Employment Court of New Zealand

Haig v Edgewater Developers Limited [2012] NZEmpC 174 (5 October 2012)

Last Updated: 18 October 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 174

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: 5 October 2012 (by telephone conference) (Heard at Auckland)

Counsel: Hayley MacDonald, counsel for plaintiff

Josh McBride, counsel for defendants

Judgment: 5 October 2012

INTERLOCUTORY JUDGMENT NO 3 OF CHIEF JUDGE G L COLGAN

[1] This interlocutory judgment is necessary because of a disagreement between counsel about the nature of the preliminary hearing in this litigation set down for 16,

17 and 18 October 2012, now less than two weeks hence.

[2] The defendants say that this hearing should be to determine both questions of limitations raised by the pleadings and the separate hearing into their liability which

latter issue was directed by the Court's first interlocutory judgment issued on 20

January 2012.1

[3] The plaintiff says, in reliance on the Court's second interlocutory judgment of

6 June 2012,2 that the preliminary hearing later this month is and should be confined to the limitations questions identified by the pleadings.

[4] It is important that the parties have a prompt answer, not only because witnesses are coming from the United States of America for the hearing but also because the Court will not be able to deal with these questions further until the day before the hearing is scheduled to commence.

[5] In these circumstances I confirm my ruling given to counsel at the end of the telephone conference call at which these questions were canvassed extensively. The plaintiff's interpretation of the earlier interlocutory judgments is correct and that the October 2012 hearing will be confined to limitations questions.

[6] Following the first interlocutory hearing in this proceeding in September

2010 but before the Court issued its first interlocutory judgment on 20 January 2012, the defendants filed and served their second amended statement of claim and counterclaim. The counterclaim against the plaintiff, Mr Haig, alleges breaches by him of his contract. Mr Haig, in response, asserts that this counterclaim is out of time and, therefore, cannot be sustained. This is one of the limitations questions which needs to be decided. It was not, however, addressed expressly in the Court's first interlocutory judgment of 20 January 2012 because it was not an issue at the earlier hearing from which that judgment was delivered.

[7] At [31]-[32] of the 20 January 2012 interlocutory judgment, the Court dealt with, and allowed, a separate trial on issues of liability on the plaintiff's claim against the defendants. That part of the proceeding also includes a limitation

question. That is whether Mr Haig brought his proceeding within the time allowed

1 [2012] NZEmpC 4.

2 [2012] NZEmpC 87.

by law to do so. At that point, however, there was no suggestion that there should be a separate preliminary hearing on that single liability question.

[8] The matter was back before the Court on 6 June 2012 on an application by the defendants to rescind one of the orders made in the 20 January 2012 judgment about letters of request. Also at issue in the Chambers hearing on 6 June 2012 was an application by the plaintiff to explore the possibility of settlement of the proceedings at a judicial settlement conference. That was eventually arranged and took place last month but unsuccessfully.

[9] The third matter dealt with on 6 June 2012 is recorded at [6] and following of the interlocutory judgment issued after that hearing on the same date, the interpretation of which is at the heart of today's matters. I therefore set out again the relevant paragraphs of that second interlocutory judgment:

[6] The third matter dealt with at today's conference with counsel is the nature of the next hearing. Although Mr McBride has submitted that this should deal, as a preliminary question, with the identity and provenance of the shares which Mr Haig may have agreed to receive, and that such a preliminary hearing will necessarily encompass arguments on limitations that the defendants raise, Mr Peters for the plaintiff opposes this course. He says that the next step in the proceeding ought to be a preliminary hearing of all limitations questions so that the parties know precisely the issues on which they will go to trial on matters of liability.

[7] Mr McBride says, in reply, that the Court should not determine the limitations question raised by the defendants' counterclaim against Mr Haig because this will turn on the knowledge of the relevant defendant of the extent of Mr Haig's alleged wrongdoing which is said to have amounted to a breach by him of his contract of employment. Mr McBride submits that this will require the Court to hear evidence on that issue which will not be able to be determined on the pleadings alone. In these circumstances Mr McBride says that the preferable course is to determine, as a preliminary question, whether the shares claimed by Mr Haig are, as the defendants say, shares in US companies which are not parties to the proceedings and which are, in any event, known to be insolvent.

[8] There is always a trade-off in such situations between saving or even eliminating trial time by pre-determining limitations issues and, potentially, exacerbating that trial time in effect. Such decisions inevitably require a degree of speculation and uncertainty.

[9] On balance, I consider that the most just and expeditious course will be to set down as preliminary issues, but only after a judicial settlement conference (if there is to be one), all limitations issues, even if these may require a degree of tightly contained relevant evidence. This will not

contradict the directions I gave in the judgment of 20 January 2012 at [31] and [32] for a separate trial on questions of liability (assuming that these exist after limitations questions are determined) and which will no doubt focus on the share identity question highlighted by the defendants.

[10] The Court is able to deal with those limitations arguments at a preliminary hearing on 15 October 2012 which should

allow for a judicial settlement conference about a month before that date. Directions to this hearing will be given once the suitability of the date is confirmed with counsel.

[10] One of the factors in declining to conduct a broader hearing later this month than was allowed by those foregoing passages, is the lateness of the defendants' approach to the Court on the question. I have to say, with respect, that the directions given on 6 June 2012 appear clear on their face and if there had been any confusion about them, I would have expected that this would have been raised with the Court earlier than a matter of only about two weeks before the hearing.

[11] Primarily, however, I have not been persuaded by Mr McBride's comprehensive and eloquent submissions that a different course should be taken to that which I directed now more than four months ago and on which the plaintiff and his counsel have relied. Included in that is the advice of the plaintiff 's counsel that they have determined not to bring to New Zealand from the United States of America one witness whom it is not proposed to call on limitation questions but will give evidence on matters of liability. It would be unjust in this respect also to now expand the nature and scope of the hearing later this month in these circumstances.

[12] Limitation questions in respect of the plaintiff's claim against the defendants will turn essentially on what Mr Haig knew or ought reasonably to have known at a particular point in time, as Mr McBride conceded. The question of the defendants' liability to the plaintiff will, however, turn on the quality of that knowledge (or presumed knowledge) but that is separable from the question of the state or nature of the plaintiff's knowledge at the relevant time which goes to limitation questions but not (at least necessarily) liability.

[13] I am still not persuaded that limitations questions should not be dealt with discretely, at a preliminary hearing, so that the substantive claims that all of the

parties face are defined before the merits of them are entered into at trial, albeit at a split trial on questions of liability first.

[14] It is also relevant to these questions that if the preliminary hearing later this month is to include questions of the defendants' liability to the plaintiff, as the defendants propose, more than the three days allocated and agreed to by counsel will be required. That is the only time available later this month and has been settled with counsel and the Registrar for some time. That is an especially important consideration where parties and witnesses are travelling to New Zealand for the hearing.

[15] For these reasons I am not prepared to either change the directions given in the second interlocutory judgment on 6 June 2012, or to interpret those directions in a way that favours the defendants' wish to include questions of their liability, contrary to the plaintiff 's interpretation of those directions.

[16] I simply record, as Mr McBride asked at the conclusion of today's hearing, that the defendants will, at the October 2012 hearing, wish to advance evidence going to a factual inquiry into Mr Haig's knowledge about his claims in the period from August 1998 to July 1999. Mr McBride submits that this will necessarily establish the plaintiff's knowledge of the share options from 1996. In doing so, the defendants will rely on the witness statement of Paul Knox Kelly filed on 2 October

2012 in accordance with the Court's timetable. This is not to determine that objection to this course cannot be taken by the plaintiff. If it is, the relevance and admissibility of that intended evidence will have to be determined either immediately before the hearing beginning on 16 October 2012 or during its course.

[17] The defendants having been unsuccessful at today's hearing, the plaintiff is

entitled to an order for his costs in relation to it but I reserve the amount of such order for later determination.

Judgment signed at 2.45 pm on Friday 5 October 2012

GL Colgan
Chief Judge