁶

[29] I do not find the circumstances of this case to justify either an order of strike out or stay on the basis that costs have not been paid in relation to the 2012 proceeding. **It is a relatively technical point, but an important one, that r 15.24 places a restriction on subsequent proceedings where there has been an order of costs which the plaintiff has not met. There has been no order of costs in this case.** Rather, the Goodwins' application so far as it relies on the costs issue invokes the fallback requirement in relation to costs under r 15.23, namely that a discontinuing plaintiff must pay the costs of the proceeding to the defendant — unless the defendant otherwise agrees or the Court otherwise orders. There has been disagreement between the parties on how the costs of the discontinued proceeding ought to be dealt with and counsels' submissions had only just been completed at the time of the present hearing. **There has therefore been no order as to the costs of that proceeding. RSL in issuing this proceeding is therefore not strictly in breach of the requirements of r 15.24. Had there been a breach of r 15.24 in relation to a costs order, I would have found a stay appropriate.**

[38] Consistent with these observations, McGechan on Procedure's commentary on r 15.23 advises:²⁷

Time limits

- There is no time limit for applying for costs following a discontinuance.
- Notwithstanding that, **a defendant would be well advised to seek costs promptly following a discontinuance because, if no costs order is made, there is no impediment to the plaintiff commencing another proceeding** (referred to in r 15.24 as “proceeding B”).

²⁵ *Westpac Merchant Finance Ltd v Wainwright* (1991) 5 PRNZ 267 (HC) at 271. I note that this decision was based on the interpretation of r 476(2) of the earlier High Court Rules, which was worded slightly differently to r 15.24:

“(2) Where a cause of action has been discontinued by a plaintiff, no further step shall be taken by the plaintiff on that cause of action until the costs allowed on the discontinuance have been paid.”

²⁶ *Rocket Surgery v Goodwin* [2013] NZHC 2648 at [29].

²⁷ *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.23.02].

- It seems that if a plaintiff has commenced another proceeding (proceeding B), and the costs order is subsequently made against the plaintiff in respect of the discontinued proceeding (proceeding A), **there will be no automatic stay of proceeding B. A stay may be available in the Court's inherent jurisdiction** (see r 15.24).

[Emphasis added]

[39] French J cited these rules in *McKeown Group Ltd v Russell* in dismissing a r 15.24 strike-out application, noting that there had never been any costs orders made in the earlier proceedings.²⁸

[40] In neither *Rocket Surgery v Goodwin* nor *McKeown Group Ltd v Russell* had a costs order actually been made in the first set of proceedings when the court determined the defendant's applications to stay or strike out the second set of proceedings on the basis of r 15.24. That is not of course the position here, where a costs order has now been made in the First Proceedings (albeit aspects of it are now under appeal). However, in *Rocket Surgery v Goodwin*, costs were determined and ordered in the first proceedings a matter of days after Associate Judge Osborne dismissed the defendant's application to stay or strike out the second proceedings. Further, the point remains that at the time Flujo Sanguineo commenced the Current Proceedings, there was no costs order in the First Proceedings. Putting aside the fact that Flujo Sanguineo and Flujo Holdings are different entities (discussed below), Flujo Sanguineo was not in breach of r 15.24 at the time it commenced the Current Proceedings. Ultimately, without more, it cannot be an abuse of process to do something which the High Court Rules permit.²⁹

[41] The second issue with the application of r 15.24 in this case, and to which Merisant's third argument was directed, is that, on the wording of the rule, it only applies to *the plaintiff* who discontinued the earlier proceeding. As Mr Marriott points out, Flujo Sanguineo was not a party to First Proceedings. At the hearing, Mr Elliott developed the submission that given Flujo Holdings had assigned the property rights (and ancillary causes of action) upon which the First Proceedings were based to Flujo Sanguineo, Flujo Holdings thereafter had no standing to

²⁸ *McKeown Group Ltd v Russell* HC Timaru CIV-2008-476-530, 16 March 2009 at [27].

²⁹ *Telstra New Zealand Holdings Ltd v Commissioner of Inland Revenue* (2010) 21 PRNZ 1 at [58]. I respectfully agree with Wylie J's observations to this effect.

continue the First Proceedings. Thus, Flujo Sanguineo as assignee, must have been controlling those proceedings and was in reality the plaintiff, or at least *a* plaintiff. Mr Elliott drew support for this submission from *Montpelier Business Reorganisation Ltd v Armitage Jones LLP*.³⁰

[42] In *Montpelier*, the Court considered an application by the third, fourth and fifth defendants to join additional parties to the proceedings to consider whether it was appropriate to make a non-party costs order against them. The defendants had already obtained a costs award against the claimants, but the claimants were unable to meet that award, due to their insolvency. The defendants argued that the third parties had assisted in the funding of the action and stood to gain from any successful recovery by the claimants.³¹

[43] The Court considered it appropriate to make a non-party costs order, on the basis the first third party:

- (a) was the predominant funder of the litigation;
- (b) had much to gain from the litigation;
- (c) exercised control of the proceedings; and
- (d) thus was the “real party” in the litigation.

[44] HHJ Saffman (sitting as a judge of the High Court) further observed that it was not necessary to the outcome in that case that the “non-party” be the “only real party” to the litigation, provided it is “a real party in ... very important and critical respects”.³² Mr Elliott notes that the Judge in *Montpelier* referred to New Zealand decisions adopting a similar approach in making costs orders against a non-party, where that party has funded litigation to pursue their own interests.³³

³⁰ *Montpelier Business Reorganisation Ltd v Armitage Jones LLP* [2017] EWHC 2273 (QB).

³¹ The third parties being, respectively, a 50 per cent shareholder in the claimant and related entities of that first third party.

³² At [13](3).

³³ *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 at 765; *Arklow Investments Ltd v MacLean* HC Auckland CP49/9719 May 2000 at [19]–[21] per Fisher J.

[45] Mr Elliott submits similar principles should apply in this case; given as a result of the assignment, Flujo Sanguineo had much to gain from the First Proceedings and must have exercised control over them (at least for the relatively short period of time from the assignment to their discontinuance). For that reason, he submits it ought to be considered the “real plaintiff” to the First Proceedings.

[46] In response to this argument raised at the hearing, Flujo Sanguineo filed further evidence to the effect that that entity was not controlling or otherwise involved in the First Proceedings prior to their discontinuance. There is no evidence Flujo Sanguineo was funding the First Proceedings at that time. Mr Marriott further submits that Flujo Sanguineo was not a “necessary party” in order to enable the determination of the First Proceedings in any event, given the trial was to consider liability only.³⁴

[47] But even putting aside these points, I consider Merisant’s third argument is stretching the concepts and the words of r 15.24 too far. In *Montpelier* (and the New Zealand decisions referred to in it), the parties against whom costs were being sought were nevertheless *non-parties* to the proceeding. The factors outlined at [43] above which led the Court in *Montpelier* to consider them the “real plaintiff” did not in fact make them a party to the proceeding; rather it provided the basis for making costs orders against them as non-parties. Rule 15.24 does not extend to non-parties; rather it applies only to “the plaintiff” in proceeding A being restricted from commencing proceeding B in certain circumstances. I do not consider the plain words of r 15.24 ought to be given a strained meaning, particularly given it is a rule which acts to prevent access to the courts.

[48] Mr Elliott submits the present circumstances are nevertheless accommodated by the plain wording of r 15.24, given the definition of “plaintiff”. Rule 1.3 defines “plaintiff” as:

...the person by whom or on whose behalf a proceeding is brought.

[49] Mr Elliott submits that at least from the date of the assignment, the First Proceedings must have been brought by Flujo Holdings on behalf of Flujo

³⁴ Merisant disputes that the trial was directed to liability only.

Sanguineo. On that basis, Flujo Sanguineo must have been the “plaintiff” in the First Proceedings.

[50] Again, I am not persuaded this analysis is sound for the purposes of r 15.24. The First Proceedings were plainly brought by Flujo Holdings on its own behalf. It was at all times the only named plaintiff in those proceedings. In addition, the costs order in the First Proceedings has been made against Flujo Holdings. It is not against Flujo Sanguineo, as the purported “real plaintiff”. Presumably the enforcement action in Australia is being directed at Flujo Holdings. The supplementary evidence filed by Flujo Sanguineo states that Flujo Holdings continues to be the party to and manage and control the First Proceedings in the Court of Appeal (i.e. Flujo Holdings’ appeal of my earlier costs judgments). There is no basis to retrospectively reassess these matters on the basis Flujo Sanguineo was, for a matter of a few weeks, the party for whom the First Proceedings were brought.

[51] Mr Elliott also submits that, for the purposes of r 15.24, Sanguineo ought to be considered the “plaintiff” as an assignee can be in no better position than the assignor.³⁵ But while it is correct that an assignment by A to B of A’s rights against C might expose B to any undisclosed entitlement in C to reduce A’s apparent rights,³⁶ the assignment is of rights only, not obligations. And there was no costs order against Flujo Holdings at the time of the assignment in any event, and once made, it is an obligation of Flujo Holdings, as noted above. I was not directed to any authority for the proposition that, having (validly) taken an assignment of intellectual property rights and ancillary causes of action, the assignee will be liable for a later costs order made against the assignor in its earlier pursuit of those causes of action.

[52] Ultimately, in these somewhat novel circumstances, I have reached the conclusion that r 15.24 does not have direct application to the Current Proceedings. They were commenced by a different entity, as a result of an assignment which has not been shown to be unlawful or invalid, prior to any costs order being made in the First Proceedings. If an application of the rule is to be made by analogy, that would have to draw on the court’s inherent jurisdiction to prevent an abuse of process.

³⁵ *Mangles v Dixon* (1852) 3 HLC 702 at 735.

³⁶ *Todd Petroleum Mining Company v Shell (Petroleum Mining) Company Ltd* CA155/05, 23 September 2005 at [97].

Analysis – inherent jurisdiction

[53] As noted at [38] above, the authors of *McGechan on Procedure* express the view that a stay might be available on the basis of the court's inherent jurisdiction.

[54] Such a finding, however, would depend on the satisfaction of three matters: first, that the court does have the inherent jurisdiction to prevent such abuses; second, that the commencement (and continuance) of the Current Proceedings was and/or will be an abuse of process given Flujo Holdings' unpaid costs in the First Proceedings; and third, that the jurisdiction ought to be exercised in this case.

[55] I do not need to address the first matter in much detail, except to say I accept this Court has inherent jurisdiction to prevent such abuses.³⁷

[56] The second matter requires further elaboration. Could Flujo Sanguineo's commencement of these Current Proceedings, having received the assignment of the intellectual property from Flujo Holdings, be an abuse of process? In my view, on the basis Mr Hanna's evidence is accepted, and given there was no costs order in the First Proceedings in place at the time the Current Proceedings were commenced, there cannot (without more) be a finding of an abuse of process. As I have already noted, in *Telstra New Zealand Holdings Ltd v Commissioner of Inland Revenue* Wylie J observed (albeit in a slightly different context) that it cannot be an abuse of process to do something that the High Court Rules permit.³⁸

[57] Accordingly, while it may, perhaps, be inferred that the Flujo parties have acted opportunistically in the way they have conducted themselves, I am not satisfied that the circumstances in which the Current Proceedings were commenced give rise to an abuse of process *in the Current Proceedings*.

[58] In addition, and while I accept the wording of r 15.24 can lead to arbitrariness, in terms of the date upon which a second proceeding might be commenced vis-a-vis the timing of a costs order made in the first (discontinued)

³⁷ *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 (HL) at 571; *Reid v Attorney General* [2013] NZHC 2386 at [9].

³⁸ *Telstra New Zealand Holdings Ltd v Commissioner of Inland Revenue* (2010) 21 PRNZ 1.

proceeding, to resort to the court's inherent jurisdiction in *any* case where the second proceedings have been commenced before a costs award in the first proceeding has been made would, without more, run counter to the plain wording in r 15.24. In a case such as this, the "something more" might have been an acceptance that the assignment of the cause of action was simply a device to get around r 15.24. However, for the reasons already given, I do not consider that to be the case here.³⁹ For the same reason, I do not accept Mr Elliott's submission that I ought to grant the application on the basis of r 1.6, as again, that would be to apply the substance of r 15.24 to fact scenarios to which it does not actually apply. And while I accept that Ellis J's decision in *Eaton* might be said to do that, I consider Ellis J's approach in that case was because there was "something more" which made the application of r 15.24 "by analogy" appropriate; namely a delay in the court's own process in finalising the cost award in the first proceeding.⁴⁰ Nothing to that effect is suggested in this case.

[59] Given there was no abuse of process in the commencement of the Current Proceedings, there would need to be an abuse of process in continuing the Current Proceedings. In circumstances where I have concluded the assignment from Flujo Holdings to Flujo Sanguineo was not invalid or otherwise unlawful, I do not consider Flujo Sanguineo's continuance of these proceedings, solely on the basis that a related entity has not yet paid costs ordered in the First Proceedings, is itself an abuse of process.

[60] Finally, and as Mr Marriott says, the costs order in the First Proceedings stands and Flujo Holdings remains liable to pay it. As such, Flujo Sanguineo's commencement of the Current Proceedings does not, as Mr Elliott submits, permit an award of costs to be ignored.

[61] Mr Marriott says in his written submissions that:

³⁹ And in those circumstances, the assignment would likely have been invalid in any event, being the assignment of a bare cause of action for no legitimate purpose. See the discussion of Merisant's first argument at [16] to [28] above. For this reason, I do not accept Merisant's submission that to permit Flujo Sanguineo to continue the Current Proceedings would "open the door" to other parties to assign their rights in order to circumvent HCR 15.24.

⁴⁰ *Easton v The New Zealand Guardian Trust Company Ltd* [2016] NZHC 3011 at [27]; *Easton v The New Zealand Guardian Trust Company Ltd* [2017] NZHC 203 at [8].

The demand for payment of the costs order has not been pressed following the filing of the appeal and, in any event, Mr Hanna confirmed Flujo Holdings still intends to pay the costs award once the quantum of costs is resolved, notwithstanding that the Flujo Sanguineo proceedings has been filed.

[62] Flujo Holdings' attitude is misconceived. Until a stay is awarded or some other agreement is reached between the parties, Merisant remains entitled to the fruits of the costs orders in the First Proceedings, and Flujo Holdings must comply with the orders and demand. The filing of a notice of an appeal does not itself stay the judgment under appeal.⁴¹

Conclusion

[63] For these reasons, Merisant's application is dismissed. I should add that I have reached this conclusion with some reluctance, and I have some sympathy with Merisant's position from a commercial perspective. Ultimately, however, I am not persuaded that r 15.24 or the Court's inherent jurisdiction can be stretched to cover the present, quite unusual, circumstances.

I make one final observation. To the extent Flujo Holdings remains either unable or unwilling to pay the costs award in the First Proceedings (and even on its own case, the undisputed portion of that award), and given Flujo Sanguineo is part of the same group as Flujo Holdings and both entities are controlled and managed by Mr Hanna and Mr Tew,⁴² Flujo Holdings' position may be relevant to Flujo Sanguineo's own ability and/or willingness to meet costs awards in the Current Proceedings. I simply express the tentative view that that may be a factor relevant to any application for security for costs in the Current Proceedings.

Fitzgerald J

⁴¹ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

⁴² Mr Hanna and Mr Tew are both directors of Flujo Holdings and Flujo Sanguineo; see exhibit "MH-1" to Mr Hanna's affidavit affirmed on 6 September 2017.