IN THE EMPLOYMENT COURT
WELLINGTON

WC 12A/08
WRC 5/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ORAKEI GROUP (2007) LIMITED (FORMERLY PRP AUCKLAND LIMITED) Plaintiff
AND	HILTON DOHERTY Defendant

Hearing: 7 July 2008
(Heard at Wellington)

Appearances: Chris Patterson, Counsel for the Plaintiff
M F Quigg and Tim Sissons, Counsel for the Defendant

Judgment: 15 August 2008

JUDGMENT OF JUDGE C M SHAW

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[1] This case is about the identity of Mr Doherty's former employer. A company associated with the plaintiff has accepted that it employed him and is liable for redundancy and other payments arising from that employment but as it is in liquidation it cannot pay what is owed. Mr Doherty says that he was jointly employed by the plaintiff which should also be liable for the payment of these entitlements.

Background

[2] Mr Doherty and another grievant raised an employment relationship problem against the plaintiff, then named PRP Auckland Limited, and an associated company, 54 Cuba Street (2007) Limited. This went to the Employment Relations Authority

for investigation of their claims that they were owed redundancy money and other allowances by the two companies.

[3] Before the investigation meeting on 15 May 2007, 54 Cuba Street (2007) Limited accepted liability for the redundancy payments leaving other entitlements to be calculated. In spite of being represented at earlier meetings the plaintiff neither appeared nor was represented on 15 May although Mr Tony Kidd, a director of both companies, advised the Authority that the company could not afford the airfares to Wellington but that he was available by phone if needed. The Authority rejected that offer and proceeded in the plaintiff's absence.

[4] On the basis of the admissions by 54 Cuba Street (2007) Limited, the Authority in a determination dated 18 May 2007[1] ordered that it pay Mr Doherty $30,570.22 net redundancy pay plus tax as well as other payments, some to be calculated. Costs of $3,000 were awarded jointly to Mr Doherty and the other applicant.

[5] The question of whether the plaintiff in the present proceedings employed Mr Doherty jointly with 54 Cuba Street (2007) Limited was canvassed at that investigation meeting but not determined until 21 December 2007[2] when Mr Doherty's next claim against the plaintiff was investigated. Mr Kidd attended by phone from Auckland.

The Authority's determination

[6] In investigating whether the plaintiff was liable to pay the sums that 54 Cuba Street (2007) Limited had been ordered to pay to Mr Doherty in WA 78/07, the Authority analysed the evidence of its company structure and the way Mr Doherty had been employed. It concluded that there was sufficient evidence to support Mr Doherty in his claim that his employer had been PRP Auckland Limited, now Orakei Group (2007) Limited. As such it was ordered to pay the outstanding sums for which 54 Cuba Street (2007) Limited had accepted liability.

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[1] WA 78/07
[2] WA 177/07

[7] The Authority ordered Orakei Group (2007) Limited to pay Mr Doherty as follows:

1. $30,570.22 net in redundancy pay (and pay the tax in addition).
2. $1,380.27 reimbursing car allowance in lieu of notice.
3. $20,107.92 for an outstanding bonus payment.
4. $2,000 as contribution towards the costs of the investigation meeting including preparation.

[8] The plaintiff challenged that determination.

The challenge

[9] For the plaintiff, Mr Patterson submitted that the question for the Court is whether there had been any offer and acceptance leading to the formation of an employment agreement between the plaintiff and Mr Doherty. In the absence of a written agreement he submitted there is no evidence of a meeting of their minds to justify a finding that there was an employment relationship between them and the facts show that Mr Doherty was intended to be and was employed only by 54 Cuba Street (2007) Limited.

[10] Mr Quigg submitted on behalf of Mr Doherty that, as a matter of fact, the employment relationship was between Mr Doherty and both the plaintiff and 54 Cuba Street (2007) Limited as joint employers. He relied on *Muollo v Rotaru* [3] and some Canadian authorities. Mr Patterson did not address the concept of joint employers.

[11] As a second argument, Mr Quigg submitted that in equity and good conscience the Court may find that the plaintiff should be responsible for Mr Doherty's conditions of employment. He expressly disavowed the prospect of the Court lifting the corporate veil.

[3] [1995] 2 ERNZ 414 at 419

Principles in deciding identity of employer

[12] The onus is on the employee, on the balance of probabilities, to prove the identity of the employer at the outset of the employment. The Court must make an objective assessment of the evidence about the identity of the employer. In this case that objective assessment will cover a consideration of whether the plaintiff was a joint employer along with 54 Cuba Street (2007) Limited.

The facts

[13] Anthony Kidd is the sole director and shareholder of the plaintiff company which is based in Auckland. His involvement is both in his personal capacity and by way of an entity which he has some control over.

[14] The plaintiff company was incorporated in July 1999 under the name Axiom Advisory Limited. Today after several name changes it is known as Orakei Group (2007) Limited. For convenience I refer to it as the Auckland company.

[15] Mr Kidd is also a director of 54 Cuba Street (2007) Limited, a Wellington based company incorporated in June 2004 as Hansop Holdings. This company has also had a number of name changes and it will be referred to as the Wellington company.

[16] The appellation history of these two companies is as follows:

The Auckland company

15 July 1999	Incorporated as Axiom Advisory Limited
1 October 2004	Name change to Axiom Rolle PRP Valuation Services Limited
22 September 2006	Name change to PRP Auckland Limited
3 April 2007	Name change to Orakei Group Limited
19 April 2007	Name change to Orakei Group (2007) Limited

[17] For completeness, another company search shows that on 27 March 2007 a company called Wairau Road No 94 Limited was registered. On 3 April 2007 it changed its name to PRP Auckland Limited although it has a different company number from that of the plaintiff.

The Wellington company

10 June 2004	Incorporated as Hansop Holdings Limited
10 September 2004	Name change to Rolle New Zealand Limited
1 October 2004	Name change to Axiom Rolle PRP Valuation Services (Wgtn) Limited
22 September 2006	Name change to PRP Wellington Limited
8 March 2007	Name change to 54 Cuba Street Limited
30 March 2007	Name change to 54 Cuba Street (2007) Limited Since 1 June 2007 this company has been in liquidation.

[18] Both of these entities have been, or continue to provide, property valuations and real estate services**.**

[19] On 10 September 2004 Hansop Holdings (or its nominee) purchased an insolvent valuation company called Rolle Limited trading as Rolle Knight Frank and on the same day changed its name to Rolle (New Zealand) Limited. The purchase was of the Rolle business in Wellington and Auckland. All leases of plant and numerous assets of Rolle in both Wellington and Auckland were included in the sale. The agreement provided that all current staff of Rolle Limited would have their existing employment contracts assigned to the purchaser. Although this assignment was briefly questioned by Mr Quigg in cross-examination of Mr Kidd, its validity was not otherwise challenged or explored.

[20] Mr Doherty is a senior registered valuer who had worked for Rolle Limited and its predecessor company since 1986. For a brief time he held a small shareholding in the company but this ended in 2001 and he had no involvement in the sale of Rolle Limited.

[21] On 17 September 2004 Mr Kidd sent a memo on the letterhead of Axiom Advisory Limited of Mt Eden, Auckland to "*All staff, ex Rolle Knight Frank*" which included this statement:

> *To reiterate, all essential terms of your employment contracts will be carried over to the new company. This includes but is not limited to such things as holiday and sick leave, salary and incentives.*

[22] Apart from the letterhead, the memo was silent as to the identity of the "*new company*". The memo also said that new contracts would be forwarded to the affected staff over the next couple of weeks. Mr Doherty did not receive a new

agreement and his only concluded employment agreement remained his Rolle Limited agreement dated 14 November 2001. Having never seen the Agreement for Sale and Purchase before it was shown to him in Court, Mr Doherty was not aware of Hansop Holdings Limited, nor, he said, of any distinction between the Auckland and Wellington companies after the sale.

[23] Mr Doherty was based and did most of his work in Wellington although he did one or two special projects for clients with a national presence in other parts of the country. The Wellington office was then managed by Sarah Todd, a director and shareholder of the Wellington company, by then known as PRP Wellington Limited. She had been involved in the purchase of Rolle Limited with her co-director, Mr Kidd. After Ms Todd became pregnant in 2004 she was not much in the office. She came in 2 to 3 days a week, sometimes only for a few hours to handle its day to day running. When matters such as the ongoing running of the company or redundancy arose, Mr Kidd became involved.

[24] In 2005 Ms Todd presented Mr Doherty with a draft individual employment agreement in which the parties were described as Axiom Rolle PRP Valuation Services Limited (the employer) and Hilton Doherty (the employee). It included the following provisions:

> *Clause 4.1* *The Employee will normally be based in the Employer's Wellington office, however, the Employee agrees that the Employer may require the Employee to work from any of the Employer's other offices or travel to various other locations within New Zealand from time to time.*
>
> *Clause 2.4* *Previous service with Rolle Associates Limited and Knight Frank (NZ) Limited shall be deemed to be service with Axiom Rolle RPP Valuation Services Limited.*

[25] The agreement stated at clause 26 that the employer operates a national computer network and clause 11.1 confirmed part of what had been offered by Mr Kidd on 17 September 2004:

> *Your annual leave accrued from your employment with Rolle Knight Frank will be transferred over to Axiom Rolle PRP.*

[26] Schedule A of the draft agreement conferred the position title of "*Senior Land & Building Valuer*" reporting to "*Wellington L & B Manager*".

[27] It was not until July 2006 that Ms Todd sent Mr Robbie Franco, the CEO of the Auckland company, an e-mail telling him that Mr Doherty had responded to the draft agreement and wanted to make some changes to his existing contract. Some of the language used in that e-mail which was read to the Court by Mr Doherty is significant.

> *I have received finally a response from Hilton to the employment contract we gave to him last year.*
>
> *… my understanding is that we are unable to unilaterally change his contract and as we have advised we were taking over the contracts when we purchased the business, I suspect we cannot make these changes.*
>
> *Let's talk on Tuesday next week as it will be good to get this signed and concluded.*

[28] Ms Todd was not called to give evidence about what she meant by those statements but an objective interpretation of them in the context of the earlier mentioned correspondence and the draft agreement leads me to conclude that she was conducting negotiations with Mr Doherty on behalf of not just the Wellington company but of the Auckland company then known as Axiom Rolle PRP Valuation Services Limited as well.

[29] The company named in the draft agreement as the employer is the same (although with a name change) company under whose letterhead Mr Kidd told the Rolle staff that their employment contracts would be carried over to in September 2004.

[30] Clause 4.1 shows that the valuation business was being run out of a number of offices operated by the Auckland company.

[31] Mr Kidd said in evidence that he had not been aware that the draft individual employment agreement Ms Todd gave Mr Doherty in 2005 named Axiom Rolle PRP Valuation Services Limited as the employer until the investigation meeting in the ERA. However the fact is that the document did identify that company as the employer and this was not changed either by Mr Doherty when he gave his suggested changes to the draft or by Ms Todd when she presented her detailed report on the changes suggested by Mr Doherty to Mr Franco, or indeed by Mr Franco. Mr Doherty did amend references to Rolle Associates and Knight Frank by adding other

corporate names which strongly suggests not only that he closely read the draft agreement but also that he recognised the importance of correctly labelling parties and other entities.

[32] Next, Ms Todd's use of the inclusive word "*we*" when communicating with the Auckland company's CEO strongly suggests at the least that Mr Doherty's employment was of as much interest to the Auckland company as to the Wellington company. It is also consistent with other evidence of the operational control exerted by the Auckland company over the Wellington office.

[33] Apart from the involvement of Mr Kidd and Mr Franco already described, all accounting for the Wellington company was done by the Auckland company's accountant, Linda Doney**.** Mr Kidd maintained in evidence that the work done by Ms Doney and Mr Franco for the Wellington company was done under a contract of services. He was uncertain if there was a written contract but said there were certainly verbal discussions with Sarah Todd about such an arrangement. He could not say on oath that money was transferred between the two entities to pay for those services. He could not recall. It was put to him that he must know if monies were being paid by the Wellington company to the Auckland company for provision of the services of Linda Doney and Robbie Franco. He said that he would have to double-check that but could not confirm it or not.

[34] In the absence of any written evidence of a formal arrangement between the Wellington company and the Auckland company for the provision of services by way of a contract and in light of Mr Kidd's uncertain and indeed evasive answers to questions on this subject I find on the balance of probabilities that there was no such contract.

[35] Mr Doherty's bank statements show that his salary was first paid by "*Axiom Rolle PR*" particularised as "*ARPRP salary*." From October 2004 to December 2004 the payer is described as Axiom Rolle Advisory – an entity Mr Kidd was not aware of but thought it may have been a shortened version of a shortened name. From about October 2006 salary and holiday pay entitlements were made in the name of

Axiom Rolle PRP (Wellington) and from December 2006 as PRP Wellington Limited.

[36] In spite of the changes appearing on his bank statements, Mr Doherty did not question the change in payers and took little notice of them. I note that the 2006 changes were not accompanied by any formal notification or agreement about a change in the identity of his employer. He received no pay slips which might have clarified the matter.

[37] Even if, as asserted by Mr Kidd, all of the salary payments to Mr Doherty were made out of a Wellington company bank account I find they were initiated by the Auckland company through Ms Doney. It is also quite clear that apart from day to day relatively mundane management decisions, the entity which set and met obligations under Mr Doherty's terms of employment was the Auckland company. I find that this company:

1. Assumed the role of employer at the outset of Mr Doherty's employment even though Rolle Limited had been purchased by Hansop Limited.
2. Represented itself as his employer by offering a new draft employment agreement in its name in 2005.
3. Conducted the major accounting functions which resulted in Mr Doherty being paid his salary and holiday entitlements throughout his employment.

[38] It was alleged by the plaintiff that Mr Doherty believed that he was employed by the Wellington company. Mr Doherty's evidence was that he thought the overall control of the operations in Wellington and Auckland was in the hands of Mr Franco who ran it as a total company.

[39] For example, in July 2006, an issue arose which required the payment of $5,000 to the Valuers Registration Board by Mr Doherty. Mr Franco sent him an e-mail agreeing that Axiom Rolle PRP would pay the sum for him. In return Mr Doherty had to acknowledge that:

3. *… under the terms of your employment agreement, ARPRP does not legally have to pay the $5,000 penalty/contribution costs, and that such payment represents a gesture of goodwill on Axiom's behalf to further promote our positive employment relationship.*

4. *You shall e-mail all the senior valuers in Auckland and Wellington, as well as Tony, Sarah and myself, advising that this issue relating to the $5,000 penalty/contribution costs has been satisfactorily resolved and that you appreciate the steps that we have taken to support you.*

[40] It is apparent that at that date no distinction between the Wellington and Auckland companies was being made such as to alert Mr Doherty to the fact that he was only employed by the Wellington company.

[41] Another example is the format of the valuation reports prepared by Mr Doherty. Until September 2006 there was little differentiation in format between the Wellington and the Auckland offices. Mr Doherty exhibited valuations which show that during 2005/2006 these valuation reports were signed off under the title Axiom Rolle PRP. The business generic e-mail address on the reports was *axiomrolleprp.co.nz*.

[42] Under cross-examination Mr Doherty accepted that on occasions valuation reports did identify Axiom Rolle PRP Valuation Services (Wgtn) Limited as the source of the report but this was a standard format which he had no ability to change. This situation changed later in 2006 when the Wellington company began experiencing difficulties and PRP (Auckland) and PRP (Wellington) came into existence; however, until the Wellington operation collapsed Mr Kidd did not discuss with him who his employer actually was.

[43] When in 2007 the Wellington operation started to go under financially, Mr Doherty was offered a position by Mr Kidd in Auckland provided that he waived all rights to holiday pay and notice periods that were allowed under the redundancy provisions of his previous employment.

[44] Mr Kidd was given several opportunities to explain why, if the Auckland company was at such arm's length, it would have any interest in protecting the Wellington company from its liabilities to Mr Doherty. Mr Kidd was unable or

unwilling to provide a coherent explanation apart from repeating that there was no relationship between the two companies. On the very best interpretation for the plaintiff its requirement for Mr Doherty to waive existing rights could be read as no more than a conclusive statement that it was not going to be liable for any of the redundancy payment obligations of the Wellington company. However, if there had been complete separation between the two operations as asserted by Mr Kidd it is hard to see the rationale for including that statement.

Conclusion on facts

[45] I accept Mr Quigg's submission that in the end what is important is who the employer was at the start of Mr Doherty's employment and whether that employer was ever formally changed by mutual agreement up until Mr Doherty was made redundant.

[46] I find that when Hansop Holdings originally purchased Rolle Limited all the employees were offered employment by Axiom Advisory Ltd – the Auckland company. It may well have been Mr Kidd's intention that the employees would then be offered employment with either the Auckland company or the Wellington company, but whatever the intention and whatever happened to other employees this did not occur with Mr Doherty. He remained on the existing Rolle Limited employment agreement without alteration until he was made redundant.

[47] In 2006, when the Wellington company was starting to have financial difficulties, attempts were made to quarantine its operations from that of the Auckland company. This was evidenced in two ways, the changes to the identity of the payer of Mr Doherty's salary from October 2006 and the changes to the valuation documentation at about the same time. However, whatever the intention of the Auckland company, there is no evidence that it advised Mr Doherty that his employer was different from the one who employed him in the first place and certainly no evidence of an employment agreement between him and the Wellington company which would have conclusively settled the matter.

Joint employers

[48] While Mr Doherty was employed to work in Wellington the operation and management of the Wellington company was closely intertwined with that of the Auckland company. The Wellington company however has accepted responsibility for obligations arising out of Mr Doherty's employment and subsequent redundancy. Whether the Auckland company is liable in respect of those same responsibilities depends on whether two companies can be held to be joint employers.

[49] Section 5 of the Employment Relations Act 2000 ("the Act") defines an employer as:

> … *a person employing any employee or employees* …

[50] Section 6 defines an employee as:

> … *any person of any age employed by an employer to do any work … under a contract of service* …

[51] Although these sections suggest that the Act contemplates that there will be only one employer, s33 of the Interpretation Act 1999 provides that words in the singular include the plural and vice versa.

[52] In *Conference of the Methodist Church of New Zealand v Gray* [4] Thomas J held in relation to the predecessor of s33 (s4 of the Acts Interpretation Act 1924), that this rule applies unless it is inconsistent with the context or where there are words to exclude or restrict the meaning of the statute being interpreted.

[53] In the absence of any reason not to apply the principle in this case I find that it is within the contemplation of the Act that a person may have more than one employer.

[54] In *Muollo v Rotaru* Chief Judge Goddard confirmed that, in spite of the definition of "*employer*" referring to "*a person*" in s2 of the Employment Contracts Act 1991 an employer can be a partnership or a joint venture.

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[4] [1996] 2 NZLR 554 at 580 (CA)

[55] This decision was in line with that of Chief Judge Horn who, in 1988, had held that two closely associated companies employed an employee[5]. He said:

> *I see nothing in principle to prevent two people or firms joining together to employ one man for their respective purposes. And the more so when those purposes are closely associated.*

[56] There are a number of authorities from other jurisdictions which have adopted the concept of joint employer.[6] [7] [8] [9] These cases establish that joint employment is possible but what is required is more than two unrelated employers. There must be a sufficient degree of a relationship between the legal entities. In judging that relationship the Court will look for the element of common control.

[57] The Court of Appeal for Ontario in *Downtown Eatery (1993) Ltd v Ontario*[10] cited with approval the Court at first instance in *Sinclair v Dover Engineering Services Ltd*[11] where the trial judge held that:

> *The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations…*
>
> *As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.*

Decision

[58] Applying the principles relating to joint employment to the evidence, I am satisfied that the plaintiff company and the Wellington company were acting in

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[5] *Inspector of Awards & Agreements v Pacific Helmets (NZ) Ltd (in Receivership) and Wholesale Cycles (South Pacific) Ltd* [1988] NZILR 411
[6] *Roberts' Fish Farm v Spencer* 153 So.2d 718 (USA)
[7] *Sinclair v Dover Engineering Services Ltd* (1988), 49 D.L.R. (4th) 297(Canada)
[8] *Hawley v Luminar Leisure Ltd & Ors* [2006] EWCA Civ 18(UK)
[9] *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13(Australia)
[10] (2001), 200 D.L.R. (4th) 289
[11] (1987), 11 B.C.L.R. (2d) 176

concert in their employment of Mr Doherty. At the outset of his employment he was told and had no reason to doubt that he was being employed by the Auckland company, that was reinforced by the offering of an employment agreement from the same company, and throughout his employment there was a merging of both managerial and operational control over his activities. Over the course of his employment the establishment of the separate companies saw each assuming responsibility for whatever part of his employment that suited the circumstances of either company at the time. Throughout, Mr Kidd was the source of common control over each company at least insofar as it affected Mr Doherty's employment.

[59] For these reasons I find that the plaintiff company was the joint employer along with 54 Cuba Street (2007) Limited and that joint employment persisted throughout Mr Doherty's employment. The plaintiff is therefore liable for the payment of the amounts owed to Mr Doherty by 54 Cuba Street (2007) Limited as identified by the Authority.

Costs

[60] These are reserved for submissions. The defendant is to file a memorandum within 28 days of this judgment. The plaintiff has 14 days to reply after that.

[61] The Court is holding $6,000 as the plaintiff's security for costs. $2,000 of this is on account of costs awarded by the Employment Relations Authority. Counsel are requested to address the disposition of this money in their costs submissions.

C M Shaw
JUDGE

Judgment signed at 3.00pm on 15 August 2008