IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 60
ARC 37/09

IN THE MATTER OF	de novo challenge to a determination of the Employment Relations Authority
BETWEEN	MARITIME UNION OF NEW ZEALAND Plaintiff
AND	C3 LIMITED Defendant

Hearing: By submissions from the plaintiff on 29 January 2010
and from the defendant on 5 February 2010
and a joint memorandum filed on 19 March 2010

Judgment: 17 May 2010

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

---

[1] The plaintiff union has sought a ruling that the defendant (C3) is the employer party to a collective agreement which covers the Tauranga work of stevedores who are members of the union. The union contended that C3 had taken over the stevedoring operations at Tauranga and should be treated as having taken over the legal obligation of the company that signed the collective agreement, TLNZ Ltd. The union relied either on the doctrine of estoppel or the lifting of the corporate veil to obtain the relief it sought in its statement of claim, namely a finding that C3 is the employer party to the collective agreement.

[2] Following the conclusion of the hearing counsel were agreed that further submissions would be filed on two issues: the principles that apply to the lifting of the corporate veil and, in particular, whether this has to be the intention of the directors and shareholders in question; and the jurisdiction of the Court under the Employment Relations Act 2000 to make the orders sought by the plaintiff.

[3] On 30 November 2009 the union sought an order that it be granted leave to file an amended statement of claim which now sought the following relief:

a) a finding that the defendant, C3 Ltd is bound by the provisions of the collective agreement;

b) a finding that C3 Ltd is estopped from denying that it is the employer of the plaintiff's members.

[4] The grounds for the application were that the filing of the amended statement of claim was consistent with the justice of the case and there was no prejudice to C3 in allowing the amendment sought. The application for leave was opposed by C3 on the following grounds: it had been filed after all the evidence had been heard and after closing submissions; the amendments sought were not necessary in order to resolve the real controversy between the parties; if the amendment was made it would cause injustice to C3 which had already prepared and presented its evidence and closing submissons.

[5] The parties then exchanged submissions and on 19 March 2010 filed a joint memorandum which advised they had agreed to the union application being determined on the papers filed. This consent was subject to the condition that if the union's application for leave was granted C3 reserved the right to make further submissions. The parties sought a separate judgment from the Court in relation to the application for leave.

[6] Mr Mitchell, for the union, submitted that the amendment sought was only very slight to provide a claim for relief to ensure that C3 was bound by the provisions of the collective agreement. He pointed out that this claim was already pleaded in the body of the statement of claim where it is alleged "the Plaintiff contends that the Agreement binds the Defendant, despite the Agreement appearing on its face to be TLNZ Ltd, a wholly owned subsidiary of the Defendant". He also submitted that the claim for estoppel was consistent with paragraph 10 of the statement of claim which stated "in the alternative, the defendant is estopped from denying that it is the employer of the Plaintiff's members".

[7] Mr Mitchell submitted that the issue of who should be bound by the collective agreement had been pleaded and was clearly in issue at the hearing as the evidence and the subsequent legal submissions demonstrated. He contended therefore, that this was not a situation where there was an attempt to bring in a new cause of action or alter the basis of the claim before the Court. Rather, he submitted, the union was seeking to amend the statement of claim to better reflect the relief sought from the Court. He submitted that the issue had arisen as a result of the issue of jurisdiction being raised by the Court and it was required to avoid a scenario where the cause of action was established but the Court was unable to provide the appropriate relief.

[8] Mr Mitchell submitted that the Court has the jurisdiction to amend the statement of claim at any time prior to the judgment to enable the Court to resolve the question before it and determine the real controversy between the parties, citing *Kirton v Prospecdev Holdings Ltd*[1] and *Elders Pastoral Ltd v Marr*[2]. In the latter case the Court had allowed an amendment following final submissions but before delivery of judgment. The Court of Appeal approved at page 384 the approach of the trial Judge which had been as follows:

> "The general approach therefore, is that even at this late stage the Court should make the amendments sought if they are necessary for the purpose of determining the real controversy between the parties, but even if that may appear to be so, the application should still be declined if making it at this stage, is likely to result in an injustice to one or more of the defendants."

[9] Mr Mitchell submitted that the present case is quite different to one where a cause of action is being added to the claim. Here an amendment is being sought consistent with the existing cause of action. He submitted that was the reason the application to amend was declined in *Tewsley St Properties Ltd v Wright Stephenson Properties Ltd*[3]. To have granted an amendment in that case would have required witnesses to be recalled and for the defendant to meet a different case.

[10] Mr Mitchell submitted that the amendment sought would not change the case C3 was required to meet, there would be no prejudice and the issues between the

---

[1] 2 PRNZ 412
[2] (1987) 2 PRNZ 383 CA

parties would be properly determined. He submitted that the lifting of the corporate veil had been the subject of evidence heard and extensive legal submissions.

[11] Mr Mitchell also called upon the support of the Court's equity and good conscience jurisdiction as described in the dissenting judgment of Thomas J in *Lowe, Walker, Paeroa Ltd v Bennett*:[4]

> But underlying the relationship the mutual obligation of confidence, trust, and fair dealing remains fast. Hence, neither the employer nor the employee can properly resent the exercise of the Court's equity and good conscience jurisdiction if they seek to press a technical point; assert, without demonstrating real prejudice, a rigid reliance on the pleadings; take advantage of human error or, generally speaking, endeavour to repudiate an agreement or promise duly acted upon. In such circumstances, the Court has the power, if not the obligation, to seek to achieve justice between the parties according to the equity and merits of the case.

[12] Mr Mitchell submitted that while the equity and good conscience jurisdiction does not allow the Court to provide a remedy if a legal remedy was not available, it does enable the Employment Court to approach a matter with latitude in accordance with the general equity of the case rather than by the application of rigid rules or principles.

[13] In opposition, Ms Muir and Ms Burton, counsel for C3, opposed the late application on the grounds that it would only be granted if such amendment was necessary to determine the real controversy between the parties and did not result in injustice. They relied on the *Elders Pastoral* case which was cited with approval in *Corrections Association of New Zealand Inc v Chief Executive in respect of the Department of Corrections*[5]. They submitted that the amendment sought was not necessary for the purpose of determining the real controversy between the parties and would alter the remedies sought as originally pleaded, thereby resulting in an injustice to C3. They stressed the union's delay in considering seeking an amendment and, citing *Morritt v Jespersen*,[6] submitted it will unfairly prejudice C3. In that case the Court stated there was prejudice because:[7]

---

[3] (1993) 7 PRNZ 58.
[4] [1998] 2 ERNZ 558 at 582.
[5] [2004] 2 ERNZ 277 at 279.
[6] [1998] 3 ERNZ 1.
[7] At 37.

> The time for deciding what evidence to call is made much earlier, when the strategy is formed. It is too easy for the plaintiff to say the case would have been the same.

[14] Counsel for C3 submitted that the amendment was not very slight and was only being sought because the Court had raised jurisdictional issues and the amendment was sought to avoid a scenario where the Court would be unable to provide relief. They submitted that the amendment was therefore being sought to avoid the current jurisdictional issues and not, as the union asserted, to better reflect the relief sought from the Court. They observed that the judgment of Thomas J in the *Lowe Walker* case was a dissenting judgment and should not be relied upon. The amendments sought, they submitted, would allow the union to avoid the current jurisdictional difficulties confronting it and would deprive C3 of the opportunity to prepare its defence with the full knowledge of the remedies sought.

Conclusion

[15] I prefer and accept the submissions made by Mr Mitchell. It would be unfortunate if a plaintiff union could not exercise the right to enforce a collective agreement because of a failure to plead precisely in the relief section in its statement of claim the jurisdictional basis for obtaining the relief sought. The issue of the Court's jurisdiction to grant the relief sought is an important one raised by the Court in this case. If the union is able to frame its relief based on the facts already presented to the Court in a way which brings it within the jurisdiction of the Court, it should have leave to amend its pleadings to reject this.

[16] As Mr Mitchell has submitted the amended relief being claimed had been foreshadowed from the outset by express pleadings in the statement of claim.

[17] Although it is a dissenting judgment that is relied upon by the union in *Lowe Walker*, Thomas J's exposition of the Court's equity and good conscience jurisdiction was not seriously challenged by the majority decision. In another portion of his judgment in that case, Thomas J said that the equity and good

conscience jurisdiction is wide and far reaching and the Court is not to be hamstrung by adherence to form:[8]

> It is the substance and reality of the matters before it that are to count. The jurisdiction enables the Employment Court, consistently with the requirements of the Act and any collective employment contract, to achieve a just regulation of the mutual rights and duties of employers and employees.

[18] Although the *Lowe Walker* case was addressing the Employment Contracts Act 1991, the Employment Relations Act 2000 affords at least the same, if not more extensive flexibility to the Employment Court to determine matters in accordance with the substantive merits of the case.

[19] Any prejudice to C3, which is not extensively set out in defendant's submissions, can be addressed by the C3's request, which I now grant, to allow the defendant to make submissions in respect to the amendments to the statement of claim. The union will have the opportunity to reply. In the unlikely event that the amendments will require further evidence this may be addressed in the submissions and leave will be granted if necessary.

[20] I therefore make the following directions:

a) The plaintiff is granted leave to amend the statement of claim in the form attached to the application for leave dated 30 November 2009;

b) The defendant has leave to both plead to this amendment if it wishes and to make submissions in respect of the amendments I have allowed;

c) The plaintiff will have the right to reply;

d) I have intentionally not put any timeframe on these responses and leave the detail of such directions to the parties themselves.

d) Leave is reserved if agreement on a timetable cannot be reached;

---

[8] [1998] 2 ERNZ 558 at 582

e) Costs are reserved pending the determination of the substantive issues between the parties.

B S Travis
Judge

Judgment signed at 11am on 17 May 2010