IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 4
ARC 30/10

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	interlocutory applications
BETWEEN	ROBERT HAIG Plaintiff
AND	EDGEWATER DEVELOPERS LIMITED First Defendant
AND	CARRINGTON FARMS LIMITED Second Defendant
AND	PH II INCORPORATED Third Defendant

Hearing:	10 September 2010 (in Chambers) (Heard at Auckland) By memoranda of submissions filed on 10, 13, 14 and 16 September and 5 October 2010
Counsel:	John Billington QC and Laura Currie, counsel for plaintiff Julian Miles QC and Josh McBride, counsel for defendants
Judgment:	20 January 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This interlocutory judgment decides several applications made in preparation for trial. These include the defendants' application for orders that a preliminary question of liability be the subject of separate trial; the plaintiff's challenge to the third defendant's notice of objection to disclosure of documents; and the plaintiff's application for letters of request for evidence to be taken overseas.

[2] It is necessary first to outline the nature of the proceedings between the parties as pleaded. I should emphasise that, except where allegations are admitted, this summary of the case is only of relevant allegations and denials for the purpose of determining the interlocutory applications presently before the Court.

[3] The relevant pleadings are the plaintiff's amended statement of claim of 8 September 2010, the defendants' amended statement of defence and counterclaim of 2 June 2011, and the plaintiff's statement of defence to the defendant's counterclaim of 6 July 2011. I note here that the defendants' statement of defence and counterclaim both refer and respond categorically to the plaintiff's original statement of claim filed on 23 April 2010. That has, of course, been superseded by the plaintiff's amended statement of claim of 8 September 2010, filed only one day before the interlocutory hearing. Assuming that the defendants were served with the plaintiff's amended statement of claim, they will now have to regularise their defence and counterclaim.

[4] It is possible, nevertheless, to discern a sufficient picture of the proceedings as the pleadings currently stand and this is as follows. I propose to use the corporate parties' full names rather than abbreviations of these or their roles in the proceeding because of the similarities of the names of a number of separate corporate entities and because there are claims and counterclaims.

[5] The plaintiff, Robert Haig, is an architect and project manager. At relevant times Mr Haig was the Chief Executive Officer of Edgewater Developers Limited. In addition, although he claims also to have been a director and the Managing Director of Carrington Farms Limited, only his directorship of this company is admitted.

[6] PH II Incorporated is a United States corporation which, through subsidiaries, is the parent and controller of the New Zealand companies Edgewater Developers Limited and Carrington Farms Limited.

[7] Mr Haig first issued proceedings in the High Court against the defendants. Summary judgment was eventually given[1] but an appeal to the Court of Appeal against that judgment identified, for the first time, that a number of the issues between the parties were employment related and therefore not ones for the High Court. The appeal was allowed[2] and the remaining proceedings in the High Court have been stayed. Mr Haig's employment claims were brought in the Employment Relations Authority and were removed then to this Court for hearing at first instance.[3]

[8] The case turns on Mr Haig's claims to shareholdings in Edgewater Developers Limited and Carrington Farms Limited which he says were terms and conditions of his employment agreements with those two companies. They and PH II Incorporated deny any contractual entitlement to these shareholdings, saying that Mr Haig was only entitled to (what transpired to be) valueless shareholdings in two United States corporations (other subsidiaries of PH II Incorporated) known as Edgewater Corp and Carrington Holdings Inc.

[9] Mr Haig's alternative cause of action, if he is found to either have had no contractual entitlement to shares in the New Zealand company or relinquished such as he had, is that he was induced by the defendants to agree to accept these valueless entitlements by false and misleading representations.

[10] Paul Kelly is a director of Edgewater Developers Limited, Carrington Farms Limited and the United States corporate entities owning the shares in these companies, as well as having a controlling interest in PH II Incorporated. The defendants deny, however, that Mr Kelly was the authorised agent of Edgewater Developers Limited and Carrington Farms Limited in relation to the assertions by Mr Haig of the breaches of contract by these New Zealand companies in which Mr Haig says that Mr Kelly represented those entities. The defendants say that Mr Haig sought deliberately to have shareholdings in PH II Incorporated, Edgewater Corp and Carrington Holdings Inc and/or yet other US entities known as Carrington

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[1] HC Auckland CIV-2006-488-322, 1 August 2008.
[2] [2009] NZCA 390, (2009) 7 NZELR 14.
[3] AA 133/10, 23 March 2010.

Capital LLC and Edgewater Capital LLC, in preference to having shareholdings in the New Zealand companies.

[11] As an affirmative defence to Mr Haig's proceedings, the defendants say that his proceedings were brought in the Employment Relations Authority more than six years after the causes of action accrued so that, under the Limitation Act 2010, Mr Haig is not entitled to sue them on these causes of action. Mr Haig denies that he is statute barred so that this (and other limitation issues referred to shortly) will need to be determined, whether as a discrete preliminary issue or as a preliminary issue at trial.

[12] Edgewater Developers Limited now brings its own counterclaim against Mr Haig for breach of their employment agreement. It says that he knowingly recommended a number of sections of land be sold through a real estate agency at substantial undervalues to friends and associates of a dishonest and unethical real estate agent. Next, Edgewater Developers Limited alleges that Mr Haig wrongfully assigned the benefits of its maintenance covenant in respect of these sections to the same real estate agent. Finally, Edgewater Developers Limited claims that Mr Haig deliberately excluded reference, in sales information provided by him to it, to one lot of land that was sold fraudulently at his instigation through the real estate agent to the agent's friends and associates.

[13] Mr Haig denies those counterclaim allegations against him and raises the affirmative defence of limitations against them. He says that these causes of action were first brought against him in the proceedings after they were removed to this Court from the Employment Relations Authority, being more than six years after they accrued as alleged breaches of his employment contract with Edgewater Developers Limited.

[14] Before addressing particular issues for decision now, I need to set out the flurry of events that began almost immediately after the end of the hearing on 10 September 2010 and continued, intensively, over following weeks. The defendants say that Mr Haig should not be permitted to rely upon those matters raised after the

close of the interlocutory hearing. They explain, although only partly, the very regrettable delay in finalising this judgment.

[15] The first event was the filing of a short memorandum by Mr Billington attaching what was then the current statement of claim in High Court proceedings between these parties. This was a matter I understood Mr Billington to have overlooked earlier on the day of the hearing. This was followed by a further memorandum from Mr Billington filed on the next working day, Monday 13 September 2010, seeking to address four additional matters, again which I understood him to have overlooked on 10 September 2010. These additional matters concerned the plaintiff's health, the discovery issues, the evidential status of a handwritten document and whether there should be separate hearings on liability and remedies. On the following day, Mr Miles for the defendants objected to Mr Billington's tactics, submitting that post-hearing submissions are not usually permitted and identifying the practice direction[4] of the High Court Judges which requires that leave be sought in the High Court if such submissions are sought to be made. Mr Miles submitted that Mr Billington's additional submissions should not be read and should indeed be removed from the file before an application for leave was made by the plaintiff, and indicated that such an application would be opposed.

[16] By a minute issued on 14 September 2010, I advised counsel that I regarded Mr Billington's first memorandum filed on 10 September 2010 as simply supplying a copy of a document that he had expected to have been in the bundle of documents but was not. I allowed him an opportunity to respond to Mr Miles's memorandum but alerted the parties to the potential for delay in view of what was then my imminent departure on leave.

[17] Mr Billington applied promptly, also on 14 September 2010, for a rehearing of the applications heard on 10 September 2010 or, alternatively, that the matters raised by his memorandum of 13 September 2010, be taken into account by the Court in deciding the questions already heard. That application was supported by an affidavit of Ms Currie, junior counsel for the plaintiff, who explained that because of his unfamiliarity with the Employment Court proceedings, Mr Billington was not as

[4] [1968] NZLR 608.

well prepared as he might have been for the interlocutory hearing on 10 September 2010. Ms Currie also explained that after the hearing, Mr Billington discussed matters with the plaintiff's solicitors and this lead to the changed position of the 13 September 2010 memorandum so that the plaintiff no longer opposed the Court dealing with issues of liability separately from quantum. This was so long as the defendants gave particularised disclosure and so long as letters of request were issued to the two American witnesses.

[18] Also on 14 September 2010, Mr Billington filed a memorandum explaining that about 24 hours before the hearing he had been provided with a list of documents the defendants intended to produce the next day. He said that the handwritten document in question was included in the list but because he had not seen it previously he assumed (wrongly) that it was part of the correspondence attached to the Court of Appeal's judgment. Mr Billington explained that he then asked his instructing solicitors to advise junior counsel for the defendants to substitute the Court of Appeal judgment for the list and documents and also to take the original statement of claim out of the list and substitute it with the amended statement of claim filed in the High Court. Mr Billington explained that he was served with a copy of the defendants' submissions at the end of the business day before the hearing and did not receive the bundle of documents until attending at court on the morning of the hearing. In these circumstances Mr Billington explained that, in relation to the preliminary question application, there were matters of which he ought to have been aware but was not and, in particular, that the scope of the preliminary question and the evidence relied on, was narrower than had been sought in the application filed on 27 May 2010. Counsel explained that although there was reference in the written submissions at para 9 to the context in which the 17 August 2010 letter would have been referred to, the letter itself was not noted. Mr Billington submitted that the oral submissions made at the hearing on the facts were not supported by evidence before this or any other court. He reiterated his acknowledgement in his memorandum of 13 September 2010 that the disclosure sought was too wide and that he had amended this application. He also confirmed that it was an appropriate case for liability and quantum to be separated generally on terms similar to those set out in the defendants' application of 27 May 2010, but on broader terms than contended for at the hearing.

[19] I then issued a further minute on 15 September 2010 confirming that I had seen Mr Billington's memorandum before Mr Miles urged me not to read it. I confirmed that I had looked at its contents solely for the purpose of determining whether there were new issues raised by Mr Billington and not for the purpose of considering the merits of any such new issues or to assist me in determining them. As to the first additional matter with which Mr Billington sought to have the Court deal, I said that I considered his submissions about Mr Haig's health appeared to draw my attention to written submissions already made before me on that topic.

[20] Next, on the question of disclosure of documents, I noted that Mr Billington appeared to concede that a narrower category of documents should be disclosed than those earlier sought by him. I said that as such, logic seemed to dictate that the submissions already made by the defendants would cover a narrower categorisation but, if Mr Miles considered that he wished to respond further, he should have that opportunity by memorandum in reply or he might seek a further hearing. As regards the references in Mr Billington's memorandum to document 7 in the defendants' bundle of documents (a handwritten note dated "8/17"), I said that his written submissions appeared to reiterate those made to me orally by counsel on 10 September 2010, in essence saying that the document has only emerged very recently and the defendants have not provided any evidential basis of its veracity.

[21] Finally, in relation to matters of "liability and quantum", I noted that Mr Billington appeared to address another issue associated with, but not the same as, that which had been argued at the hearing. In my Minute I recorded that "Whereas Mr Miles has argued for a preliminary hearing and decision on one factual element of, potentially, a number going to questions of liability, Mr Billington proposes that if I decide against the defendants on this issue, questions of quantum of loss should nevertheless be severed." I recorded that this was not a matter on which I had heard from the defendants and, in any event, was one which I considered would be best determined after decision of Mr Miles's narrower severance issue argued at the then recent Chambers hearing. I invited counsel to consider whether the Court could now determine, by judgment, those matters heard on the previous Friday in light of the indications given by me.

[22] Mr Billington responded by a memorandum dated 16 September 2010, emphasising that his submission was that all questions of liability should be separated from all matters of quantum. Counsel did not dispute that the category of documents sought was too wide and noted that he had indicated the extent of disclosure now sought.

[23] The exchanges of memoranda continued. Mr Miles filed a further memorandum, also on 16 September 2010. Counsel's provisional submission (in the sense that he has not been able to take his clients' instructions) was that the plaintiff having applied formally for a rehearing, the Court was bound to determine this unless the application was abandoned. Mr Miles submitted that Mr Billington had not established any of the usual criteria for a rehearing and that the application had dubious prospects of success. He anticipated being instructed to oppose it. Further, Mr Miles submitted that Mr Billington's post-hearing submissions sought discovery on an entirely different basis from that advanced at the hearing. Counsel contended that in some respects the categories of documents sought appeared more targeted, but in fact the ambit of the discovery had been broadened and there were now requests for discovery from four non-parties domiciled in the United States of America. Counsel submitted that the plaintiff's options were then to either formally abandon his previous application and file a new one (including any applications for non-party discovery) or to proceed with the original application.

[24] Still on 16 September 2010 Mr Billington filed a further memorandum indicating that if I were prepared to consider the matters raised in his memorandum of 13 September 2010, he did not need to persist with his application for rehearing and invited me to deliver a judgment on that basis.

[25] Finally, and as anticipated by Mr Miles, on 5 October 2010 the defendants opposed formally the application for rehearing including on grounds that no new matters had arisen since the hearing and there was no risk of a miscarriage of justice occurring if the plaintiff was denied a rehearing. That was said to be because the plaintiff has effectively abandoned his earlier application for discovery and a new application, rather than a rehearing, is required, and that he has accepted, post-

hearing, that a liability/quantum split is in fact appropriate despite his counsel's submissions to the contrary on 10 September 2010.

[26] Although belatedly, it is nevertheless necessary to deal with Mr Billington's application for a rehearing because it has been made, formally opposed, and because the parties are not in agreement about what should happen.

[27] Because I have allowed Mr Billington's memorandum of 13 September 2010 to be filed and taken into account, it is unnecessary in the alternative to consider counsel's application for a rehearing. These are interlocutory applications for the purpose of determining how the Court can most justly and expeditiously deal with the substantive merits of the claims and counterclaims. They relate to procedural questions which, as with all matters before it, the Court must deal in equity and good conscience as it thinks fit (s 189 of the Employment Relations Act 2000) and in a manner that best secures the speedy, fair, and just determination of the proceedings (reg 4, Employment Court Regulations 2000 (the Regulations)).

[28] I accept that Mr Billington may not have been as familiar with the proceedings in this Court as he might have wished at the hearing on 10 September 2010 although counsel had that role in the earlier High Court and Court of Appeal proceedings representing Mr Haig. I consider that it would not promote the ends of justice to exclude reliance on information and material supplied after the hearing and would be unduly formalistic to require the plaintiff to apply for a rehearing in these circumstances. It is important that the defendants have had the opportunity to reply to Mr Billington's subsequent submissions and have done so.

[29] In addition to declining to deal with Mr Billington's application for rehearing for reasons of non-compliance with the legislative requirements, I consider in any event that the preferable way of dealing with these issues is to treat them as an extension of the hearing. This is, after all, only a preliminary interlocutory stage of the case and the Court's objective is to have the parties prepare as well as they can for the hearing. To exclude any post-hearing consideration or reconsideration of these matters, as Mr Miles submits the Court should, would be to apply an unduly artificial and technical rigour that runs contrary to the jurisprudence of this Court. I

am satisfied that any justifiable concern by the defendants can be addressed justly in costs. In this regard, also, I note that in respect of at least some of these subsequent issues, counsel has acknowledged his responsibility (as opposed to his client's) for these shortcomings and it would be unjust in these circumstances for the plaintiff to be disadvantaged thereby.

[30] For these reasons, I agree to receive and consider the subsequent memoranda filed by Mr Billington and to which Mr Miles has responded in substance as a fall-back to Mr Miles' primary submission that they should not be considered.

Separate trials

[31] I deal first with the defendants' application for a direction for separate trials on issues of liability on the one hand, and causation of loss and damages, on the other. The defendants say that this is an appropriate case in which to separate these two elements because, they say, a 1999 agreement that they entered into with the plaintiff precludes any liability to him. Further, they say that if liability is established, then there will be "extensive evidence" about the extent and effect, if any, of their breaches. The defendants say that if they are successful on the preliminary issue of liability, much time and expense will be saved for both parties in this regard. The defendants assert that there can be no prejudice to the plaintiff in separate hearings following a split trial.

[32] Upon reflection immediately after the hearing, however, the plaintiff conceded through counsel that all issues of liability should be dealt with separately so long as the defendants gave particularised discovery (disclosure) and so long as letters of request are issued by the Court to two witnesses, Fred Rosetti and Jeff Gaynor. Because the second order is to be allowed and because of the breadth of document disclosure available under the Regulations, I propose to treat Mr Billington's conditional consent as having been satisfied so that issues of causation of loss and of damages will be reserved for subsequent hearing if necessary following preliminary trial on questions of liability. There will, therefore, be a separate preliminary trial on questions of liability.

Application for letters of request

[33] I deal next with Mr Haig's application for letters of request. He wishes to have an order authorising letters of request to be forwarded to a relevant court in the United States of America requesting evidence in these proceedings be given by two citizens of that nation. Reliance is placed on r 9.17(1)(b) of the High Court Rules which gives that Court authority to make an order "for the sending of a letter of request to the judicial authorities of another country, to take, or cause to be taken, the evidence of a person." The plaintiff says that it will be "more practical" for the evidence of these two witnesses to be taken in their own country rather than to have them come to New Zealand to give evidence. The two potential witnesses (Messrs Gaynor and Rosetti) are both citizens and residents of the United States of America.

[34] I am satisfied that the Court is empowered to issue letters of request to the judicial authorities of another country (the United States of America) to take or cause to be taken the evidence of a person pursuant to r 9.17(1)(b) of the High Court Rules. That is pursuant to reg 6 of the Regulations which provides:

> **6 Procedure**
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> (1) Every matter that comes before the court must be disposed of as nearly as may be in accordance with these regulations.
>
> (2) If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the court must, subject to section 212(2) of the Act, dispose of the case—
>
> (a) as nearly as may be practicable in accordance with—
>
> (i) the provisions of the Act or the regulations or rules affecting any similar case; or
>
> (ii) the provisions of the High Court Rules affecting any similar case; or
>
> (b) if there are no such provisions, then in such manner as the court considers will best promote the object of the Act and the ends of justice.

[35] The relevant High Court Rule is 9.17 which provides as follows:

> **9.17 Order for examination of witness or for letters of request**
>
> (1) When, in a proceeding or on an interlocutory application, a party desires to have the evidence of a person or persons taken otherwise than at the trial or the hearing of that interlocutory application, the court may, on application by that party, make orders on any terms the court thinks just—

> (a) for the examination of a person on oath before a Judge, Registrar, or Deputy Registrar or before a person that the court appoints (in rules 9.18 to 9.23 referred to as the examiner) at any place whether in or out of New Zealand; or
>
> (b) for the sending of a letter of request to the judicial authorities of another country, to take, or cause to be taken, the evidence of a person.
>
> (2) On the application of an opposite party, the court may, if it is satisfied that the party who obtained the order under subclause (1) is not implementing the order with due diligence, rescind the order and may make any other order justice requires.

[36] Although they cannot be described as principal witnesses, Messrs Rosetti and Gaynor are nevertheless material witnesses on whose evidence the plaintiff at least will seek to rely. They were both senior and influential actors in the events with which this case is concerned and have relevant and important evidence to give. I am satisfied that although Messrs Rosetti and Gaynor are willing to give evidence for the plaintiff, they may nevertheless not wish to travel to New Zealand for that purpose. Although one alternative to this dilemma may have been to seek to have the witnesses give evidence by video link, how they give evidence is ultimately a matter for election by the party wishing to call them and counsel for the plaintiff has elected to take the pre-video conference era procedure. I simply note that the relative expenses incurred by these courses may be a relevant matter if and when costs come to be considered.

[37] In these circumstances, I propose simply to allow the application to issue letters of request in respect of the two named witnesses. I invite counsel for the plaintiff to file a draft order and other draft documents for consideration and, after submissions by the defendants if they wish to make these, approval and sealing by the Registrar. Leave is reserved to refer any outstanding issues to a judge.

Decision of application for disclosure of defendants' financial records

[38] Although other questions of document disclosure have been completed between the parties and, as I understand, there has also been mutual inspection, the defendants object to disclosing their financial records, from 1994 to date, to the plaintiff. They say such documents are not relevant to the issues in the proceedings

or at least that they have not been shown by the plaintiff to be relevant. The defendants say that disclosure of such records will be both onerous and oppressive.

[39] The plaintiff says that on 1 July 1999 Mr Kelly, as PH II Incorporated's authorised agent, wrote to Mr Haig stating that his entitlements were to acquire his equity interests in the same two United States corporations named in the 24 August 1998 letter but that the shares would be purchased from another entity known as PH II Enterprises Inc. The plaintiff says that this letter was misleading and a misstatement of fact in that it did not disclose that PH II Enterprises had been substituted for PH II Incorporated and did not advise Mr Haig of the difference between the first and second defendants, and the two United States based companies also called Edgewater and Carrington.

[40] The defendants' financial records which they resist disclosing, can really only relate to the remedies claimed by Mr Haig. Given the separation of these issues at trial from preliminary questions of liability, not to mention the need to determine limitations questions which may themselves potentially end the claims summarily, I do not propose to require the defendants to disclose those documents at this stage. If, following the Court's judgment on liability, these documents can then be shown to be relevant, the plaintiff's application may be renewed.

Delay

[41] As already noted, I very much regret the delay in issuing this judgment and the inconvenience of that to the parties. This has been a result of a combination of the extended exchanges of memoranda between the parties, my leave, and the pressure of other court business.

Progress

[42] The Registrar should now arrange a further telephone conference call with counsel to timetable the issues of limitations and liability to trial. If, as already noted, I am correct that the defendants' latest statement of defence does not address

the plaintiff's amended statement of claim, then this should be re-pleaded promptly to enable that progress to be made.

[43] One other matter for consideration at the forthcoming directions conference will be the offer to the parties of a judicial settlement conference. This should not necessarily delay the allocation of a fixture for trial but may allow for a settlement of the litigation otherwise than by judgment. A judicial settlement conference can only be convened with the agreement of all parties and the Court expects any such agreement to be given with a commitment to attempt to settle the case.

[44] Costs on these interlocutory applications are reserved.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Friday 20 January 2012