IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 96
WRC 17/04
WRC 19/05
WRC 8/09

IN THE MATTER OF	an application for adjournment
BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NEW ZEALAND LIMITED Defendant

Hearing: By video conference in chambers at 10.30am on 25 July 2011
(Heard at Wellington)

Counsel: Richard Fletcher, counsel for plaintiff
Michael Quigg and Tim Sissons, counsel for defendant

Judgment: 29 July 2011

REASONS FOR ORAL INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff's application to adjourn the four week fixture set down for the hearing of these three cases was partially successful on Monday 25 July 2011 in that I have adjourned the proceedings in WRC 17/04, described as the disadvantage grievances, and WRC 19/05, described as the unjustified dismissal grievance, sine die. The hearing of WRC 8/09, described as the fraud proceedings, was adjourned from commencing at 9.30am on Monday 1 August 2011 until Monday 8 August 2011. These are my reasons for that judgment which was delivered orally at the conclusion of the hearing on 25 July 2011. This judgment also contains the conditions for the grant of those adjournments.

[2] The application to adjourn the proceedings was principally made on medical grounds on the basis that the plaintiff has fallen seriously ill with medically diagnosed depression and Post Traumatic Stress Disorder (PTSD), but also on the

following grounds. In reliance on an affidavit from the plaintiff's forensic expert, Wayne Kedzlie, Mr Fletcher, counsel for the plaintiff, submitted that the hearing set down for 1 August 2011 should not proceed as it was not possible for the information technology experts to prepare a joint expert's report; that Mr Kedzlie would not be able to participate in the concurrent giving of evidence at trial because he had not been permitted to inspect and analyse the defendant's "SunSystem SQL" database; there had been non-disclosure of relevant documents; an adjournment would allow sufficient time for the Court to appoint two independent experts under the High Court Rules to assist the Court to determine the complex financial and information technology issues in dispute and that a referral by the forensic expert has been made to the Director of the Serious Fraud Office (SFO) at Auckland and a probable result of that referral may be that the proceedings in WRC 17/04, WRC 19/05 and WRC 8/09 will not proceed. Finally, Mr Fletcher submitted that as of late last week it had become apparent that senior counsel instructed, Mr Colin Carruthers QC, would not be available for the trial and that, despite significant efforts to seek and instruct alternative counsel, the plaintiff has not been successful to date in obtaining new counsel.

[3] The adjournment application was also supported by a medical certificate from Dr Sarah Sawrey, which stated that the plaintiff had consulted her on 6 July 2011 as symptoms of the depression and PTSD from which she had suffered in the past were returning. It further stated that her current unwellness was caused by a combination of stress associated with caring for a much loved terminally ill mother and the impending Court case. In deference to the plaintiff's current state of health, and because her mother may only have months to live, Dr Sawrey respectfully suggested that the hearing be delayed for 6 months.

[4] The application for the adjournment was filed on 18 July 2011 and apparently served the following day on the defendant. The defendant's solicitor filed a memorandum late on 19 July 2011, indicating that the defendant "strenuously oppose[d]" the application, setting out some of the extensive history of the litigation and dealing with each of the grounds advanced in support of the adjournment application.

[5] On 20 July 2011, I advised the parties that because of my hearing commitments, the opposed adjournment application could not be heard until Monday 25 July 2011 by means of video conferencing. In my minute of 20 July I stated:

> 5. The memorandum for the defendant observes that the certificate from Dr Sarah Sawrey, dated 6 July 2011, does not state that the plaintiff is currently unfit to engage in the hearing set down for 1 August 2011, as Mr Fletcher's memorandum states.
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> 6. In view of the opposition to the application and to ensure that I can properly determine the overall justice of the application, I require an affidavit from the medical practitioner setting out in far more detail than the certificate, her knowledge of the plaintiff and her reasons for the diagnosis and its consequences for the trial. There may indeed be issues as to when, in view of the plaintiff's previous medical history, she will be sufficiently fit to attend the trial. Other methods of dealing with her evidence may be required. The medical practitioner's affidavit should address such matters.

[6] I also noted Mr Quigg's concerns that the medical certificate dated 6 July was not referred to during a lengthy judicial hearing management meeting with counsel on Thursday 14 July 2011. This teleconference dealt in detail with the process of simultaneous expert witness evidence, known as "hot-tubbing", the order in which the plaintiff and the defendant would be calling their witnesses the preparation of documentary evidence, and various other procedural matters relating to the management of the trial. At no stage during that directions conference were the plaintiff's health difficulties referred to. Mr Fletcher stated to the Court at the opposed adjournment hearing that he was not aware of those health difficulties at the time and I accept his assurance. However, none of the difficulties with the expert evidence referred to in Mr Kedzlie's lengthy affidavit sworn on 18 July were referred to in the 14 July conference call and therefore were not dealt with in my six page minute dealing with trial management issues.

[7] Shortly before the commencement of the opposed adjournment application hearing, Mr Fletcher filed an affidavit from Dr Sawrey. It referred to the plaintiff's medical depression that she suffered in 2003 and the treatment for that depression. It confirms that Dr Sawrey, in July 2003, assessed the plaintiff as fit for work. It states that the plaintiff remained well until February 2007 at which stage she suffered a relapse of her depression and Dr Lesley Rothwell diagnosed a moderately severe clinical depression and PTSD. Dr Rothwell advised the plaintiff that she should not

proceed with the Court case until her health was restored and prescribed medication which continued until August 2007. It appears that on the basis of this material, Judge Shaw, in her ruling to the parties dated 19 February 2007, adjourned an application for her recusal which was set down to be heard on that date. On that date the plaintiff's then counsel, Dr Moodie, was suspended from legal practice and the plaintiff had been unable to obtain alternative legal representation. I understand another hearing in April 2007 was also adjourned due to the plaintiff's ill health.

Further background

[8] On 14 July 2008, Dr Moodie confirmed that he was again acting for the plaintiff, that she was well enough to instruct him and he sought to have the recusal matter set down for a three day hearing. By a ruling to the parties issued on 29 August 2008, Judge Shaw directed that the matter would be set down for hearing once it was ready for trial. It was set down in late 2008 but 8 days prior to the hearing, the plaintiff withdrew her recusal application.

[9] After a change of counsel to Mr John Upton QC and back to Dr Moodie and protracted interlocutory applications by the plaintiff seeking further disclosure, which included applications for leave to appeal to the Court of Appeal, the fraud proceedings were filed on 17 March 2009. These proceedings sought orders that the findings, directions, orders and decisions of Judge Shaw in the proceedings WRC 17/04 and WRC 19/05, which are detailed in the statement of claim, were obtained for the benefit of the defendant by fraud, that they be set aside and be of no further effect and the defendant be held in contempt of Court and pay a fine. The plaintiff also sought to have the statements of defence in the grievance proceedings struck out and judgment entered for the plaintiff, or, in the alternative, that the defendant comply with the requirement to disclose a particular set of documents which Judge Shaw had previously ruled had been properly disclosed. In broad terms, the plaintiff's statement of claim alleged false, misleading and fraudulent conduct on the part of the defendant and its legal advisors in the process of providing disclosure in 2005 and 2006.

[10] In a judgment dated 28 June 2010[1] the Court of Appeal declined leave to appeal against a judgment I issued on 24 February 2010[2] in which I had declined the plaintiff's application for additional discovery in the fraud proceedings as an abuse of process. The Court of Appeal noted that there were a number of features to the plaintiff's continuing attempts to obtain further discovery "which, in combination, are disquieting".[3] The Court of Appeal stated that the plaintiff's discovery demands were premised on the assumption that there had been a fraud, that the defendant had produced a mass of fraudulently altered documents and had practiced fraud on her and on the Court.[4] The Court of Appeal then concluded:

> [9] The allegations of fraudulent discovery are of direct relevance to the determination of the grievance proceedings because, on our understanding of the case, there is a real sense in which the allegations about discovery are a subset of the broader complaints made by Ms Snowdon about financial misreporting. Dr Moodie maintains that he can demonstrate fraudulent discovery on the evidence already to hand. The additional discovery is therefore being sought only on a belt and braces basis. Of course, if during the trial of either or both of the grievance or fraud proceedings, the trial Judge were to conclude that there should be additional discovery, that could be ordered. Against this background we can see little risk of prejudice to Ms Snowdon if leave is refused.
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> [10] Further, we are of the view that the time has come for the procedural music to stop. The substantive litigation has been before the Employment Court for many years. We see any utility (doubtful at best) associated with the proposed appeal as heavily outweighed by the adverse consequence of the further deferral of the determination of the grievance proceedings which would result if we granted leave to appeal.

[11] Mr Quigg, by memorandum dated 29 June 2010, sought to have the proceedings set down for hearing. In response, Dr Moodie noted that it was likely that a hearing of the fraud matter alone would occupy something in the order of three weeks of hearing time. By a minute of 2 July 2010, quoting from the paragraphs in the Court of Appeal judgment set out above, I invited counsel to obtain instructions from the parties as to whether the point had been reached, after the completion of the pleadings, that all the proceedings should be set down for hearing together. I suggested this would have the additional benefit of allowing the evidence in the fraud proceedings to be used in the substantive proceedings and vice versa.

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[1] *Snowdon v Radio New Zealand Limited* [2010] NZCA 271.
[2] *Snowdon v Radio New Zealand Limited* [2010] NZEmpC 10, [2010] ERNZ 33.
[3] At [3].
[4] At [3g].

[12] On 29 July, Dr Moodie advised that his client could not consent to the consolidation of the grievance and fraud proceedings, because, if successful, a consequence of the fraud proceedings would be that the conclusive discovery determinations of the Court in the grievance proceedings would be set aside and it would be found that the defendant had not made relevant disclosure. Dr Moodie also advised that an amended statement of claim in the fraud proceedings was being drafted.

[13] The plaintiff's second amended statement of claim was filed on 18 August 2010. On 19 August 2010, Dr Moodie filed another memorandum seeking a decision on the consolidation issue and advising that the fraud proceedings were likely to occupy five hearing days.

[14] On 6 September, the plaintiff changed her solicitors to Izard Weston. Shortly after, the plaintiff's counsel was changed from Dr Moodie to Richard Laurenson, Barrister.

[15] Following a telephone judicial conference with counsel I made suggestions as to how the combined hearing could take place. Counsel addressed those suggestions at a further management conference on Friday 5 November 2010. This resulted in a minute issued that day recording what had been agreed. It was agreed that the case would proceed on the basis that all evidence for the plaintiff and the defendant in relation to the personal grievance claims would be led first. This would include evidence about the plaintiff's contention that some $300,000 from an allocation of $889,000 was wrongly reported by the defendant and unavailable for her use and contributed to the financial pressure on her, which in turn lead to her personal grievances. The expert financial evidence would therefore include material in support of or in opposition to the allegation of financial mismanagement. I ruled that at the conclusion of the evidence from both sides in relation to the personal grievances, evidence would then be led separately in relation to the fraud proceedings. Because the fraud proceedings dealt with the allegations of fraudulent manipulation of the disclosure procedure, that evidence would be largely expert evidence but it might also be necessary for the plaintiff and employees of the defendant to give evidence as to relevant procedures. I then stated in paragraph [5]:

> At the conclusion of all that evidence, the Court will be invited to deliver a judgment dealing first with the fraud proceedings and the allegations of fraudulent manipulation of the disclosure procedures. If the judgment on that issue results in an order that the defendant be required to disclose documents that it has not previously disclosed then both parties will have the opportunity to lead evidence in relation to that documentation in support of, or in opposition to, the personal grievance proceedings.

[16] I recorded counsel's agreement that directions concerning such matters as the joint report of the experts, the "hot-tubbing" and the appointment of an independent expert by the Court to assist it, should follow the exchange of evidence. I set out an agreed timetable for the filing and service of that evidence and directed that a four week hearing commence at 9.30am on Monday 1 August 2011 in Wellington.

[17] On 25 March 2011, counsel for the plaintiff requested an additional 20 working days for the filing of the plaintiff's evidence. Counsel for the defendant, in response, expressed concern at the delays but sought an amended timetable for the filing of the defendant's briefs of evidence. By a minute of 8 April 2011, after receiving further memoranda, I set out a new timetable which had been largely agreed and, where it was not agreed, it was to be regarded as Court imposed. It required that between 13 June and 30 June 2011, the independent expert and the parties' experts were to confer in an attempt to reach agreement on matters and prepare a joint statement about matters which were agreed or disagreed.

[18] On 21 April, counsel for the plaintiff sought leave to amend the pleadings on the basis that the extant pleadings were unnecessarily prolix and outdated, the amendments raised no new issues and the defendant would not be prejudiced. Copies of the draft pleadings in WRC 17/04 and WRC 19/05 were provided. The defendant took no objection to those changes in the interests of retaining the August fixture. A copy of the draft amended pleadings in the fraud proceedings WRC 8/09 had not been provided and the defendant reserved its position. By minute dated 9 May, I set out an amended timetable but required the application to amend the fraud proceedings be filed and served by no later than 4pm on Thursday 12 May 2011. By memorandum dated 12 May counsel for the plaintiff advised the Court that he did not have instructions to file an amended pleading in WRC 8/09.

[19] On 13 May the solicitors for the plaintiff filed a memorandum stating that at 10.21am that day the plaintiff had informed the partners of Izard Weston and counsel, Mr Laurenson, that her instructions were withdrawn and that alternative counsel, and presumably alternative solicitors, had been instructed.

[20] Counsel for the defendant filed a memorandum on 13 May complaining that the plaintiff had not fully complied with the extended timetable, seeking "unless orders" and expressing the defendant's concern to retain the 1 August fixture so that, after some 8 years of litigation, the matter could be brought to a conclusion.

[21] On 16 May the plaintiff's husband, Mr Hickling, wrote to the Court for my attention, advising that he did not represent Ms Snowdon, although he holds a current practicing certificate as a barrister, but was writing the letter as an officer and friend of the Court to fully update me on the issues which he then canvassed. He confirmed that for a number of reasons which were not expressed, instructions were withdrawn from Izard Weston and Mr Laurenson and that Mr Colin Carruthers QC had accepted instructions to represent the plaintiff. He advised that Mr Carruthers was unable to attend the scheduled judicial conference call due to prior commitments. He advised that as a result of a recent forensic analysis undertaken by Mr Kedzlie, a number of significant public law issues had been identified. After a detailed analysis of a number of issues he stated "I have been asked by Ms Snowdon to specifically advise Your Honour that she does not want delays and wishes to go to trial on 1 August 2011 and does not want the fixture date placed in jeopardy".

[22] In the telephone directions conference on 16 May, leave was given to Mr Laurenson and Ms Bacon to withdraw, on condition that Izard Weston remained as the address for service of the plaintiff until a new address for service was filed. I recorded Mr Quigg's advice that he shared the view of the plaintiff that the trial should proceed on 1 August and that the defendant would oppose any attempt to delay that fixture. I noted that this was also the view of the Court. I referred to an earlier ruling of Judge Shaw, when adjourning matters for the second time in 2007, which stated that the delays were prejudicing the defendant due to the extraordinary amount of time and effort and resources that "had to be poured into it".

[23] On 20 May Mr Fletcher filed a memorandum stating that he had, that day, received and accepted instructions from the plaintiff in the three proceedings and gave a new address for service.

[24] Since that time there have been lengthy exchanges of memoranda and volumes of evidence have been filed and served for the trial. The defendant applied to strike out parts of the second amended statement of claim in WRC 8/09 which accused the defendant's solicitors of complicity in the alleged fraud over the disclosure process. New solicitors and counsel were engaged by the defendant to deal with that application.

[25] The defendant also applied for an order requiring security for its costs. In support of her opposition to that application, the plaintiff swore an affidavit on 10 June 2011 in which she referred to problems in obtaining documents as she had been in Auckland attending to her ill mother and that, like the defendant, she had put considerable cost and effort through her legal advisors and forensic accountants into preparing for the consolidated hearing set down for 1 August. She stated she was anxious to ensure that that cost and effort was not wasted. She then stated, in response to an affidavit of Peter John Cavanagh dated 7 June 2011, filed in support of the defendant's application for security of costs:

> 9. It is quite incorrect for Mr Cavanagh to assert as he does in paragraph 18, conduct on my part will result in the hearing not proceeding on 1 August 2011. I have given very firm instructions that all matters required by the Court for the hearing to proceed on 1 August 2011, be attended to. As to my health, I am perfectly fit and well. I want to appear in Court in August, give my evidence and have my case heard.

[26] The plaintiff swore a further affidavit on 13 June 2011 in opposition to the application for security for costs in which she dealt with her properties and stated that the reasons for selling them related to her mother's ill health and terminal cancer, as a result of which the plaintiff and her husband had decided to move to Auckland to look after her.

[27] These matters and the strike out application were dealt with at a hearing on 14 June in which I struck out all references to Mr Quigg or his firm in the plaintiff's second amended statement of claim in WRC 8/09. I gave my reasons for so doing in

an interlocutory judgment on 24 June 2011[5] in which I required a third amended statement of claim in WRC 8/09, complying with the Employment Court Regulations 2000, to be filed and served by 4pm on Tuesday 28 June 2011. I noted that the parties had agreed on matters relating to security for costs and were working towards a consent order that the plaintiff would pay $200,000 into Court to be held in an interest bearing account, when certain properties were sold. I also ruled that, because of the late filing of the briefs of evidence and the failure of the parties to be able to agree on an independent expert, the Court would be unable to call upon the services of such a person to assist it in the trial. I gave further directions regarding the preparation of the documentation for the trial.

[28] The third amended statement of claim in WRC 8/09 was filed on 4 July.

[29] A full trial management directions conference was held on 14 July, to which I have referred (at [6]), and addressed all the outstanding matters in relation to the impending trial.

The principles to be applied to adjournment applications

[30] It was common ground between counsel that the paramount consideration is the need to do justice to both parties. Both cited the decision of Tipping J in *O'Malley v Southern Lakes Helicopters Ltd*:[6]

> The essential question which the Court always has to consider when asked for an adjournment is whether or not that is necessary in order to justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wishes to retain the benefit of the fixture. It is essentially a balancing exercise.

[31] I accept Mr Quigg's submission that it is also relevant whether the parties and their representatives have taken a responsible attitude to the litigation and done everything reasonably practicable to avoid having to seek an adjournment: see *ANZ Banking Group (New Zealand) Ltd v Couchman*.[7]

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[5] *Snowdon v Radio New Zealand Ltd* [2011] NZEmpC 73.
[6] HC Christchurch CP 513/89, 4 December 1990 at 1-2.
[7] (1992) 6 PRNZ 34.

[32] Mr Fletcher submitted that an adjournment is a discretionary exercise citing *Feasey v Dominion Leasing Corporation Ltd*,[8] he submitted that the commentary on High Court Rule 10.2 in *McGechan on Procedure* at 10.2.03 emphasises the "very wide" discretion of the Court as to time, place and terms of any adjournment which can include payment into Court as a possible condition. He observed that the plaintiff has already undertaken that a payment into Court will occur once a property has been sold.

Adjournment on medical grounds

[33] Mr Fletcher submitted that an adjournment on medical grounds is different to other grounds for an adjournment. He submitted that the key factor was the impact on the party seeking the adjournment and that, once adequate evidence of illness or disability has been presented, the Court's discretion becomes more focused. He cited *Feasey* which had adopted *Dick v Piller*,[9] which he submitted stated that once a Judge was satisfied of the medical facts and that the evidence was relevant and important, it would be the Judge's duty to give an adjournment. He accepted that that was probably stating the proposition a little high for New Zealand and accepted it was still a discretionary matter. He submitted that where a costs award can compensate the other side, the Court should adjourn the hearing.

[34] Mr Fletcher also relied on *Goodman v Commissioner of Police for the Metropolis*,[10] an English Court of Appeal decision, which found that an adjournment should have been granted in the face of a non-appearance, in what Mr Fletcher correctly described as circumstances which included the "sacking of solicitors and other extremely marginal behaviour". He also cited *Ramesh Lal t/a Glomax Super Tailors v Rama Yeleswaram (Labour Inspector)*,[11] in which Chief Judge Colgan granted a second adjournment on medical grounds on the eve of a resumed hearing, on condition that the plaintiff gave security in the amounts directed to be paid by him by the Employment Relations Authority.

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[8] [1974] 1 NZLR 593 at 598.
[9] [1943] 1 KB 497.
[10] [1997] EWCA Civ 1910.
[11] AC 32/09, 9 September 2009.

[35] Mr Fletcher relied on Dr Sawrey's evidence in her affidavit that she had examined the plaintiff again on 22 July 2011, and felt her mental health had deteriorated to the point where anti-depressant medication was once again required. Dr Sawrey stated that the medication would take at least a month before any clinical effect was noticed and that as much rest as possible and stress reduction were important to the plaintiff's recovery. She noted that in the past the plaintiff had typically shown a good response to treatment over a six month period and, although it was not possible to be definite, she anticipated an improvement in the plaintiff's mental health over this timeframe. She noted that recovery on this occasion might be made more complicated by the plaintiff's mother's illness. As to the implications for the Court proceedings, Dr Sawrey stated:

> 18. It is my opinion that Ms Snowdon is not medically fit to give evidence at the hearing on 1 August 2011. Her current state of mental health precludes this.
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> 19. Whilst I accept there is a legal process underway, my professional responsibility is to the health of my patient and her well being. This affidavit should be read this way.

[36] Dr Sawrey concluded that further psychiatric assessment was not required at this time as the plaintiff had suffered from PTSD and clinical depression twice in the past and recovered fully each time and that, given appropriate medical treatment, stress reduction and time, she was confident the plaintiff would effect a full recovery. The difficulty for the Court with this diagnosis is that it is linked, in Dr Sawrey's words, with the "continued stress of the impending Court case which cannot be underestimated".

[37] Mr Quigg initially took objection to the PTSD diagnosis in the certificate dated 6 July, particularly as it did not address the necessary diagnostic criteria contained in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (DSM–IV–TR) on post-traumatic stress disorder. Mr Quigg accepted that the diagnosis following the attendance on 22 July had lead to the prescription of medication and that it was not now open to the defendant to contend that the plaintiff was medically fit to give evidence at the hearing next week.

[38] As the existing litigation appears to trigger the plaintiff's illness, I was not prepared to adjourn the proceedings in which the plaintiff was required to give evidence, for a period of 6 months to another lengthy fixture which might again trigger the plaintiff's illness. I considered that the grievance proceedings should not be given a fixture until the plaintiff is able to provide compelling medical opinion that she is fit to give evidence. I therefore adjourned the proceedings under WRC 17/04 and WRC 19/05 sine die. I was of the view that these considerations did not apply to the fraud proceedings.

The fraud proceedings

[39] As pleaded in the third amended statement of claim, the fraud proceedings relate to allegations of false and misleading and fraudulent behaviour by the defendant in 2005 and 2006, apparently after her employment with the defendant terminated on 11 April 2005.

[40] I accept, for the reasons I have given above, Mr Fletcher's submissions based on the medical evidence, that the plaintiff is not medically fit to give evidence at the hearing in these matters set to commence on 1 August.

[41] I therefore suggested to counsel a means of proceeding with the fraud trial on its own, which had always been Dr Moodie's wish. It appeared to me that the fraud proceedings could be heard with the plaintiff's brief of evidence, which has been filed, being taken as read, with no opportunity for cross-examination in these proceedings. This would be followed by the defendant's lay witnesses and then expert evidence in support of and in opposition to the allegations of the fraudulent handling of the documentation in the disclosure process. Mr Quigg indicated that the defendant was prepared to accept that limitation. The defendant will have the opportunity at another fixture to cross-examine the plaintiff, when she is fit to give evidence, in relation to her two grievance claims. If the fraud proceedings are successful further disclosure relevant to the grievance proceedings could be required to be made. This accords with my earlier ruling that a judgment would be given on the fraud proceedings before the conclusion of the grievance proceedings, in case further disclosure was required.

[42] The opposed adjournment hearing was adjourned at 12.30pm to enable counsel to obtain instructions on my suggestions and, in particular, for counsel to be able to make submissions concerning the plaintiff's medical fitness to give instructions in light of her 10 June affidavit and the subsequent extensive steps taken on her behalf since 6 July. The hearing was to resume at 3pm.

[43] On the resumption of the hearing, no further evidence was available at that point in time from the plaintiff or Doctor Sawrey as to the plaintiff's ability to give instructions.

[44] Mr Quigg then provided a written statement of the defendant's position in light of the Court's suggestions. He advised that the defendant sought to have the fraud proceedings heard commencing on either Monday 1 August, or failing that, Monday 8 August 2011. He advised that the latter date would enable, in the interim, the experts to meet and endeavour to provide the Court with a report on the matters about which they could agree or disagree. He accepted that the hearing would proceed with evidence from the plaintiff's brief of evidence being taken as read, without cross-examination, followed by Mr Ken Law for the defendant who would be available for cross-examination. The evidence of the plaintiff's expert, Mr Kedzlie, and the two experts for the defendant, John Fisk and Wayne Findlay would then be subject of the "hot-tubbing" exercise and their evidence would be taken together.

[45] Mr Quigg's submissions did not deal with the evidence of Barry Jordan and David Vance for the plaintiff, about which counsel for the parties had still to make decisions, as I noted in my minute of 14 July.

[46] As Mr Fletcher maintained the plaintiff's application for the adjournment of the fraud proceedings, it was then necessary to address the other grounds relied on by the plaintiff.

The joint experts' report

[47] Mr Fletcher submitted that, with the hearing set down on 1 August, it was not possible for the information technology experts to prepare a joint experts' report due to insufficient time. It was submitted that they would take between 3-6 months to prepare that report. He submitted that in order for Mr Kedzlie to prepare such a report Mr Kedzlie would have to inspect, examine and analyse the defendant's SunSystem SQL database and he was not permitted to do so by previous Court orders. Mr Fletcher submitted it was only the defendant's information and technology experts who had inspected that system and, in order for a joint report to be prepared, Mr Kedzlie also needed to inspect and examine the database.

[48] As I have noted, no such objections were taken by the plaintiff in agreeing to the trial management directions on 14 July. Nor were they ever previously raised on behalf of Mr Kedzlie who had already filled voluminous affidavits and briefs of evidence for the 1 August fixture.

[49] As Mr Quigg pointed out, what in effect Mr Kedzlie was requesting in his affidavit in support of the adjournment was to have Judge Shaw's earlier orders, determining that disclosure had been properly undertaken and completed, set aside. This would give Mr Kedzlie the opportunity to inspect the defendant's data systems. That effectively is the relief being sought in the fraud proceedings and, I find, is yet another attempt to obtain disclosure without having to prove fraud. I rejected that approach in my 24 February 2010 judgment as an abuse of process, and as I have noted above, the Court of Appeal did not grant leave to re-open that question and instead directed that the matters proceed to a hearing.

[50] I am not satisfied that this ground for adjournment has been established but I accepted Mr Quigg's suggestion that the hearing be adjourned until 8 August 2011 to enable the experts to meet and prepare, if possible, a joint report. If they cannot agree, they can each report individually.

[51] For these reasons I also do not accept that Mr Kedzlie will not be able to participate in the "hot-tubbing" exercise at the trial.

[52] A further ground advanced by Mr Fletcher was said to be the requirement for discovery of the defendant's SunSystem SQL database. Mr Fletcher referred to Judge Shaw's earlier decisions relating to these matters and her refusal to allow inspection. For the reasons I have given above, it is not appropriate to set aside the earlier rulings of this Court until fraud has been proven, for to do so would be an abuse of process. The same comments are made in effect of Mr Fletcher's submissions that there has been non-disclosure of relevant documents.

Serious Fraud Office

[53] A more substantial ground for the adjournment advanced by Mr Fletcher is what he stated was the probable result of the referral, by the plaintiff's representative to the Director of the SFO at Auckland, of the plaintiff's expert's forensic reports. His memo stated:

> 8.1 A probable result of the referral to the Director of the Serious Fraud Office may be that the proceedings WRC 17/04, WRC 19/05 and [WRC 8/09] will not proceed.

[54] When asked to clarify this submission, Mr Fletcher said that he meant that the defendant's witnesses might not be able to give evidence as it could breach their right to silence if they were the subject of criminal proceedings. I was not satisfied that this is what he meant in his original submission, but I was aware that where there is likely to be concurrent criminal proceedings this can have an impact on a civil trial covering the same or similar issues.

[55] The Employment Court has long recognised that when criminal charges are pending or a criminal investigation is underway, the subject of that criminal proceeding or investigation has a right against self-incrimination which must be considered, and if necessary, protected by the Court. In some cases, the Court has prevented an employer from conducting its own disciplinary investigation while criminal charges loom.[12] In other cases, protection of the right has meant that a

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[12] *Russell v Wanganui City College* [1998] 3 ERNZ 1076; *Sotheran v Ansett New Zealand Ltd* [1999] 1 ERNZ 548.

hearing before the Court may have to be postponed until the criminal charges are resolved.[13]

[56] Mr Quigg in response first noted that the documents already before the Court should the plaintiff had made a disclosure in January 2003 under the Protected Disclosures Act 2000, alleging financial mis-management by the defendant. This was said to have been considered by the defendant's Board and rejected. He said this was later referred by the plaintiff to the Ombudsman, who after a period, indicated there was no continuing place for an investigation by that office. He also noted that in August 2003, the plaintiff had complained to the Police that the defendant had attempted to obstruct or prevent an investigation into the alleged mishandling of funds and, in November 2003, the Police advised that they would not be acting further on the complaint.

[57] Mr Quigg then assured the Court that the defendant's only lay witness in the fraud proceedings, who could have been the subject of investigation by the SFO, was so confident that his actions were appropriate that he has waived the right to silence and the right to seek independent legal advice and is prepared to give evidence in the way that Mr Quigg proposed. I therefore found that this was an inadequate ground on which the plaintiff could rely in support of her adjournment application.

Legal representation

[58] The final matter relied on by Mr Fletcher was that Mr Carruthers would not be available for the trial. Mr Carruthers had made contact with the Court registry and advised that while he had been overseeing Mr Kedzlie's evidence, he had on the morning of 25 July 2011, told Mr Hickling, the plaintiff's husband who has been filing documents in the Court, that while he was not available for the hearing starting 1 August 2011, if the matter was adjourned to a time that he was available, he could represent the plaintiff. Mr Fletcher advised that he was unaware of Mr Carruthers' unavailability at the time of the trial management conference on 14 July. He also advised that he did not consider himself competent to conduct the fraud trial as counsel and has been unable to find any other counsel to assist.

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[13] *A Ltd v B* [1999] 1 ERNZ 613. See also *Mann v Alpine Wear (NZ) Ltd* [1996] 1 ERNZ 248.

[59] I expressed considerable sympathy for the position in which Mr Fletcher found himself but observed that this situation had arisen because the plaintiff elected to withdraw the instructions from her previous counsel and solicitors in May, only a matter of weeks away from a trial that had been set down in November last year. This was not the first time the plaintiff had changed counsel. From the outset Mr Fletcher had been unable to advise the Court whether Mr Carruthers would be available for the fixture in spite of being pressed by both counsel for the defendant and by the Court. In my minute of 27 May, I had advised the parties:

> … that the Court is unlikely to entertain an adjournment application based on the unavailability of counsel because of other fixtures…

[60] The difficulties the plaintiff may now find herself in because of previous decisions she has made over representation are outweighed by the need to finally start to advance these proceedings. From the way he has conducted two difficult defended interlocutory matters before me in this case, I am not persuaded that Mr Fletcher does not have the competence to conduct this trial. The disposition of the fraud proceedings may in itself help to reduce the plaintiff's stress and give the parties at least a degree of certainty which may perhaps allow the grievances to be dealt with more effectively. It will also deal with the serious allegations of fraudulent financial misconduct hanging over the defendant and its employees which have been, I am advised by Mr Quigg, causing the employees and former employees considerable stress.

Conditions for the adjournment

[61] As I have already indicated, the grievance proceedings are adjourned sine die and cannot be brought back on for hearing until the Court can be persuaded, on compelling medical opinion, that the plaintiff is able to give evidence at a trial.

[62] The defendant also seeks an order that the plaintiff pay into Court, what appears to be an agreed sum of $200,000, by 4pm on Wednesday 31 August 2011, with such monies to be held in an interest bearing account. The defendant also seeks an "unless order" that if the money is not paid in by that date, the proceedings should be struck out.

[63] In view of the impending trial, the date the defendant seeks may be too early to enable the plaintiff to either complete the sale of her property or to arrange financing. I am therefore not, at this stage, prepared to put a time limit, or an "unless order" in place, until her financial position is clearer. I will, however, make it a condition of the resumption of the grievance proceedings that the $200,000 is paid into Court. I am prepared to review this decision when more up to date information is available to the Court.

[64] The defendant also seeks an order that, prior to 31 August 2011, the plaintiff must pay all outstanding costs awarded against her in favour of the defendant, including the Court's forthcoming judgment as to costs in relation to the strike out proceedings as well as any outstanding costs owed by the plaintiff to the defendant in relation to the related defamation proceedings before the High Court which have been stayed pending the Employment Court proceedings.

[65] I do not consider I have jurisdiction to make any order relating to the High Court costs and decline to do so.

[66] As to the outstanding costs that have already been awarded by this Court, I agree that it should be a condition of the plaintiff being able to resume her grievance proceedings that these have been paid to the defendant. For the reasons I have indicated above, I am not prepared at this stage to express a time limit by which such payment should be made. The matter can be reviewed once more information is available and following the Court's judgment on the costs in relation to the strike out.

[67] In relation to defendant's lost costs on this adjournment application, which may be in the nature of indemnity costs, the defendant is to file and serve its application for costs by 4pm on Friday 5 August 2011. The plaintiff is to have until 4pm on Friday 2 September 2011 to respond. The payment of these costs to the defendant, when determined by the Court, will be a another condition before the plaintiff's grievance proceedings can be set down for hearing.

[68] The defendant also sought a requirement that the plaintiff was to file and serve within 30 days, submissions in relation to any costs reserved in respect of any of the proceedings before the Court and for the defendant to file and serve its submissions within 30 days thereafter. In view of the pending fraud trial, I do not consider it appropriate to make such an order at this stage and it is not to be a condition of the adjournment.

Hearing management matters

[69] Counsel will now have to deal with the evidence of Messrs Jordan and Vance as I set out in my 14 July minute. If a further directions conference on this matter, or on the documentary evidence to be presented at trial would assist, they should approach the Registry and a chambers meeting can be arranged next week.

B S Travis
Judge

Judgment signed at 3pm on 29 July 2011