IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 55
CRC 21/07

IN THE MATTER OF	a challenge to a determination by the Employment Relations Authority
AND IN THE MATTER OF	an application by the plaintiff for leave to amend pleadings as to the quantum of damages
BETWEEN	ROONEY EARTHMOVING LTD Plaintiff
AND	KELVIN DOUGLAS MCTAGUE First Defendant
AND	CLARENCE HENRY WHITING Second Defendant
AND	KERRY WAYNE BARTLETT Third Defendant

Hearing: 4 May 2010
(Heard at Christchurch)

Appearances: C H Toogood QC and R S Brown, counsel for plaintiff
Jane Costigan, counsel for the first defendant
A Shakespeare, counsel for second defendant
P Shamy and K Dalziel, counsel for the third defendant

Judgment: 17 May 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has sought leave to amend its pleadings as to the quantum of damages it is seeking against the defendants. The amendment consists of deleting two paragraphs of the combined statement of claim and further particulars which set out the calculation of damages for the period 1 April 2004 until 31 December 2004,

totalling $1,796,000, and sought, in paragraph 25, a sum of not less than $1 million from the first defendant and not less than $500,000 each from the second and third defendants.

[2] The plaintiff now seeks leave to extend its claim for losses after December 2004 and alleges that the losses are continuing. They are now said to amount to not less than $6 million. The amended pleadings say that the damages sought will be more accurately quantified on the basis of both the plaintiff's losses and the revenue of the company formed by the first and second defendants, BMW Contracting Ltd (BMW Contracting) "during the damages period as at the date of hearing following disclosure by the defendants and/or BMW Contracting of BMW Contracting's financial statements". The amendment sought to paragraph [25] would make it read:

> The plaintiff seeks the sum of not less than $6 million by way of damages from the defendants jointly and severally.

[3] The application for leave was made pursuant to reg 6 Employment Court Regulations 2000, adopting the approach taken in the High Court and affirmed in decisions of the Employment Court. The relevant High Court Rules relied on were r 7.18(2) and r 7.77 which, in combination, permit the filing of an amended pleading after the setting down of a case only with the leave of the Court. Mr Toogood relied on the following principles set out in *Corrections Association of NZ Inc v Chief Executive in respect of the Department of Corrections*[1] at para 9:

> [9] From as early as *NZ (with exceptions) Electrical etc IUOW v Remtron Lighting Ltd (in rec)* [1990] 1 NZILR 583; (1990) 3 NZERLC 98,141, this Court followed the judgment in *Marr v Arabco Traders Ltd (No 8) unreported,* Tompkins J, 12 March 1987, HC Auckland A1195/77 affirmed on appeal in *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA). Leave to amend proceedings at a late stage of them is a discretionary decision based on whether such an amendment is necessary to determine the real controversy between the parties and does not result in injustice to the others of them. The facts in that case *(Marr v Arabco)* were extreme. The application for leave to amend the statement of claim (for the fifth time) came after more than a week of final submissions that in turn followed a trial of 57 sitting days. …

[1] [2004] 2 ERNZ 277.

[4] Mr Toogood also relied on *Thornton Hall Manufacturing Ltd v Shanton Apparel* Ltd[2] where the Court of Appeal stated:

> The parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.

[5] He also cited *Tawhiwhirangi v Attorney-General in respect of the Chief-Executive, Department of Justice*[3] which stated that a plaintiff is entitled to have leave to amend so that the pleadings will conform to the evidence.

[6] Mr Toogood submitted that the amendments would not result in any injustice to the defendants because the original claim for damages made it clear that it was for not less than the sums sought against each of the defendants. He submitted it was important to note that the initial allegation as to the plaintiff's losses was made at a time when much of the evidence, upon which the Court's liability findings were based, was not available to the plaintiff and that crucial evidence was subsequently provided in discovery and at trial. He observed that towards the end of the hearing of evidence and after the exchange of briefs of evidence prepared by expert financial witnesses, the defendants had acknowledged that, before the Court could determine what damages flowed from any proven breaches of duty by the defendants, the Court would first need to make its findings of fact and law in relation to the alleged breaches. In a memorandum, dated 3 December 2008, the plaintiff signalled the possibility of an increased claim for damages and the possibility that various scenarios could be contemplated which could see the damages period extend through until 2007. Mr Toogood noted that in the memorandum filed by the defendants, dated 4 December 2008, in response to the plaintiff's memorandum, they did not protest that their clients would suffer any injustice if consideration of the quantum issues was deferred until after the Court's findings on liability. By consent I ordered, on 5 December 2008 that the trial of the plaintiff's claim would be split between liability and quantum. I observed in my minute that the course proposed had the advantage of the experts not having to speculate on hypothetical findings of fact.

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[2] [1989] 3 NZLR 304 at 309.
[3] [1994] 1 ERNZ 459 at 464.

[7] In my judgment dated 24 August 2009, I made factual findings against the defendants and held that each of them had breached their duties of fidelity, trust and confidence. I held that if the plaintiff could show losses to have flowed from these breaches of contract, then the defendants might be liable in damages. I also found that the defendants had acted in concert in breaching the duties they owed to the plaintiff.

[8] Mr Toogood advised that the plaintiff's amended claim for losses flowing from the defendants' breaches was based on the premise that if they had not acted in breach of their duties as employees they would never have been able to put BMW Contracting in a position to compete and obtain revenue and profits at the expense of the plaintiff. The plaintiff wishes to now argue that the damage it is suffering as a result of the unlawful action of the defendants is continuing and that its losses are significantly greater than the estimate given at the time the initial statement of claim was filed, which was before discovery and the evidence revealed at trial. This initial estimate was said to have been based on a conservative view taken by the plaintiff's expert. In light of the material now available to the plaintiff and having regard to my findings on liability, the damages period is now said to be much longer than initially supposed. As a consequence the level of losses is said to be greater and the appropriate level of damages consequently higher.

[9] Mr Toogood also referred to the proceedings in the High Court against the three defendants and BMW Contracting which have now been stayed pending the outcome of the Employment Court proceedings. The claims in the High Court allege tortious liability on the part of all four defendants and seek damages of not less than $6 million jointly and severally against them.

[10] Leave to amend was partially opposed by all the defendants. At the hearing of the application on 4 May 2010, Ms Costigan advised that, although the first defendant had filed a notice of opposition, he now was prepared to abide the decision of the Court regarding the plaintiff's application, but sought to be heard on costs. The first defendant opposed the plaintiff's claim for costs on the application for leave and sought costs for himself.

[11] By agreement Mr Shamy then addressed the Court on behalf of the third defendant. Mr Shamy spoke to a memorandum of counsel signed by Ms Dalziel. This set out the following as the applicable principles to be applied to an application for leave to amend which are taken from *Pegasus Group Ltd v QBE Insurance (International) Ltd*:[4]

> a) The discretion to grant leave will be exercised in a way that will best achieve justice;
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> b) There must be some basis or material upon which the Court could exercise its discretion;
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> c) The Court will weigh injustice to the defendant/plaintiff to see where the justice lies;
>
> d) The reasons for not making application before setting down will be considered;
>
> e) The Court will consider whether irreparable damage will be suffered by the applicant if the order is not made.

[12] Mr Shamy submitted that the amendment sought is a significant shift from a claim for $1.8 million to one of $6 million. He submitted that it should have been within the predictable knowledge of the plaintiff and there was nothing in the judgment of 24 August 2009 which created the need to amend the proceedings. He submitted that the amendment as pleaded changes the complexion of the case and in particular now seeks joint and several liability against the defendants whereas previously, each was to be held liable for their own breaches. In contrast to the previous pleading there is now no delineation between the actions of the three defendants. Mr Shamy submitted that in substance the amendment was being sought in order to draw BMW Contracting into proceedings in the Employment Court and, under the provisions of the Employment Relations Act 2000, the Employment Court had no jurisdiction over the company. He referred at some length to the High Court proceedings, noting that the plaintiff was seeking an order estopping BMW Contracting from denying the findings of fact made in my judgment of 24 August 2009, despite the fact that BMW Contracting was not and could not be a party to those proceedings. He submitted that amending the claim in the Employment Court

[4] HC Auckland CIV-2006-404-6941, 6 March 2009.

proceedings to bring it in line with the High Court action was therefore an abuse of process.

[13] The third defendant's memorandum contended that the plaintiff had failed to provide a reasonable explanation for the plaintiff's delay in applying to amend the proceedings and was not based on any evidential foundation but on what the plaintiff considers it might achieve through further discovery. The third defendant submitted that it was unjust in all the circumstances to put him to the cost of defending a $6 million claim when he had been facing a claim of $500,000 up until this late stage in the proceeding.

[14] Mr Shamy also submitted that there were insufficient particulars in the amendment sought showing why the third defendant should be liable for the increased damages and no briefs of evidence filed to support the amendment, as was done in *Grey v Elders Pastoral Holdings Limited (formerly Elders Pastoral NZ Limited)*.[5]

[15] Ms Shakespeare, for the second defendant submitted that the plaintiff was not seeking a minor amendment because it converted individual liability, as originally pleaded, to joint and several liability. She submitted that there was no justification for such a change and that it would put the second defendant to a considerable disadvantage when he had been proceeding on the basis that he was defending his own actions. She observed that the original limit of damages was calculated until the end of 2004 and consequently the evidence had been limited at the liability trial. There was no evidence of what had happened after the end of 2004 as to the involvement of the defendants in BMW Contracting.

[16] Ms Shakespeare observed that the distinction drawn between the defendants in the original proceedings was now being blurred and that this amounted to a huge shift in the basis of liability. She submitted that the second defendant's involvement with BMW Contracting was limited because he resigned as a director on 10 January 2007, joined a dairy company and later provided contracting work for the plaintiff. She submitted that when the plaintiff had filed its challenge in the Employment

[5] HC Auckland CP 417/95, 1 May 1997.

Court in May 2007, it should then have known the full extent of the second defendant's involvement in BMW Contracting. She submitted that the second defendant could only be liable for the losses caused by his actions and not that of his colleagues or BMW Contracting. She submitted that the spring-board principle on which the plaintiff relied would place liability on BMW Contracting and not on the second defendant personally and therefore was more appropriately addressed in the High Court proceedings.

[17] Ms Shakespeare submitted that the plaintiff had claimed to have lost $6 million and the interests of justice did suggest that the plaintiff should be able to recover that in accordance with appropriate legal principles. However, this should be balanced by the fact that the plaintiff has had the opportunity to fully and fairly inform the defendants of its case against them. She submitted that granting leave for the amendment sought by the plaintiff would effectively deprive the defendants of the opportunity to defend the plaintiff's revised claims. She observed that a key plank of the plaintiff's High Court claims is that BMW Contracting has been the recipient of most of the benefits and therefore the plaintiff will still have an opportunity to seek its damages of $6 million in that context. She submitted that this lengthy and expensive proceeding is nearing a close and the defendants, in particular the second defendant, would be placed at a significant disadvantage in having to modify their defence in answer to the new claims being made by the plaintiff. She submitted that the interests of justice require that this matter be drawn to a conclusion without amendment.

Conclusion

[18] As I advised the parties at the conclusion of the hearing, I considered that the plaintiff should, if it is required, be granted leave to amend the quantum it seeks against the defendants. This is because the trial was split between liability and quantum, partly to enable the Court to make any appropriate findings which would enable the experts to be called to base their opinions on factual findings rather than hypothetical ones. The consequence of those findings may entitle the plaintiff to seek greater damages than that contemplated in the statement of claim which formed

the basis of the trial on liability. In these circumstances, as Mr Toogood submitted, it is even questionable whether leave to amend is required.

[19] If leave is required then, in accordance with the principles outlined by Mr Shamy, I consider that this is a case where irreparable damage will be suffered by the plaintiff if it is not entitled to pursue the full extent of the losses it claims to have been caused by the defendants' breaches of their employment contracts. Such claims cannot be pursued in the High Court, see s187(3) Employment Relations Act 2000 (the Act).

[20] I am not persuaded that the defendants have been prejudiced in dealing with issues such as quantum and causation by the way in which they led evidence in the liability trial. The proceedings have not changed their character. The claims against them were for not less than the amounts previously specified and the findings of fact made in the trial provide a firm basis for assessment of the losses (if any) which have flowed from the proven breaches.

[21] The delay in seeking the amendment appears to have been caused by the initiation of the parallel proceedings in the High Court, and the complexity of the matter. I am not satisfied that this has caused any irreparable prejudice to the defendants which would bar the granting of leave to amend, if such leave is necessary.

[22] If there are any risks that the defendants have not had the opportunity to lead evidence on matters such as causation, mitigation, the extent of the losses alleged by the plaintiff or the effect of market trends, then such evidence may be led in the quantum trial. It was conceded by Mr Toogood on behalf of the plaintiff, that the defendants should have the opportunity of giving such further evidence as they wish on these matters, including evidence from the defendants themselves as to their actions in relation to BMW Contracting after they left the employment of the plaintiff or from any other lay persons who may be able to assist them on these aspects. Such evidence would be in addition to the expert testimony which has previously been briefed by the parties.

[23] Where the defendants were on stronger grounds was in opposing the amendment both as to the paucity of particulars of damages provided and, more importantly, on the claim of joint and several liability. I agree with the defendants that this later claim appears to sound more in tort than in contract. The defendants can only be liable for such damages that their proven breaches of contract caused to the plaintiff, in accordance with contractual principles. These include the test of remoteness which has traditionally been known as the rule in *Hadley v Baxendale*[6].

[24] Mr Toogood accepted the need to re-plead the amendment the plaintiff was seeking, to take into account of these matters.

Consequent directions

[25] The plaintiff will file and serve by 4pm on Wednesday 26 May 2010, an amended statement of claim setting out such particulars as can be provided in support of its claim for damages against each of the defendants, for losses allegedly flowing from their respective breaches of contract, as found in the judgment of 24 August 2009.

[26] Leave will be granted to amend the statement of claim in the form to be pleaded by 26 May 2010, provided any of the defendants cannot point to any irrevocable prejudice they may suffer as a result of the trial proceeding on the amended pleadings to be filed, that cannot be addressed by evidence they will be free to lead at the trial or extract by cross-examination. If there are any further grounds for objecting to the amendment, other than those advanced by the defendants to date, the defendants may file a notice of opposition to the grant of leave to the pleadings in the form to be amended. Such notice of opposition should be filed and served by 4pm on Wednesday 9 June 2010.

[27] If the defendants do not take any new objection to the plaintiff's amended pleadings by Wednesday 9 June 2010, leave will be granted to file those amended pleadings. The defendants should then file and serve statements of defence to those amended pleadings by 4pm on Wednesday 23 June 2010.

[6] (1854) 9 Ex341; 156 ER 145.

Further steps

[28] Mr Toogood explained that the plaintiff's expert cannot provide a detailed brief of the losses claimed by the plaintiff until it has received the financial accounts of BMW Contracting. That is a matter which can be included in the amended pleading to be filed by the plaintiff. The parties are therefore directed in the meantime to endeavour to obtain disclosure from BMW Contracting by informal means. If that fails, or, if the plaintiff so requires, an application for non-party disclosure may be necessary. If such an application can be avoided it will reduce the costs being incurred by the parties.

[29] The parties will also give consideration as to whether BMW Contracting should be allowed to appear or be represented before the Court at the quantum trial. The parties will, after the pleadings have been completed, file and exchange memoranda addressing the issue in terms of clause 2(2) of the Third Schedule to the Act.

[30] Such exchange of memoranda can also address the future progress of the proceedings. It is contemplated that there will be a need for further evidence from lay witnesses. Briefs of those witnesses should be exchanged and provided to the experts before the experts exchange their briefs of evidence and meet to see if they can determine what matters can be agreed or which matters remain in issue. The memoranda also should address whether the experts should be called at the same time at the quantum trial, the process described as "hot tubbing".

[31] There will clearly be a need for a further directions conference which can then timetable the quantum hearing to a fixture.

Costs

[32] The plaintiff sought costs on the application for leave to amend its pleadings. As such leave has yet to be granted its costs application would be premature at this stage. I note the first defendant, who has abided the decision of the Court has opposed costs being awarded against him. The other defendants also opposed costs

and all defendants appear to seek costs from the plaintiff, on the grounds that if leave is granted it is said to be an indulgence. In these circumstances I will reserve the question of costs which may be addressed when the pleadings are settled.

B S Travis
Judge

Judgment signed at 10am on 17 May 2010