**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2010] NZEMPC 131**
**CRC 21/07**

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| IN THE MATTER OF | a de novo challenge of a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | application for leave to amend pleadings as to quantum of damages |
| BETWEEN | ROONEY EARTHMOVING LIMITED<br>Plaintiff |
| AND | KELVIN DOUGLAS MCTAGUE<br>CLARENCE HENRY WHITING<br>KERRY WAYNE BARTLETT<br>Defendants |

Hearing: 30 September 2010
(Heard at By telephone conference call)

Appearances: C H Toogood and Roger Brown, counsel for plaintiff
Ms Costigan, counsel for first defendant
Appearance for the second defendant - excused
Kathryn Dalziel, counsel for third defendant and the non-party BMW Contracting Ltd
Ms Argyle, counsel for non-party Gabites Ltd

Judgment: 4 October 2010

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**INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS**

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[1] A telephone chambers hearing was convened to deal with a number of opposed applications dealing with disclosure. The plaintiff had applied for further and better discovery against all three defendants, particular discovery against a non-party, BMW Contracting Ltd (BMW) and against two other non-parties Capon Madden Ltd and Gabites Ltd, both Chartered Accountants.

[2] The application for particular discovery against Capon Madden Ltd had not been opposed. However, as BMW has opposed the making of non-party discovery orders against it in relation to similar classes of documents to those sought from Capon Madden Ltd, who have also acted as its chartered accountants at some stages, it would not be appropriate to grant that discovery in wider terms than that being ordered against BMW as a result of this hearing. Mr Toogood helpfully suggested that he would arrange a draft order which would be referred to Capon Madden Ltd and, as I have stated, it should reflect the limited disclosure of the BMW documents that I have ordered today.

[3] A similar situation arises in respect of Gabites Ltd. Discovery at this stage from that non-party will again be of the limited nature which I have ordered in respect of BMW. The order against Gabites Ltd will also, as in the case of Capon Madden Ltd, be on the terms contained in Rule 8.27 of the High Court Rules, namely the plaintiff will pay to the persons from whom the discovery is sought those persons' expenses, including solicitor and client costs, of and incidental to the application and complying with these orders. Again Mr Toogood will prepare a draft order and forward it to Ms Argyle and, subject to her consent, that will be the order of the Court. If the order is opposed, leave is reserved to bring the matter back before the Court for further deliberations. On this basis Ms Argyle was excused from the hearing.

[4] The orders against both Gabites Ltd and Capon Madden Ltd are, until further order of the Court, subject to an embargo of the documents produced as part of the discovery process being made available to any person other than the solicitors and counsel in this case and the financial experts.

[5] Ms Shakespeare, on behalf of the second defendant, had filed a memorandum on 15 September advising the Court that although her client opposed the application for further and better discovery, due to costs constraints he did not wish to make an appearance at the telephone conference. Ms Shakespeare requested her appearance be excused and her request was granted.

[6] I invited counsel to advise me of the extent of discovery in the parallel High Court proceedings against the three defendants and BMW. They advised me that there has been limited discovery in the High Court proceedings in relation to a freezing order, which requires BMW to provide monthly statements to solicitors, counsel and the financial experts but which are not to be disclosed to any other person. There has been an exchange of lists of documents in a limited form, but the action in the High Court is now stayed.

[7] Ms Dalziel noted that the High Court proceedings are tortious in nature and this has changed the litigation significantly and may have also impacted upon the discovery exercise. However, it is only because of the way in which the legislature has approached the matter in the Employment Relations Act 2000 that litigation involving both contractual and tortious claims against the same ex-employees and the company they may have formed are not heard in the same court. Some of the difficulties that are presented by the parallel proceedings in this case would have been avoided if they all could have been commenced in one court.

[8] Mr Toogood then addressed the applications for further and better discovery against the three defendants and the non-party, BMW. He accepted that the notice requiring disclosure and the application for further and better discovery against the individual defendants seek a very wide range of personal documents including all bank accounts, all records relating to trusts for the period from 1 May 2004 until today's date. Ms Dalziel and Ms Costigan both took objection, on behalf of their respective clients, to the width of that disclosure, both on the grounds of relevance and oppressiveness.

[9] In the course of his submissions Mr Toogood modified the plaintiff's position somewhat, at least on an interim basis, to cover any documentation that records any monies received by the three defendants, whether by way of wages, salaries, dividend fees or other advances from BMW or received directly from BMW by any person, as a result of any direction by any of the defendants.

[10] I consider that such disclosure is relevant on the basis of the pleadings as they now stand. The years over which such disclosure must be made was, however, the subject of considerable dispute and debate.

[11] Ms Dalziel and Ms Costigan referred to an affidavit sworn by Mr Rooney in support of an application by the plaintiff for an urgent fixture. In paragraph 15 of that affidavit he refers to the amount he expected by way of sales per month to be achieved by the Ashburton Branch of the plaintiff, following its purchase in August 2003. He deposes that it was not until April 2007 that the plaintiff finally achieved a turnover in excess of that, but was able to maintain that only for a short period. I have omitted the actual amounts in light of previous non-disclosure orders made in the substantive trial.

[12] Counsel for the defendants and BMW contend that this evidence establishes that any losses the plaintiff may have suffered, which are denied, ceased as at April 2007.

[13] Mr Toogood contended that this statement in Mr Rooney's affidavit was for the purpose of obtaining an urgent trial and did not amount to any concession that the losses suffered by the plaintiff as a result of the defendant's activities, ceased in April 2007.

[14] I agree with Mr Toogood that such a limitation is not pleaded in the latest statement of claim and I have reservations as to whether Mr Rooney's evidence amounts to a concession as contended by the defendants. However, it is difficult to resolve that issue at present and the interim orders I have made will at least allow the matter to be addressed in part and for the issue to be revisited at a later hearing if that proves necessary. The limited disclosure which I am satisfied needs to be provided as the matters are presently pleaded may therefore be from the period 1 May 2004 up to and including 30 April 2007.

[15] As to disclosure by BMW, whilst reserving her position, Ms Dalziel accepted that if the Court was minded to grant orders for discovery against BMW it should be

limited to discovery of financial information relating to BMW from June 2005 up to the period of 30 April 2007 being:

a) Annual returns of BMW;

b) Monthly statements of financial performance and financial position;

c) Wages, salary, dividends, fees and/or advances made by BMW to the three defendants or to any persons on their direction during that period.

[16] Disclosure is to be limited to the solicitors and counsel and any financial experts of the parties. Ms Dalziel also submitted that there should be mutual disclosure by the plaintiff, a matter to which I will return.

[17] Mr Toogood raised two new issues which had not been expressly dealt with in either the original discovery applications, memoranda or the additional written submissions. The first was that because of the conduct of the third defendant, disclosed in the substantive trial and referred to in my judgment of 24 August 2009, there were grounds to believe that the third defendant and consequently BMW and the first defendant who had sworn a relevant affidavit in the substantive proceedings, would not properly disclose the documents they were ordered to disclose. This is a serious allegation which, as Ms Dalziel says, is not supported by any affidavit evidence filed in support of the discovery application. It is, however, as Mr Toogood submitted, based entirely on the findings of fact I made in the substantive judgment. It is Mr Toogood's submission that because of this concern the source documents, such as invoices to clients and original accounts on which the financial statements have been based, should also be discovered.

[18] The second submission which Mr Toogood raised for the first time was that it was necessary to ascertain the source of BMW's income to deal with any arguments the defendants may raise to the effect that BMW was also performing work for persons who had no involvement whatsoever with the plaintiff and therefore there was no causative link between the plaintiff's alleged losses and the profits derived

from such work. Mr Toogood explained that the plaintiff's case was that BMW would never have been set up at all had it not been for the defendants' proven breaches of contract and therefore all of BMW's financial earnings could be the subject of the plaintiff's claim. The discovery was sought in anticipation of the defendants' defences.

[19] There was considerable force in Ms Dalziel's submission that in the absence of an affidavit from Mr Hadlee, the plaintiff's financial expert, as to why the plaintiff should be entitled to the benefit of this source material or to claim access to documents beyond 30 April 2007 the date when its turnover had reached the original expectations, such discovery should not be ordered. In order to deal with that submission, I have ordered the interim discovery on the basis set out by Ms Dalziel in her submissions, and, if that material proves to be inadequate or unsatisfactory, then the plaintiff is free to come back with appropriate affidavit evidence seeking further and better discovery.

[20] Counsel are to endeavour to agree upon forms of consent orders embodying these matters but if they cannot agree the matter is to be referred back to me and I will make the appropriate orders.

[21] The two non-parties disclosure is limited to the same classes of documentation BMW is to discovery.

[22] Finally, there was the issue of disclosure from the plaintiff to show the losses it claims to have suffered. I accept Ms Dalziel's submission that such disclosure should reflect the disclosure required from BMW and that discovery is granted as against the plaintiff for precisely the same period at precisely the same terms in respect of the annual returns of the plaintiff and its monthly statements of financial performance and financial position. Again that disclosure is limited to the parties solicitors and counsel and any financial advisors.

[23] At this stage the parties were unable to give any indication as to when the orders made above will be complied with. They are all cognisant of the hearing commencing on 14 March 2011 and the rapidly approaching Christmas vacation. If

there is any difficulty providing timely compliance, that issue should be brought back the Court on the shortest possible notice.

## Costs

[24] The costs of this morning's hearing are reserved. At this stage I have not made any orders, as contemplated by Rule 8.27 of the High Court Rules, requiring the plaintiff to pay for BMW's costs because I am yet to be persuaded that it would be just to do so. That issue is reserved for further consideration.

[25] Costs for the present applications and hearing are reserved.

B S Travis
Judge

Judgment signed at 12 noon on 4 October 2010