Employment Court of New Zealand

Premier Events Group Limited v Beattie [2012] NZEmpC 26 (21 February 2012)

Last Updated: 28 February 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 26

ARC 22/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application to strike out affirmative defences

BETWEEN PREMIER EVENTS GROUP LIMITED First plaintiff

AND BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP)

Second Plaintiff

AND MALCOLM JAMES BEATTIE First Defendant

AND ANTHONY JOSEPH REGAN Second Defendant

AND PATRICIA PANAPA Third Defendant

Hearing: 15 February 2012 (in Chambers) (Heard at Auckland)

Counsel: Erin Davies and Cathryn Curran-Tietjens, counsel for second plaintiff in support

John Eichelbaum, counsel for defendants to oppose

Judgment: 21 February 2012

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This interlocutory judgment decides the second plaintiff's application to

strike out several of the second defendant's affirmative defences before trial.

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[2] The second plaintiff has a high threshold to surmount before Anthony Regan's pleadings will be struck out. The second plaintiff is required to satisfy the Court that the impugned defences are not justiciable, that is that the law does not recognise them as defences which may be pleaded to the claims. These are the same rules that apply to the striking out of any cause of action or pleading, more usually in the case of a statement of claim but, as here, where a defence is advanced.

[3] To determine whether the impugned defences will fail, even if the facts supporting them are established by the second defendant, it is necessary to understand the nature of the proceeding in which they arise and of the second plaintiff's claims against Mr Regan.

Litigation history

[4] What are now multiple proceedings, where a number of parties are suing each other, began life in May 2010 in the Employment Relations Authority where the first defendant Malcolm Beattie issued proceedings against what is now the first

plaintiff, Premier Events Group Limited (Premier Events). There are also concurrent proceedings between the same parties, in different capacities, in the High Court.

[5] So far as Mr Regan and BA Partners Limited (BA Partners) are concerned, Mr Regan issued proceedings[1] in the Employment Relations Authority on 23 June

2010 against Robert Gill (BA Partners Limited's Chief Executive Officer), BA Partners, and Premier Events for lost wages and distress compensation under s

123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Mr Regan filed an amended statement of problem in the Authority on 31 August 2010 which expanded his claims to include compensation for losses for removal of a business opportunity with an organisation known as Cartan. On 15 October 2010, Mr Regan filed a second amended statement of problem against the same parties (including BA Partners) although the claims appear to be substantially the same. A third amended statement of problem was filed by Mr Regan in the Authority on 17 January 2011 which discontinued his claims against Mr Gill personally. A fourth amended

statement of problem was lodged by Mr Regan in the Authority on 4 February 2011

which included the previously claimed relief and sought additional compensation for asset stripping of companies under s 123(1)(c)(ii) of the Act.

[6] In separate proceedings[2] in the Employment Relations Authority, Premier Events and BA Partners issued proceedings against Messrs Beattie and Regan and Ms Panapa on 13 July 2010. These claims included for breach of contractual restraints of trade, breaches of confidentiality, breaches of obligations not to solicit customers, breaches of obligations to inform the second plaintiffs of all matters arising out of employment, breaches of good faith, and for penalties against Messrs Beattie and Regan. Additional causes of action against Mr Regan included damaging the second plaintiffs' goodwill, breaches of his duty of fidelity, breaches of his obligation to deliver up documents at the end of his employment, breaches of his duty not to offer employment to BA Partners' employees, and a claim that Mr Regan diverted unlawfully the sum of $52,693 to a solicitor's trust account and had refused to return this money, the property of BA Partners.

[7] Mr Regan's defence to these claims against him was set out in his statement in reply filed in the Authority on 27 July 2010 and included that his restraint of trade had expired and that he was authorised to receive and was paid justifiably the sum of

$52,693 for holiday pay and salary in arrears.

[8] To complete the picture, on 14 March 2011, Premier Events and BA Partners applied for the removal of all three Authority proceedings to this Court for hearing at first instance. Those proceedings were removed by determination[3] of the Employment Relations Authority on 29 March 2011.

The pleadings

[9] The operative statement of claim is the second plaintiff's amended statement of claim filed on 22 November 2011. It alleges that Mr Regan was a director of it from 29 August 2003 to 31 March 2010 and that he was employed by it as Group

Chief Operating Officer from 14 November 2003. It also asserts that among its

shareholders were the second defendant, Jennifer Regan, and Bart Cleverley

(jointly), having 20 per cent of the company's share capital.

[10] A difficulty with the strike-out application is that the second plaintiff has not pleaded any terms (express or implied) of the employment agreement which it alleges it had with Mr Regan and the existence of which he has denied (barely) in the defendants' relevant statement of defence filed on 1 December 2011. The amended statement of claim makes allegations against Mr Regan of "diverting" funds from its bank account into that of a third party, claims that this payment was not authorised, and says that Mr Regan used the diverted funds for his personal benefit.

[11] Although I drew to the parties' attention this deficiency in the second plaintiff's pleadings in a minute of 26 January 2012 so that the second plaintiff has had an opportunity to seek leave to file and serve a further amended statement of claim (the case having been set down for a hearing), its claim against Mr Regan remains incomplete. However, he has chosen to plead to it, including by the impugned statement of defence filed on 1 December 2011. For the purpose of this application, I am prepared to assume that the second plaintiff will identify terms or conditions of its employment agreement with Mr Regan that it says he has breached.

[12] The affirmative defences advanced by Mr Regan include, first, that the second plaintiff "participated in an unfair/bad faith asset stripping scheme between June 2009 and December 2010" and that, before 30 June 2010, the second plaintiff

"stripped out a contract with NZ Netball which derived income of $334,000 per annum to a fresh company Brand Advantage

Measurement & Consulting Limited for consideration of Nil". Mr Regan alleges that the second plaintiff advised creditors that it had insufficient funds to pay them whereas the sum of $150,000 in client revenues were misappropriated from the second plaintiff by Mr Gill between March and June 2010 and, in addition, "more than $344,000 in the 12 month period to March 2011". Mr Regan says that the second plaintiff thereby "wronged creditors and shareholders by paying them 0.55 cents in the dollar (in the case of creditors) and nothing in respect of shareholders".

[13] No relief is claimed by Mr Regan for these alleged misconducts by the second plaintiff, nor is it possible to see how any could be available in these proceedings. They are also said to be advanced as background facts to be relied on by Mr Regan later in his pleading.

[14] The second defendant then says that the sum alleged by the second plaintiff to have been improperly paid to Mr Regan constituted monies due and owing to him for salary and holiday pay and was paid in accordance with properly kept company records in the ordinary course of business. In other words, Mr Regan says that he was entitled contractually to the monies that he received.

[15] Next, described as "Second set-off defence: breach of duty of good faith", Mr

Regan says that the second plaintiff owed him a duty of good faith under s 4 of the

Act but acted in breach of that in a number of specified ways. These include:

- attempting to bully him into signing minutes of meetings which did

not occur;

- attempting to bully him into signing minutes of meetings which would have ratified unlawful dealings designed to disadvantage

business partners/employees had he acceded to such demands;

- attempting or actually entering into major transactions without calling

necessary shareholders' meetings;

- attempting to or entering into major transactions without obtaining

required special resolutions;

- failing to give notice of company meetings;
- engaging in the backdating of documents in order to disadvantage him and others;
- participating in an unfair/bad faith asset stripping scheme involving particularised assets; and

making unlawful deductions from his salary.

[16] The remedies for these alleged breaches of good faith include orders that the second plaintiff 's conduct has been unconscionable and that his employment contract has been repudiated and is unenforceable, for "Penalties under ss 134(1) and 189 [sic]", and costs and disbursements.

[17] Described as "Third set-off defence; breach of contract", Mr Regan asserts that the second plaintiff was under contractual obligations to treat him "fairly". He alleges that in breach of this contractual obligation, the second plaintiff acted in the same ways as described above, particularising the allegation of breach of the duty of good faith. The remedy claimed by Mr Regan in this regard is said to be a set-off.

[18] As a "Fourth set-off defence", Mr Regan claims a breach by the second plaintiff of the Wages Protection Act 1983 and/or an express term of his second employment agreement by failing to pay an agreed salary or wages to him. He invokes ss 4-6 of the Wages Protection Act 1983, s 131 of the Act and cl 18 of his second employment agreement in asserting that the second plaintiff reduced his salary by 30 per cent between 1 July 2009 and 31 March 2010. Mr Regan says that this amounted to salary deductions which were not agreed to in writing by him and claims the relevant sums plus interest and costs.

[19] Mr Regan's next affirmative defence is entitled "Fifth set-off defence: damages for humiliation, loss of dignity & injury to feelings". Mr Regan claims that the second plaintiff, via Mr Gill, engaged in oppressive, overbearing, bullying, threatening, tyrannical, and unfair behaviour towards him during that part of his employment in 2009-2010. He provides particulars of these allegations which do not need to be set out for the purpose of this interlocutory judgment. Suffice it to say that the particulars are repetitions of, or variations on, the particulars set out previously in this judgment in relation to Mr Regan's other positive defences. These are said to have been "in breach of the Employment Relations Act 2000 in that [they]

caused the second defendant humiliation, loss of dignity, and injury to feelings". Compensation under s 123 of the Act, together with interest and costs, are claimed in respect of this counterclaim cause of action.

[20] Mr Eichelbaum confirms that these claims are all alternatives in the event that his defences to the claims may not succeed.

[21] Shorn of adornments, the second plaintiff's case alleges that Mr Regan improperly appropriated to himself a sum of $52,693, the return of which it claims together with interest and costs.

[22] Also in essence, Mr Regan says that he is not obliged to repay this sum to the second plaintiff because he was legally entitled to it. He also wishes to advance

alternative defences and/or claims against the second plaintiff including:

- That the second plaintiff repudiated their employment agreement

which is unenforceable including, in particular, the second plaintiff's

claim against him based on its breach;

- for penalties against the second plaintiff for its unconscionable

conduct towards him;

- for damages in an unquantified amount, but for less than the total of

the second plaintiff's claim against him, for breach of its contractual

obligation to treat him fairly;

- that by failing to pay him his agreed remuneration, the second plaintiff was in breach of the Wages Protection Act 1983 for which damages in the amount of short-paid remuneration should be ordered;

and

- that the second plaintiff's conduct constituted an unjustified disadvantage to Mr Regan in his employment in 2009-2010 for which he should be compensated under s 123 of the Act.

Grounds for strike-out

[23] The primary ground relies on s 248 of the Companies Act 1993 which provides relevantly (with underlining to emphasise the precise passages):

248 Effect of commencement of liquidation

(1) With effect from the commencement of the liquidation of a company,—

(a) the liquidator has custody and control of the company's assets:

(b) the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to

be exercised by this Part:

(c) unless the liquidator agrees or the Court orders otherwise, a person must not—

(i) Commence or continue legal proceedings against the company or in relation to its property; or

(ii) Exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property

of the company:

...

[24] As the cases, and commentaries on them, appear to agree, the rationale of s 248 is to seek to ensure that claims against a company in liquidation are dealt with by the orderly and, as between claimants, fair process of proofs of debt submitted to the liquidator. The maintaining, and certainly, the bringing of claims in different courts by different creditors is said to be antithetical to the insolvency process.

[25] Although it may appear unfair and counter-intuitive to permit a company in liquidation to prosecute claims against a person but not permit that same person to bring claims against the company in liquidation, the answer to this concern lies ultimately with the discretion of the High Court to grant leave and this has not been obtained. Before that ultimate remedy, there is, however, a window of opportunity through which Mr Regan seeks to come into court and it is that window and its dimensions with which this part of the case is largely concerned.

[26] The second plaintiff says (with one exception) that, to the extent that Mr Regan's pleadings make claims for relief against it (as opposed to being assertions of justification for what is alleged against him by way of defence), s 248 prohibits these. That is because the second plaintiff is a company in receivership and

liquidation. The liquidator has not consented to Mr Regan's claims being brought against the company. Although leave to do so was originally sought, or at least intimated, in the High Court, that application was abandoned or not pursued before hearing or at least decision. The exception referred to above is Mr Regan's claim to damages for breach of the Wages Protection Act 1983, at least to the extent that it is an alternative defence and that the amount claimed by him cannot exceed the second plaintiff's claim against him.

[27] Affected by the s 248 argument are paras 7-10 and 14-15 of the statement of defence (filed on 1 December 2011) to the second amended statement of claim.

[28] Alternatively to the s 248 arguments set out above, the second plaintiff submits that allegations advanced in the amended statement of defence are matters not within the ambit of the employment relationship between Mr Regan and the second plaintiff and can therefore neither constitute a lawful defence to its claims against him or are otherwise not justiciable claims in this Court. These allegations are also contained in paras 3-5, 8, 10, and 14-15 of Mr Regan's amended statement of defence.

[29] Finally, in respect of Mr Regan's defence that he received the sum of $52,693 lawfully because "it constituted moneys due & owing ... for salary and holiday pay", the second plaintiff says that such a claim cannot succeed. That is said to be because although the funds were "diverted" by Mr Regan to himself on 29 January 2010, his employment did not end until 31 March 2010. It follows, in the second plaintiff's submission, that there was no entitlement to be paid accrued but unused holiday pay at the time of the diversion of the funds. To that extent, the second plaintiff says that in respect of holiday pay, the defence should be struck out on the basis that it has no reasonable chance of success.

[30] This third ground for strike-out can be dealt with shortly and I will do so now. I will not strike out this defence at para 6 of the amended statement of defence for the following reasons. The duration and, indeed, even the fact of Mr Regan's employment by the second plaintiff, is not agreed on the pleadings. The pleadings say that "In or around January 2010" Mr Regan directed the diversion of the funds

from the second plaintiff's bank account into the account of a third party, which diversion occurred on 29 January 2010. It also says that on 17 March 2010, Mr Regan resigned as an employee of the second plaintiff with effect from 31 March

2010. Mr Regan, however, denies those assertions and I am not persuaded that the pleadings establish that the plaintiffs' claims in this regard are incontrovertibly correct. That will be a matter for trial.

[31] Before engaging with the more challenging legal question whether Mr Regan's counterclaims are set-offs, I can and should deal with the allegations set out in paras 3-5 of his statement of defence and which are elaborated on in [12] above. They are not, and cannot amount to, a justiciable defence to the second plaintiff's claim against Mr Regan. Whatever the truth or otherwise of these allegations of commercial impropriety, they cannot constitute a defence to the second plaintiff's contractual claim for repayment of monies paid to Mr Regan. Nor can they survive justifiably as facts to be relied on by Mr Regan later in his pleading. There is no ascertainable justiciable relationship between those allegations and those claims by Mr Regan against the second plaintiff, which can survive this judgment. Paragraphs

3-5 (inclusive) of the second defendant's statement of defence (filed on 1 December

2011) must be and are struck out.

Are the second defendant's claims true set-offs?

[32] Counsel were agreed that if Mr Regan's claims amount to what the law recognises as a set-off, s 248 is not applicable. There is no New Zealand case directly on point but in view of the agreement of counsel that this is the correct legal position, it is unnecessary to decide whether that interpretation of s 248 of the Companies Act 1993 is correct.

[33] Mr Eichelbaum's argument in this regard relies on a single English Court of Appeal judgment, given more than 40 years ago, which is noted in commentaries on s 248 of the Companies Act 1993. Counsel could not find any New Zealand judgment or other authority on the point and the current New Zealand texts, including a comprehensive analysis of set-offs in *Laws of New Zealand*, do not assist unfortunately.

[34] The case relied on, and accepted as the law in New Zealand, is the judgment of the English Court of Appeal in *Langley Constructions (Brixham) Ltd v Wells*,[4] the headnote[5] of which states:[6]

If a company in liquidation brings an action, the defendant to that action may without leave set up a cross-claim for liquidated or unliquidated damages, but only as a set-off to reduce or extinguish the plaintiff's claim; accordingly, the defendant cannot, without leave of the court under s 231 of the Companies Act 1948, counterclaim in the action for an account and a declaration as to an amount in excess of the plaintiff's claim for which the defendant is entitled to prove in the

winding-up ....

[35] Section 231 of the United Kingdom Companies Act 1948 was materially similar to s 248 of the New Zealand Companies Act 1993. The United Kingdom legislation provided that in the event of a liquidation, "... no action or proceeding shall be proceeded with or commenced against the company except by leave of the court ...". *Langley* was a case of a company in liquidation which had sued one of its directors on a cause of action relating to that relationship of company and director, and alleging that the defendant, in that role, had signed a statement of affairs disclosing that the amount subsequently claimed was owed to him by the plaintiff company.

[36] There are two judgments of the Court of Appeal which, although not in the context of s 248, nevertheless determine what is a set-off in litigation. The first is *Grant v NZMC Ltd.*[7] It was a commercial landlord and tenant case but that is not material for these purposes. Delivering the judgment of the Court of Appeal, Somers J held at page 11:

The effect of the distinction between set-off and counterclaim is well understood. A counterclaim is a cross-action which may have no connection at all with the subject-matter of the claim, ... and is not confined to money claims. It is not of itself a defence to the claim although under RR 534 and

535 of the High Court Rules, where claim and counterclaim arise out of the same matter ... one judgment only is given in favour of the party who on a

balance is entitled to recover. Set-off affords a defence to an action wholly or

in part depending upon the amount and is by its very nature limited to money claims. When a set-off is established by judgment it will pro tanto extinguish the plaintiff's claim: ...

[37] Later at pages 12-13, the Court held:

The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross- claim arise out of the same contract.

[38] The second judgment of the Court of Appeal is in *Hamilton Ice Arena Ltd v Perry Developments Ltd.*[8] As in the case of *Grant, Hamilton Ice* was neither an insolvency case nor one dealing with employment litigation but, again, that is immaterial for the purpose of defining a set-off. At [39] of the judgment, having considered the concept of set-off specifically in landlord and tenant cases, the Court concluded:

... It is therefore appropriate to adopt that approach which allows a set-off even if the cross-claim does not arise out of the relationship of landlord and tenant, provided there is a "sufficiently close connection" between the two claims – essentially the classic requirement for equitable set-off.

[39] Then, at [40] the Court noted:

... While, as was said in *Grant*, the fact that the claims arise out of different contracts is not decisive, if that is so there must be such a link between the different contracts as to justify their effectively being treated as one. In *Grant's* case that was so because the contract represented by the lease was induced by the contract concerning supply of business to the company which was going to take the lease.

[40] So it may be seen that in New Zealand, equitable set-off is broadly defined although there must be interdependence of the claim and cross-claim.

[41] Here, the second plaintiff's claim and Mr Regan's counterclaims arise out of their employment relationship and indeed are claims and counterclaims either for

breach of that contract or, in Mr Regan's case, for statutory personal grievances that

are jurisdictionally dependent on that employment contract.

[42] Because I propose to deal with the strike-out application on a cause of action by cause of action basis, I will address each of the two grounds set out above (breach of s 248 of the Companies Act 1993 at [26] and non-justiciability at [28]) per cause of action. I have already struck out paras 3, 4 and 5 for reasons other than in reliance upon s 248.

[43] Paragraphs 7-8 are properly included in the statement of defence but only for the purpose of prayer (a) relating to this cause of action. The relief sought in this prayer is purely defensive in nature (an order that the employment contract was repudiated by the second plaintiff by its unconscionable conduct towards Mr Regan and is therefore unenforceable). What is and must be struck out as not amounting to a set-off, however, is the second prayer (although described erroneously as (c)) for

"Penalties under ss 134(1) & 189 [sic]" of the Act. A claim for a penalty for breach of an employment agreement, which penalty is payable to the Crown (unless directed to be paid to the second defendant), does not meet the statutory test of set-off identified in the *Grant* and *Hamilton Ice* judgments of the Court of Appeal.

[44] Next are paras 9-10 of the amended statement of defence. These are styled as a "Set off in the amount of the claim" which is an enigmatic description of them although Mr Eichelbaum has confirmed that this means a claim for damages of no more than $52,693 as an alternative to Mr Regan's other claims.

[45] In the sense that this is a claim for damages for breach of a term or condition of the parties' employment agreement that it would treat him "fairly" and that by the specified acts or omissions, the second plaintiff caused Mr Regan loss by breach of that duty, the cause of action meets the definition of a set-off and should not therefore be struck out. To the extent, however, that this claim replicates Mr Regan's personal grievance alleging unjustified dismissal in employment for which compensation is sought, he must elect to pursue one and abandon the other and, I assume by absence of reference to it in his document, he may be taken to have abandoned this unjustified disadvantage personal grievance.

[46] Next are paras 11-13 of the amended statement of defence. These set up a claim against the second plaintiff for monies for alleged statutory breach. The second plaintiff acknowledges that this is a set-off and does not now pursue its strike-out application in respect of this cause of action.

[47] Finally, paras 14 and 15, although resembling a claim to a disadvantage personal grievance, must be regarded as claims for compensation for breach of Mr Regan's employment contract. Although, as in the case of the second plaintiff's pleading, Mr Regan does not plead terms or conditions of his employment agreement allegedly breached by these acts or omissions, they are nevertheless a claim for monetary relief limited to the amount of the claim against him and as an alternative to his other causes of action.

[48] Although pleaded under a heading that foreshadows a claim for damages for breach of contract, these allegations are, in reality a personal grievance: the prayer for relief under s 123 of the Act tends strongly to confirm this. To the extent that this is, or part, or a variation of a personal grievance originally brought by Mr Regan against the second plaintiff in the Employment Relations Authority and removed to this Court, the claim amounts to a set-off and therefore an exception to s 248 of the Act. It will not be struck out but should be re-pleaded to more clearly identify it as a personal grievance for unjustified disadvantage in employment.

Summary of judgment

[49] Paragraphs 3-5 (inclusive) of the second defendant's statement of defence are

struck out.

[50] Subparagraph (c) of the prayer in respect of the second defendant's second

set-off defence is struck out.

[51] Paragraphs 14-15, together with the associated prayer for relief must be re- pleaded as a personal grievance.

Postscript

[52] There were a number of matters raised by counsel at the hearing with which I will not deal. These include claims for indemnity costs against the first plaintiff for previously abandoned strike-out applications. Not only had Mr Eichelbaum's intention of doing so been signalled only in his notice of opposition to the second plaintiff's current application, but I also consider that any application for costs relating to abandoned interlocutory applications should be dealt with as part of the wash-up of costs in the litigation generally, if and when, that is required.

Progress

[53] As discussed with counsel at the hearing, the result of this interlocutory judgment will almost inevitably require Mr Regan's statement of defence to be re- pleaded and he may have the period of 14 days from the date of this judgment to do so. To the extent that Mr Regan has been permitted to make claims against the second plaintiff by way of set-off, it will be entitled to defend these by a statement of defence to the second defendant's claims to set-off, which should be filed and served within the period of 14 days from service upon the second plaintiff of Mr Regan's further amended statement of defence and set-off.

[54] As discussed with counsel, the Registrar should arrange a further telephone directions conference with counsel for the parties early in the week beginning 27

February 2012 in an attempt to preserve the hearing scheduled for early May and to deal with what will inevitably be further interlocutory applications between these and other parties.

[55] I reserve costs on this interlocutory application.

GL Colgan

Chief Judge

Judgment signed at 2.15 pm on Tuesday 21 February 2012

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[1] File number 5310009.

[2] File number 5312283.

[3] *Premier Events Group Ltd & BA Partners Ltd v Beattie, Regan and Panapa* [2011] NZERA Auckland 122.

[4] [1969] 2 All ER 46.

[5] Although law students are taught that references to headnotes are no substitute for reading a judgment and I agree, in this case there is no dispute about the legal principles or that the headnote is accurate

[6] At 46.

[7] [1988] NZCA 135; [1989] 1 NZLR 8 (CA).

[8] [2001] NZCA 308; [2002] 1 NZLR 309.
