IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 168
WRC 8/09
WRC 19/05
WRC 17/04

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

Hearing:	On the papers (Application for orders directing conference of experts and submissions filed 30 August and 4 September 2013)
Counsel:	Mr Carruthers QC and Mr Fletcher, counsel for the plaintiff Mr Quigg, counsel for the defendant
Judgment:	5 September 2013

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] Because of other pressing commitments, the Court is dealing with the application before it on an urgent basis. Final confirmation was received only this morning from counsel that the matter could be dealt with on the papers. The substantive hearing of these long-standing proceedings is set to commence on 30 September 2013. By a consent order dated 20 May 2013,[1] the hearing is to proceed for an initial three and a half weeks and then, following an agreed adjournment, the hearing will continue without interruption until completion.

[1] [2013] NZEmpC 84.

[2] In an application dated 30 August 2013, the plaintiff sought an order requiring the experts for the parties to attend a conference of experts. The experts are named as Messrs Barry Jordan, David Vance, Wayne Kedzlie and Garry Simpson for the plaintiff and Messrs John Fisk and Wayne Findley for the defendant. The application also seeks orders directing that:

> 3. Before conferring, the experts exchange documents, financial reports, budgets, working papers and other material relied on by them in undertaking their analysis and reaching their conclusions. This exchange [is] to include all CD ROMs provided to them by Radio New Zealand Ltd in the disclosure process.
>
> 4. The experts arrange to confer at mutually convenient times to discuss and prepare a written joint witness statement.
>
> 5. The joint witness statement include a statement of:
>
> (i) the matters on which they agree upon, and
>
> (ii) the matters on which they do not agree.
>
> 6. The joint witness statement be prepared and filed in the Court no later than Friday 14 September 2013.
>
> 7. The plaintiff be awarded costs incurred in preparing this application and filing the application in the Court.

[3] The defendant, Radio New Zealand Ltd, opposes the making of the orders sought in the application and seeks costs in having to prepare its notice of opposition and deal with this application, "so close to the substantive hearing".

Grounds for application

[4] The grounds in support of the application have been fully set out in Mr Carruthers' memorandum dated 30 August 2013 and reliance is also made on an affidavit from Mr Garry Simpson, an expert auditor, dated 28 August 2013. Mr Simpson deposed that it was apparent to him from his examination of the experts' financial analysis that the conclusions reached by the experts for each party in relation to, "the significant financial issues in dispute in these proceedings were in serious conflict". Mr Simpson identified five matters which he considered contributed to the conflicting conclusions of the experts. He summarised them as follows:

- the review-material provided to and relied upon by the Plaintiff's experts in undertaking their financial analysis was not the same as the review-material provided to and relied upon by the Defendant's experts in undertaking their financial analysis;

- the forensic accounting methodologies and expert financial analysis employed and applied by the Plaintiff's experts in undertaking their financial analysis was not the same as the forensic accounting methodologies and expert financial analysis employed and applied by the Defendant's experts in undertaking their financial analysis;

- whenever possible the review-material provided to and relied upon by the Plaintiff's experts in undertaking their financial analysis was tested for document authenticity;

- the review-material provided to the Defendant's expert John Fisk and relied upon by him in undertaking his financial analysis was not tested for authenticity;

- the knowledge of the Plaintiff's experts about RNZ Division Reports, RNZ Division Budgets and RNZ Division restructuring in the period 1999/00 to 2003/04 was not the same as the knowledge of the Defendant's expert John Fisk about RNZ Division Reports, RNZ Division Budgets and RNZ Division restructuring in that period.

[5] Mr Simpson concluded:

19. The conflicting conclusions reached by the experts is a significant issue for the parties and the Court. If the experts are not given an opportunity to confer and address the explanations for their different and conflicting conclusions that I have identified above (and such further explanations as they may identify upon conferring), and to report to the Court, the parties and the Court will be required to commit substantial time and cost to hearing and testing the expert evidence of the parties and the Court will be required to consider and make a decision in respect of that expert evidence in particular in respect of the forensic accounting methodologies employed, the expert financial analysis undertaken, the review-material provided to the experts for review and the knowledge relied upon by them in undertaking their analysis.

20. It is more likely than not that a meeting of experts will enable them to prepare a report for the Court in which they identify those matters in issue in respect of which they agree, those matters in issue in respect of which they disagree (if any) and the reasons for the disagreement. Such a report more likely than not will substantially reduce the time the Court will require to hear and test evidence in respect of those matters in issue in respect of which they disagree (if any) with commensurate and substantial savings in costs to both the Court and the parties.

[6] The application is said to be made in reliance on s 189 of the Employment Relations Act 2000 (the Court's equity and good conscience jurisdiction); reg 6(2)(ii) of the Employment Court Regulations 2000 (empowering the Court to follow the High Court Rules affecting similar cases) and r 9.44 of the High Court Rules. Rule 9.44 of the High Court Rules provides:

> **9.44 Court may direct conference of expert witnesses**
>
> (1) The court may, on its own initiative or on the application of a party to a proceeding, direct expert witnesses to–
> (a) confer on specified matters:
> (b) confer in the absence of the legal advisers of the parties:
> (c) try to reach agreement on matters in issue in the proceeding:
> (d) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement:
> (e) prepare the joint witness statement without the assistance of the legal advisers of the parties.
>
> (2) The court must not give a direction under subclause (1)(b) or (e) unless the parties agree.
>
> (3) The court may, on its own initiative or on the application of a party to the proceeding,–
> (a) appoint an independent expert to convene and conduct the conference of expert witnesses:
> (b) give any directions for convening and conducting the conference the court thinks just.
>
> (4) The court may not appoint an independent expert or give a direction under subclause (3) unless the parties agree.
>
> (5) Subject to any subsequent order of the court as to costs, the court may determine the remuneration of an independent expert and the party by whom it must be paid.
>
> (6) The matters discussed at the conference of the expert witnesses must not be referred to at the hearing unless the parties by whom the expert witnesses have been engaged agree.
>
> (7) An independent expert appointed under subclause (3) may not give evidence at the hearing unless the parties agree.

[7] Counsel for the plaintiff referred to and relied upon the following statements made in recent High Court judgments in relation to r 9.44 of the High Court Rules:

> (i) .. there should be the facility for experts on all sides to be the subject of a r 9.44 conference so that the issues, where there is disagreement between the experts, are narrowed and can be dealt with on a more tightly focused basis.[2]
>
> (ii) Had there been a conference directed under r 9.44, the task ... would have been made much easier ...[3]

[2] *Xelocity Ltd v Bay Audiology Ltd* HC Auckland CIV-2009-404-1744, 18 June 2010 at [25].
[3] *Singh v Rutherford* [2013] NZHC 1276 at [49].

(iii) We consider that there would be real benefit in a one-day conference of experts preceding the hot tub procedure ... The advantage of such a panel conference can be that, as well as narrowing issues and, better still, achieving some agreement, the experts attain a better understanding of each other's position before appearing in Court;[4] and

(iv) ... a conference could well be advantageous. If the two experts giving evidence ... were to meet the scope of the dispute between them could be marked out with some precision and hopefully the issues that are not truly going to be in dispute at the trial would be cleared away and the parties may be assisted to reach a settlement.[5]

Grounds for opposition

[8] Counsel for the defendant, Mr Quigg, did not take issue with the commonsense statements quoted from the authorities relied on by the plaintiff but the thrust of the defendant's opposition to the application is threefold. First, a very similar application to the one currently before the Court was made by the plaintiff on 26 November 2012. On that occasion the plaintiff relied on a supporting affidavit from another of its expert witnesses, Mr Wayne Kedzlie. The defendant opposed that application and, in an order[6] dated 1 March 2013, the Court rejected the application ruling:

viii) The Court does not propose to appoint an independent expert or to require the experts to confer.

[9] As at the date of the Court's judgment of 1 March 2013, a firm fixture had been made for the hearing to commence on 4 June 2013. One of the principal reasons why the Court did not agree to the proposal was that it could place in jeopardy that long-standing fixture. The witness, Mr Kedzlie, had earlier deposed, in an affidavit dated 18 July 2011, that the preparation of a joint expert's report would take between three and six months to complete.

[10] As it was, one of the other directions contained in the order of 1 March 2013, a direction fixing security for costs, was appealed by the plaintiff to the Court of Appeal.[7] The appeal was dismissed but subsequent complications arose with various

[4] *Commerce Commission v Cards NZ Ltd (No 2)* (2009) 19 PRNZ 748 at [28]-[29].
[5] *Walker, Dick & Associates v Best Pacific Institution of Education Ltd* [2013] NZHC 378 at [23].
[6] WRC8/09, WRC19/05, WRC17/04, 1 March 2013 (Order to the Parties of Judge A D Ford).
[7] [2013] NZCA 108.

incidental applications filed by the plaintiff relating to the security for costs issue and the June 2013 fixture had to be vacated.

[11] Another ground of objection advanced by Mr Quigg is expressed in these terms:

> It is unrealistic to expect that the experts will be able to exchange documents, confer and file a joint witness statement by 14 September 2013. Despite this matter being set down to be heard on [30] May 2013 the Plaintiff has chosen to make this application four weeks before the substantive hearing commences. There is no new evidence to justify this latest application ...

[12] Finally, Mr Quigg submitted:

> The Defendant has been awaiting a hearing of these matters for an extraordinary length of time. The orders sought by the Plaintiff put in jeopardy the hearing set down for 30 September 2013.

Discussion

[13] Whilst the saving of Court time and other arguments advanced by the plaintiff in support of her application for a conference of experts are attractive and have immediate appeal, given the background to this litigation, which goes back to a personal grievance first raised by Ms Snowdon on 15 November 2002, it is quite unrealistic to expect all the experts to be able to get together and reach agreement on a joint witness statement prior to 30 September 2013.

[14] I have earlier made it clear that the fixture made for 30 September 2013 is a firm fixture. One of the reasons for this is that the Court was advised in the course of an interlocutory hearing that two of the defendant's senior management staff who are closely involved in the litigation will be retiring in December 2013. I am also mindful that back in 2011 Judge Travis allocated a firm fixture for a six-week hearing commencing on 1 August 2011 but at the eleventh hour, and against the strenuous opposition of the defendant, his Honour reluctantly had to vacate that fixture to allow the plaintiff time to recover from a medical condition.[8] Against that background, I am not prepared to jeopardise the existing fixture.

[8] [2011] NZEmpC 96.

[15] For the reasons stated, the plaintiff's application for an order directing a conference of experts is declined. Costs are reserved.

A D Ford
Judge

Judgment signed at 4.30 pm on 5 September 2013