Employment Court of New Zealand

O'Hagan v Waitomo Adventures Limited [2014] NZEmpC 227 (12 December 2014)

Last Updated: 17 December 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 227

ARC 35/14

IN THE MATTER OF	an application to set aside judgments
AND IN THE MATTER	of an application to strike out proceedings and for security for costs
BETWEEN	BRENT O'HAGAN Plaintiff
AND	WAITOMO ADVENTURES LIMITED Defendant

Hearing:	3 November 2014 (Heard at Hamilton)
Appearances:	B O'Hagan, in person T Braun and M Brady, counsel for defendant
Judgment:	12 December 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Mr O'Hagan was employed by Waitomo Adventures Limited (WAL). He departed from the company in 2009. He subsequently claimed, amongst other things, that he had been constructively dismissed. The Employment Relations Authority (the Authority) dismissed that aspect of the grievance and awarded costs

of $3,500 in WAL's favour.1 Mr O'Hagan challenged the Authority's determination

on a de novo basis. The claim of constructive dismissal was rejected, and costs and disbursements totalling $72,179.77 were awarded against Mr O'Hagan.2 Mr O'Hagan has applied for the Court's substantive and costs judgments to be set aside. That application is opposed by WAL. It has applied for orders striking out the

proceeding and, alternatively, orders for security for costs and/or a stay.

1 *O'Hagan v Waitomo Adventures Ltd* ERA Auckland AA512/10, 15 December 2010; and *O'Hagan v*

Waitomo Adventures Ltd [2011] NZERA Auckland 111.

2 *O'Hagan v Waitomo Adventures Ltd* [2012] NZEmpC 161 [Substantive EC judgment]; and

O'Hagan v Waitomo Adventures Ltd [2013] NZEmpC 58, [2013] ERNZ 124.

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[2] It is convenient to deal with the strike out application first.

Strike out application

[3] Mr O'Hagan's statement of claim seeking orders setting aside the Court's judgments is based on an allegation that they were obtained by fraud. The claim as pleaded alleges that Mr Andreef, director and shareholder of WAL, gave perjured evidence at the hearing in the Employment Court. Mr O'Hagan further alleges in an affidavit filed in support of his claim that WAL's counsel at the Employment Court hearing misled the Court (because he knew, or ought to have known, that Mr Andreef was giving false evidence and failed to take steps in relation to it) and criticises various other lawyers who have been involved in the proceedings and an expert witness who gave evidence. Mr O'Hagan also seeks to rely on what is said to be "fresh evidence" in support of his claim. I pause to note that Mr O'Hagan has pursued a number of complaints with various entities, including the Police and the Law Society, but it is apparent that no further action has been taken in relation to them.

[4] It is well accepted that the Employment Court may strike out proceedings. Because no procedure is set out within the Employment Relations Act 2000 (the Act) or the Employment Court Regulations 2000 (the Regulations), the application is to be dealt with in accordance with the High Court Rules.3 Rule 15.1(1)(a) provides that the Court may dismiss a proceeding if it discloses no reasonably arguable cause of action. It is this ground that the defendant relies on.

[5] The general approach can be summarised as follows. Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation. The cause of action must be clearly untenable. It is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed. The jurisdiction is to be exercised

sparingly, and only in clear cases.4

3 Employment Court Regulations 2000, reg 6(2)(a)(ii).

4 *Attorney-General v Prince* [1997] NZCA 349; [1998] 1 NZLR 262 (CA) at 267.

[6] Mr O'Hagan's claim is brought as a separate proceeding, based it seems on an implied power to set aside a judgment obtained by fraud. No issue has been taken by the defendant with the way in which the claim is being advanced, although it is notable that cl 5 of sch 3 to the Act makes express provision for applications for rehearing. Clause 5(2) provides that a rehearing may not be granted on an application made more than 28 days after the decision unless the Court is satisfied that it could not reasonably have been made sooner. Mr O'Hagan has not advanced an application for rehearing and the application to set aside was filed in this Court some 20 months after the Court's substantive judgment was delivered. In the intervening period Mr O'Hagan had however taken steps to set aside the judgment in

the High Court – an application which was dismissed for want of jurisdiction.5

[7] It is arguable that any implied power to set aside is displaced by the express statutory power to rehear, and that a litigant is obliged to bring an application for rehearing in the manner provided for under the Act and the Regulations. If that is so (and it has not been advanced as a ground of strike out) the prescribed timeframe for bringing such an application may present difficulties for Mr O'Hagan.6 More generally, an application for rehearing based on an allegation that judgment has been

obtained by fraud will be considered having regard to the same sort of factors applying to an application to set aside on the same grounds.

[8] Dealing with the claim as pleaded, and the strike out application as advanced by the defendant, it is common ground that a judgment obtained by fraud may be set aside. However, such a step is reserved for rare and limited cases, where the facts can be strictly proved.7 A lack of frankness does not suffice. These stringent requirements are relevant to the merits assessment that must be undertaken in determining the defendant's strike out application, and are also relevant to the way in

which the facts as pleaded are to be viewed.

5 *O'Hagan v Waitomo Adventures Ltd* [2014] NZHC 905.

6 A Practice Direction of the Court provides that no application for leave to bring an application out of time is required and that, rather, the timeliness or otherwise of the application is to be considered as part of the application itself: *Practice Direction* [2005] ERNZ 60 at [12].

7 *The Ampthill Peerage* [1977] AC 547 (HL) at 569.

[9] As Mr Braun (counsel for WAL on the current application) submits, before an action alleging fraud on the ground of perjury can be successful, there must be evidence newly discovered since the trial. When the alleged fraud consists of perjury, as in the present case, the evidence must be so strong that it would reasonably be expected to be decisive at a rehearing, and if unanswered must have that result. Generally, the plaintiff must submit probative affidavit evidence verifying the critical pleaded facts relied on in the proceeding and has the onus of

establishing that the new evidence is such as to justify a new trial.8

Does the statement of claim disclose a reasonably arguable cause of action?

[10] Pivotal to Mr O'Hagan's claims of perjury is Mr Andreef 's evidence given in Court as to access to a reservations computer and spreadsheet (the EOM summary). It is helpful to set out the allegations in the statement of claim at this juncture:

5. A material issue in the proceedings was whether the [Defendant's] director (Mr Andreef) had opportunity to reconstruct the reconciliations to disguise the removal of cash from the company before the plaintiff received the monthly reconciliations.

6. With knowledge the evidence was false and contradicted his previous sworn evidence in the Employment Relations Authority in particular that he had access to the reconciliations at all material times, Mr Andreef consciously and deliberately presented evidence to the Employment Court that he had no access or opportunity to alter the End of Month ("EOM") figures at the material time.

7. The judgment was therefore obtained by fraud: Particulars

a) In the Employment Relations Authority the [Defendant's] director gave

evidence that:

"The Reservations Manager has total responsibility for the cash that is placed into the safe each night and balancing the cash. From time to time I have accessed the reservations computer. I should point out that the Office Manager/Reservations Manager does not have her own computer and never has. I access the computer from time to time to check on the Company's progress and its performance. There is no basis whatsoever for Mr O'Hagan to claim that I had accessed the computer to tamper with any of the cash takings."

b) Having heard further oral evidence the Determination at paragraph 15 records: "Normally Ms Hunt emailed the information EOM report to Mr Andreef and then to Mr O'Hagan. Mr O'Hagan attached a sinister

8 See *Shannon v Shannon* [2005] NZCA 83; (2005) 17 PRNZ 587 (CA).

significance to this but there is nothing untoward about the director of the company wanting to check the material before it was released to Mr O'Hagan'.

c) In his evidence in the Employment Court, (para 10.28.1 page 17) Mr

Andreef stated under oath:

"I have no access to the EOM report until it was released to me. It was

released to me at the same time it was received by Mr O'Hagan."

8. The [Plaintiff's] case theory in the Employment Court included the [Defendant's] director having the opportunity to remove cash and alter the EOM reconciliations before the plaintiff saw them.

9. The plaintiff provided the Employment Court evidence including screenshots showing actual cash received and which were greater than the EOM reported amount. This evidence became irrelevant once Mr Andreef gave the evidence he received the EOM report simultaneously with the plaintiff.

[Italics in original document]

[11] Issues relating to access to computer records and the way in which the EOM report was dealt with were put to Mr Andreef during the course of the Employment Court hearing. As Mr O'Hagan alleges in the statement of claim, Mr Andreef did say at one point during evidence-in-chief that he had no access to the EOM report until it was released to him and that it was released to him at the same time it was received by Mr O'Hagan. However, he also gave further evidence-in-chief :

Q. And I'm talking about your statement, it was released to me at the same time it was released to Mr O'Hagan. In other words did you know when it was released to Mr O'Hagan, is the question I putting to you.

A. No, I didn't know exactly when it was released, it was only an

approximate time that was given to both of us. So there would be some days when I would get it first and some days when he would get it first, especially if I was away. In either case I don't see that as a significant point because the information was pass-worded by the reservations manager until it was passed on to both of us.

Q. Well the evidence was given [by Mr O'Hagan] this morning that it was released to you for checking. What do you, could you throw some light on that.

A. Well I'd certainly look at it because I'm interested in the progress of the

company.

Q. But would you look at it with a view to altering the report?

A. Well if I had a query about anything I would have to refer that back to

the reservations manager. So I couldn't alter the report.

[12] Mr Andreef was later cross-examined on his evidence relating to the timing of the release of the EOM report by the Reservations Manager (Mrs Hunt) and on the extent to which he had accessed the reservations computer. He confirmed that he had limited access but said that he could not alter the reports as they were subject to password protection. His evidence relating to password protection was tested in cross-examination. He rejected the proposition put to him by counsel for Mr O'Hagan that it would not make business

sense for only one person to have a password, saying:

A. I think it is a perfectly sensible answer because Mrs Hunt had been with the company for many years. She is a much trusted employee. And she was responsible for the integrity of that data. If there had been a query and it had been looked at in a timely way we could have recovered the summary she was building from the daily sheets.

Q. Have you previously said that you accessed the computer from time to time to check – this is the reservations computer – I accessed the computer from time to time to check on the company's progress and its performance? **A.** Okay so I just told you that from time to time I might be called upon to simply help out at the desk and when I'm there I'd look and see "Ok so that's what we did yesterday" and so on. But – it gives me a feeling for how the trips are flowing, what sort of people are coming through, lots of little things that keep me in touch with the grass roots or the coal face.

Q. So you would have access to the 8-day summaries wouldn't you?

A. Yes.

Q. Did you ever enter data into those?

A. Um if I made a sale I could do yes.

Q. So you knew how that worked didn't you?

A. Yes. Although as I just said – it was a long time ago that I stopped working on the desk on a daily basis. And systems have moved on a little bit

so I'd be reluctant to do that at the best of times. So if I did do something

like that it would be checked by, not necessarily the reservations manager but the person who was principally in control of that desk that day.

[13] In the Authority, Mr Andreef said that Mrs Hunt had responsibility for cash balancing and accepted that he had access to the computer from time to time. Both of these points emerged in evidence in the Court, including under cross-examination. It is correct, as Mr O'Hagan points out, that the evidence given (as pleaded) was not identical in relation to the timing when both he and Mr O'Hagan received the EOM report. In the Authority Mr Andreef said that Mrs Hunt normally emailed the report to Mr Andreef and then to Mr O'Hagan; in the Court he expanded on this aspect of his evidence, and said that the timing depended on whether Mr O'Hagan was in the

office or not. However, in both fora he firmly rejected the key proposition that he had altered the company's records. These points were traversed in cross- examination, including by reference to Mr Andreef's brief of evidence filed in the Authority and his evidence before the Court that the records were password protected and that the only person who had knowledge of the password was Mrs Hunt. Mrs Hunt was not called by either party to give evidence in the Employment Court. That is a litigation choice that the plaintiff, through counsel, made.

[14] In submissions, Mr O'Hagan pointed to another perceived area of inconsistency in Mr Andreef 's evidence, namely that he had described Mr O'Hagan as a "bookkeeper" in the Authority and had referred to him multiple times as an "accountant" in Court. This too was the subject of cross-examination, with Mr Andreef saying that the role of bookkeeper was a subset of what Mr O'Hagan did.

[15] Mr O'Hagan also raised concerns about the way in which Mr Andreef responded to questions in cross-examination during the course of the Court hearing, characterising his answers as evasive. This concern was echoed in relation to the evidence of an expert witness.

[16] As I have already observed at [9] above, there are stringent requirements relating to the successful pursuit of an application to set aside a judgment based on fraud. There must be deliberate and conscious dishonesty, and evidence newly discovered since the trial which would reasonably be expected to be decisive. These factors are relevant to an assessment of whether Mr O'Hagan's claim, as pleaded, can succeed. The inconsistencies relied on fall short of supporting a claim of perjury. Nor do the concerns relating to the way in which Mr Andreef responded to questions bolster the prospects of success. More fundamentally, the material relied on is not new in the required sense. Such matters could have been the subject of cross-examination, and were. Perceived inconsistencies or prevarications could have been explored in this context, and were. Mrs Hunt could have been called as a witness, but was not.

[17] Mr O'Hagan submitted that he was unaware that he could have drawn his lawyer's attention to incorrect evidence being given, and accordingly failed to do so.

However that does not constitute a basis for setting aside a judgment. Ultimately, as Mr O'Hagan submitted, the Court was faced with two competing versions of events. That meant that an assessment had to be made as to which version of events was to be preferred. In the event, for a range of reasons set out in the judgment, Mr O'Hagan's was not.

[18] Mr O'Hagan filed an affidavit with his written submissions which sets out the history of events from his perspective, identifies alleged inconsistencies in the evidence, and raises a number of concerns about various other people who were involved in the Court process (including counsel and one of the experts). The affidavit does not raise new matters. Many of the assertions advanced by Mr O'Hagan are speculative and are not adequately supported.

[19] Mr O'Hagan further relies on an affidavit of a Ms Stockholmes filed as an attachment to his affidavit. The defendant sought leave

to belatedly adduce an affidavit in response. I did not grant leave, primarily because I was not persuaded that it was material to the matters at issue in the current application and also to avoid any prejudice to Mr O'Hagan.

[20] Ms Stockholmes deposes that she was employed by WAL at the relevant time, worked in the reservations area, and that she observed Mr Andreef accessing the office manager's computer on occasion. There is nothing to suggest that the evidence was not available at the time of the hearing. It is not new and does not materially support the claim that Mr O'Hagan wishes to advance.

[21] The claim faces additional difficulties. In order to succeed, the evidence Mr O'Hagan seeks to rely on must be so strong that it would reasonably be expected to be decisive of the claim, and if unanswered must have that result. I accept Mr Braun's submission that the inconsistencies in evidence as pleaded would not be significant, much less determinative, in disposing of the claim. This is reinforced by consideration of the basis on which Mr O'Hagan's personal grievance (which was heard on a de novo basis) was determined. He claimed that he had been forced to resign because Mr Andreef refused to rectify perceived irregularities in the company's books, leaving him with no choice but to tender his resignation. I

rejected this claim. I found that Mr O'Hagan had voluntarily resigned. His resignation had followed a sequence of events over time during which Mr O'Hagan had unreasonably refused, on a number of occasions, to accede to requests to provide further information relating to his concerns and how they might be addressed, and for a copy of any documentation he had to enable his concerns about office systems

to be remedied.9 He had also sought a hefty sum by way of settlement, which Mr

Andreef had declined to entertain.10 While inconsistencies in evidence may be more broadly relevant to credibility, the nub of the decision dismissing the challenge was that Mr O'Hagan himself had chosen to resign and he had not been unjustifiably constructively dismissed.

[22] I do not consider that the plaintiff has a tenable claim against the defendant on the facts as pleaded and nor do I consider that the claim would realistically be cured by amendment. I am satisfied that the claim ought to be struck out and the proceeding dismissed.

Security for costs/stay

[23] Because the proceeding is to be struck out in its entirety, I do not need to make an order for security for costs and/or a stay. However, for completeness I indicate that I consider that the defendant has established a proper basis for seeking security for costs if the proceeding had survived.

[24] Mr O'Hagan has not met the costs awards made against him in the Authority or the Court. WAL applied to the High Court for orders placing Mr O'Hagan into bankruptcy. This was based on a failure to meet the previous orders of costs. The High Court stayed that application pending determination of Mr O'Hagan's current proceedings.11

[25] WAL sought an order for security for costs in the sum of $32,000. It

submitted that it can reasonably be inferred that Mr O'Hagan will be unable to pay

costs if he fails to succeed in his claim and that the Court ought to exercise its

9 Substantive EC judgment, above n 2, at [51]-[56].

10 At [32].

11 *Re Waitomo Adventures Ltd, ex parte O'Hagan* [2014] NZHC 247 at [38].

discretion in its favour to protect it from an exposure to costs which it has no prospect of ultimately recovering.

[26] Mr O'Hagan took issue with the assertion that he would be unable to meet an order of costs made against him in the event that his claim fails. He advised the Court that he has equity in his house of approximately $40,000 which, allowing for associated costs in the event of a sale, would reduce down in his assessment to about

$30,000. He confirmed that he has no other assets of financial value. He is currently unemployed and has been for some time.

[27] It is apparent that Mr O'Hagan has outstanding costs awards totalling just under $80,000. If his claim proceeds, and fails, he will very likely be exposed to an additional order of costs. Mr O'Hagan now represents himself, advising that he cannot afford the costs of legal counsel. Litigants in person often generate more work for the opposing party than those with legal representation, primarily because they tend to be unfamiliar with the Court's procedures and processes. Relevant too is the fact that it is not uncommon for indemnity costs to be awarded in

circumstances where fraud is alleged, but not adequately made out.12 This represents

a significant financial exposure – not just for Mr O'Hagan, but also for WAL which will have no prospect of recovering the costs it is due if Mr O'Hagan fails in his claim.

[28] I am satisfied, on the basis of the material currently before the Court, that Mr O'Hagan would not be in a position to meet his costs obligations if he is unsuccessful in these proceedings. The threshold under r 5.45(1)(b) of the High Court Rules for the Court to exercise its discretion whether to order security is accordingly met.

[29] There are a number of factors relevant to the exercise of the Court's

discretion as to whether to order security for costs. A claimant's right of access to the

Court must be weighed against a defendant's interest in being protected against an

12 *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [57]- [64]. See also *Bradbury v*

Westpac Banking Corp [2009] NZCA 234, [2009] 3 NZLR 400 at [29](a).

ineffective order for costs.13 This is particularly so where the merits of the claim have been assessed as weak. I have already set out my views of the merits of the claim. I consider that WAL has a strong case to be protected against a barren order for costs.

[30] I would order security for costs, having regard to the circumstances, including the merits and the nature of the allegations advanced by Mr O'Hagan in his claim. I would also stay the proceeding until Mr O'Hagan paid those costs into Court and fix a time within which Mr O'Hagan was to pay the security, after which WAL would be entitled to apply to strike out the proceeding for non-compliance.

[31] WAL seek costs on its application. If the parties cannot agree costs they may be the subject of an exchange of memoranda, with WAL filing and serving any memorandum and supporting material within 21 days of the date of this judgment, Mr O'Hagan filing and serving any memorandum in reply within a further 21 days and anything strictly in reply by WAL within a further seven days.

Outcome

[32] Mr O'Hagan's statement of claim is struck out.

[33] WAL is entitled to a contribution to its costs on its strike out application, the quantum of which will be determined (if necessary) on the papers and following the exchange of documentation in accordance with the above timetabling orders.

Christina Inglis

Judge

Judgment signed at 11.30 am on 11 December 2014

13 *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129 at [10]- [12].
