IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 73
WRC 17/04
WRC 19/05
WRC 8/09

BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NEW ZEALAND LIMITED Defendant

Hearing: 14 June 2011
(Heard at Wellington)

Counsel: Mr R Fletcher, counsel for the plaintiff
Mr J Tizard, counsel for the defendant in WRC 8/09
Mr M Quigg and Mr T Sissons, counsel for the defendant in WRC 17/04 and WRC 19/05

Judgment: 24 June 2011

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] On Tuesday 14 June 2011, on the application of the defendant in WRC 8/09 (the fraud proceedings), I struck out all references to Mr Quigg or his firm Quigg Partners, Barristers & Solicitors, in the plaintiff's second amended statement of claim dated 18 August 2010. The following are my reasons for so doing.

[2] The second amended statement of claim in the fraud proceedings runs to 77 pages and contains also a schedule of changes made to the first amended statement of claim which runs to a further 15 pages. At least the following references to Mr Quigg or the defendant's solicitors, Quigg Partners are to be found in that documentation in the context of allegations of fraudulent or intentionally misleading conduct. The numbering is that in the second amended statement of claim but the emphasis has been added.

[3] At page 13:

F. Grounds of the application

UPON THE GROUNDS that -

(i) in respect to A to D above such findings, directions, orders and decisions (as the case may be) were obtained or procured by the respondents **and/or their solicitors** by fraud; and

[4] At page 14:

1.23.3 the statement made in **Solicitor Michael Quigg's** letter to Moodie & Co dated 6th October 2006 prior to disclosure of the 5 CD ROMs on 13 October 2006 that –
(At 3rd paragraph)

"As to category 4, we have unfortunately encountered greater than anticipated difficulty in producing the documents covered by this category, being the detailed Management Profit & Loss reports covering Features Programming and Business Divisions for the period 1999/2000-2003/2004. Radio New Zealand have allocated considerable further recourses to this task, and accordingly it is anticipated that these documents will be able to be provided to you by Friday 13 October. …"

[5] At page 15:

was false and misleading and **Mr Quigg and/or** the Radio New Zealand Chief Financial Officer Mr Law knew or should have known it was false because at all materials times summary monthly profit and loss reports, the Category 4 divisional consolidated summary monthly profit and loss reports issued to divisional managers that the applicant required to be discovered could have been directly and conveniently exported to the 5 CD ROMs from the Radio New Zealand SUN accounting system; and

1.23.4 in submissions made to her Honour Judge Shaw at the hearing on 23rd November 2006 the following statements made by the respondents Counsel Mr Quigg were false and **Mr Quigg and/or the** Radio New Zealand Chief Financial Officer Mr Law knew or should have known they were false; namely –

… [three references to the transcript omitted]

(emphasis added)

[6] At page 34:

> **AND UPON THE FURTHER GROUNDS** that such findings, directions, orders and decisions (as the case may be) were obtained or procured by the respondents **and/or their solicitors** by fraud.

[7] At page 41:

> **AND UPON THE FURTHER GROUNDS** that such findings, directions orders and decisions (as the case may be) were obtained or procured by the respondents **and/or their solicitors** by fraud.
> (emphasis added)
>
> **AND UPON THE FURTHER GROUNDS**
>
> 1.40 That the evidence of fraud detailed in this amended statement of claim -
> ...
> 1.40.8 shows that the respondent **and/or [its] solicitors** were responsible for perpetrating the fraud in a way that renders it inequitable that the respondent should take advantage of Judge Shaw's Judgements dated 16th December 2005, 27th March 2006 and 7th December 2006; and

[8] Mr Tizard, on behalf of the defendant, submitted that the allegations set out above, which were denied, involving the defendant's solicitors, related to statements made in a letter from Quigg Partners to Moodie & Co dated 6 October 2006 and statements made by Mr Quigg before the Employment Court on 23 November 2006. Since the filing of the second amended statement of claim, the parties have been required to file and serve their briefs of evidence or "Will Say" statements from the witnesses intended to be called at the hearing, set down for four weeks commencing on 1 August 2011.

[9] Mr Tizard submitted that, in determining whether or not to strike out any cause of action, the Court usually proceeds on the basis that pleaded facts, even if denied, are true, although this does not necessarily extend to allegations which are speculative and without foundation. He submitted that an allegation of fraud must be alleged with precision – namely, how, where and in what way, citing *Prosser v NZ Investment Trust Ltd*;[1] *Belmont Finance Corporation Ltd v Williams Furniture Ltd*;[2] *Marshall Futures Ltd v Marshall*;[3] *Connell v NZI Securities Asia Ltd*.[4] He also

[1] [1937] GLR 93.
[2] [1979] 1 Ch 250; [1979] 1 All ER 118 (EWCA).
[3] [1992] 1 NZLR 316.

submitted that the responsibilities on counsel when making allegations of fraud are higher than in respect of other allegations: where fraud is alleged, there must be clear and sufficient evidence to support it, see for example *Carter Holt Harvey Ltd v Commerce Commission.*[5] He submitted that this is also recognised in r 13.8 of the Rules of Conduct and Client Care 2008, which provides:

> **Reputation of other parties**
>
> 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
>
> 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.
>
> 13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[10] Mr Tizard examined the allegations in the second amended statement of claim closely and submitted that there were no particulars capable of supporting any allegation that Mr Quigg or Quigg Partners knew that what was being done was false and intended to mislead either the plaintiff or the Court.

[11] The defendant's application had awaited the filing of the plaintiff's briefs of evidence and "Will Say" statements in order to ascertain whether any material within those documents supported the allegations made by the plaintiff in the second amended statement of claim. Mr Tizard referred to the material filed by the plaintiff and submitted there was no evidence supporting the allegations of fraud by Mr Quigg or Quigg Partners and the pleadings therefore should be struck out. He submitted that the plaintiff would suffer no prejudice with those parts of the second amended statement of claim being struck out, as Mr Quigg and Quigg Partners were not a party to the proceedings and the only allegations against them related to their actions as agents of the defendant.

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[4] (1995) 9 PRNZ 36.
[5] [2009] NZCA 40, [2009] 3 NZLR 573 at [80].

[12] Mr Fletcher, in opposition to the strike out application, contended that the issue had already been dealt with in an earlier judgment of mine. He submitted that the plaintiff was aware that the defendant might attempt to strike out the proceedings in WRC 8/09 for want of evidence. He referred to the judgment[6] I issued on 24 February 2010, which dealt with the defendant's objection to the plaintiff's request that it disclose certain documents which were the very documents sought to be disclosed as part of the relief sought in the fraud proceedings. I there noted that the disclosure challenge proceeded on the basis of the current pleadings, which was, at that time, the first amended statement of claim filed on 17 June 2009 in the fraud proceedings. I proceeded "on the assumption that the plaintiff will be able to prove her fraud allegations, which are strenuously denied by the defendant".[7] I then stated:

> [18] For present purposes, as I have stated, I accept that the plaintiff has established a prima facie case of fraud as alleged in her amended statement of claim and the affidavits filed in support. This would prevent the fraud proceedings being struck out if the defendant had made such an application.
> …

[13] Mr Fletcher submitted this judgment raised issue estoppel or res judicata preventing the defendant re-arguing the matter and that my interlocutory judgment dealing with disclosure had determined that the defendant and/or its solicitors had a case to answer. He submitted the application to strike out should be dismissed with indemnity costs in favour of the plaintiff for the time and expense involved in responding to the application.

[14] As Mr Tizard submitted, there was no application to strike out before the Court when I dealt with the disclosure matters. The position has now advanced to the stage before trial where the defendant now had all of the evidence that the plaintiff seeks to rely on to prove her allegations. I accept that submission and agree that there was no application for strike out before me at the time I was dealing with the issues of disclosure. I made assumptions for the purpose of that application alone and on the basis that the plaintiff would be able to establish her allegations by the evidence which was to be led at trial. There is no issue estoppel or res judicata which would bar the present application.

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[6] *Snowdon v Radio New Zealand Ltd* [2010] NZEmpC 10.
[7] At [16].

[15] Mr Fletcher then turned to the voluminous material the plaintiff has filed in support of her claims, with a view to establishing the basis for the fraud allegations against Mr Quigg and his firm.

[16] The first reference relied on by Mr Fletcher was contained in an affidavit by David Stuart Vance, annexed to a "Will Say" statement of Mr Vance and purporting to be dated 17 November 2006. At page 202 of the "Will Say" statement in para 4.5 there is a statement that "*Yet there still seems to be ongoing confusion given that Radio New Zealand is* "*baffled*"."

[17] The second reference to the evidence was at page 217 of Mr Vance's "Will Say" statement, referring to para 2.1.9 of his second affidavit dated 2 June 2008 in support of recusal application dated 5 February 2007, where he states:

> **A Court of law has been seriously misled from the outset of the disclosure process.:**
>
> 2.1.9 In my opinion, having completed our analysis, it would appear that over a period of time a Court of law and a judicial officer have been misled by RNZ, their deponents, Quigg Partners as solicitors of record and their counsel, Michael Quigg and Jole Bates (**refer** to **Sections G, H, I, J, K,** and **L)**

[18] Mr Fletcher was unable to show what evidence had been relied upon for this opinion by Mr Vance, a chartered accountant, on the very issue that the fraud proceedings were alleging.

[19] The third reference relied on by Mr Fletcher was in the same document under paragraph 2.2.1, in which Mr Vance stated:

> The documents detailed below in following paragraphs are very important. They explain the conduct which RNZ and their solicitors have engaged in since June 2005, up to the present time relating to Category 4 document disclosure requests and non-compliance.

[20] The fourth reference is a paragraph numbered 2.2.4 of Mr Vance's "Will Say" statement where it states:

> … I understand from counsel the Reasons of Relevance document was prepared at the specific request of Michael Quigg as he could not see how they were relevant. …

[21] The fifth reference relied on by Mr Fletcher was at page 222 of the same document, under para 2.1.5.4 where Mr Vance states:

> (vii) RNZ's counsel stated the following at the hearing on 23 November 2006 (refer to the transcript (**Doc 10** and sections **H, I, J, K** and **L**):
>
> …
>
> (b) That Category 4 class documents had been disclosed not once, but many time and in many forms:
>
> > **Mr Quigg:** "*They wanted the short version they got the short version. They wanted the long version, they got the long version, now they say the long version isn't in a version that our experts can easily digest"* (**Doc 10** at paragraph 12 page 43). This claim is misleading and incorrect; …

[22] Those five references were the only evidence Mr Fletcher could point to in 675 pages of "Will Say" statements on behalf of David Stuart Vance and Barry Phillip Jordon, both chartered accountants. Mr Fletcher did not refer to the 598 pages of the two briefs of evidence of Wayne Paul Kedzlie, a forensic information technology analyst and accountant, filed on behalf of the plaintiff.

[23] I could only assume that there was no evidence in any of that unmentioned material to support the plaintiff's allegations, as I frankly confess I had not read all that material, especially as the two volumes of the "Will Say" statements totalling 675 pages were handed up by Mr Fletcher at the commencement of the interlocutory hearing and had not previously been seen by either Mr Tizard or the Court. I have proceeded on the basis that Mr Fletcher would refer the Court to all the relevant evidence supporting the fraud allegations the plaintiff was making against Mr Quigg and his firm.

[24] I was satisfied, having read the material on which Mr Fletcher relied, that it provided no grounds at all for the allegations contained in the paragraphs in the second amended statement of claim referred to above at [3]-[7]. The allegations were therefore made without any evidentiary foundation and I struck them out.

[25] I invited Mr Tizard to file a memorandum as to costs, with a view to granting indemnity costs, within 7 days and invited Mr Fletcher to reply on behalf of the plaintiff within a further 7 days.

[26] The second amended statement of claim in relation to WRC 8/09 at present is prolix, sets out large quotations from various sources and does not clearly or concisely inform either the defendant or the Court of the true nature of the allegations being made.

[27] I therefore required the plaintiff to file and serve a third amended statement of claim to withdraw the allegations of fraud against Mr Quigg and his firm and which complies with reg 11 of the Employment Court Regulations 2000 by specifying, in consecutively numbered paragraphs:

(a) the general nature of the claim;

(b) the facts (but not the evidence of the facts) upon which the claim is based;

(c) any relevant agreements or legislation relied upon;

(d) the relief sought and the grounds of the claim.

[28] The third amended statement of claim complying with the Regulations should be filed and served by 4pm on Tuesday 28 June.

[29] Although not dealt with at the hearing, I direct that the defendant file and serve a statement of defence to the third amended statement of claim I have directed to be filed in WRC 8/09, within 10 working days of receipt by the defendant of that document.

[30] I then turned to the defendant's application for security for costs, noting that it had been filed very late. There had apparently been an earlier attempt to obtain security which was not pursued. Mr Quigg argued that there were exceptional circumstances relied upon in support of the application, which was opposed by the plaintiff. There are some aspects of the material filed on behalf of the plaintiff which do not clearly indicate the nature of the ownership of the land she asserts she owns.

[31] I was advised, after the luncheon adjournment, that the defendant was seeking $500,000 by way of security for costs but in light of the indications that I had given, the parties were working towards a consent order that security for costs in the sum of $200,000 would be paid into Court, to be held in an interest bearing account. This would occur once the Oriental Bay property, which is apparently on the market and jointly owned in the names of the plaintiff and one other person, was sold. The Court will be advised if and when that agreement has been reached. The application for security for costs was accordingly adjourned sine die, to be brought on again if agreement could not be reached.

[32] The Court then addressed the defendant's concerns as to the expertise of three witnesses being called by the plaintiff. After discussion it was agreed that only one of the plaintiff's witnesses, Mr Kedzlie would be involved in a "hot tubbing" exercise. This would mean that Mr Kedzlie would share the witness box at the same time as one or two of the defendant's experts so that the experts could be cross-examined by counsel and questioned by the Court simultaneously.

[33] Mr Quigg advised that Mr Kedzlie's expertise was no longer being questioned by the defendant for the purposes of this interlocutory hearing, but he expressed reservations that at trial the defendant might still challenge Mr Kedzlie's expertise in particular areas.

[34] Counsel were to agree on a process for ensuring that this would happen during the course of the trial and leave is reserved for them to apply for further directions.

[35] I had contemplated in my minute of 5 November 2010 that an independent expert would be appointed to assist the parties' experts and the Court, but the parties have been unable to agree on such a person and time has now overtaken us. It is now not possible as a matter of practicality for an independent expert to be properly instructed due to the late filing of the briefs of evidence and the absence overseas of one of the experts to be called by the defendant. The Court in these circumstances will be unable to call upon the services of an independent expert to assist it.

[36] Counsel for the defendant has advised that any issue as to whether any of the plaintiff's disadvantage grievances were raised outside the 90-day limit will be left to final submissions.

[37] Counsel have agreed to work together on trial management matters including which briefs of evidence can be taken as read, and the order in which witnesses will be called. It is contemplated that there may need to be another telephone conference call for further directions before trial.

[38] The plaintiff is to prepare a draft index to an agreed bundle of documents within three weeks. The defendant is to have one week to respond with the documents it requires to be included in the bundle. The agreed bundle is to be filed two weeks before the commencement of the trial. The briefs of evidence are to be filed in amended form to include references to the agreed bundle one week before the commencement of the trial.

[39] The defendant will file and serve, within 10 working days, statements of defence to the amended statement of claim filed in WRC 17/04 and 19/05.

[40] Except in relation to the successful application to strike out parts of the second amended statement of claim in WRC 8/09, costs in all other matters are reserved.

B S Travis
Judge

Judgment signed at 2.40pm on 24 June 2011