Employment Court of New Zealand

Sheridan v Hirequip Limited AC 34/08 [2008] NZEmpC 79 (10 September 2008)

Last Updated: 7 October 2008

IN THE EMPLOYMENT COURT

AUCKLANDAC 34/08ARC 42/08

IN THE MATTER OF proceedings removed from the Employment Relations Authority

AND IN THE MATTER OF interlocutory applications re particulars and document disclosure

BETWEEN MICHAEL REX SHERIDAN
Plaintiff

AND HIREQUIP LIMITED
Defendant

Hearing: 8 September 2008 (in Chambers)

(Heard at Auckland)

Appearances: Tony Drake, Counsel for Plaintiff
Jennifer Mills and Aaron Lloyd, Counsel for Defendant

Judgment: 10 September 2008

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiff alleges that the essential pleadings of the defendant are insufficiently detailed and seeks an order that it be directed to provide for further information.
[2] There are also document disclosure issues that are unresolved between the parties. The plaintiff challenges the defendant's objection to disclosure. He has not yet made discovery of his documents.
[3] To determine the issues both of particularity of pleading and document disclosure, it is necessary to analyse generally the nature of Mr Sheridan's claim as pleaded. This is set out in his amended statement of claim filed on 21 August 2008. Mr Sheridan says that in December 2006 he became Hirequip's chief financial officer, having accepted the offer of this employment following the making to him of a number of representations about both his employment prospects and about the future success of the company's business. In particular, the plaintiff claims to have taken employment in reliance on terms offered for participation in a management equity scheme known as the *"management sweet equity scheme"*. Mr Sheridan says that as part of his terms and conditions of employment, he agreed to contribute the sum of $350,000 of his own money as capital in the management sweet equity scheme

with the promise of financial benefits accruing to him of between 5 and 15 times that amount within a period of between 3.5 and 5 years if, as anticipated, one of the company's major shareholders were then to sell the business.
[4] The plaintiff claims that in early November 2007 he was told by the defendant's chief executive that its directors had lost confidence in him and that he was to be dismissed. He asserts that the chief executive told him that if he continued to work diligently, including on a particular project, until February 2008 he would be refunded the capital amount paid into the sweet equity scheme upon termination of his employment at that time.
[5] The plaintiff alleges that these actions breached both express and implied contractual obligations and amounted to a repudiation of the contract of employment between the parties. Mr Sheridan says that this was a constructive dismissal of him that was unjustified. He seeks compensation for financial and non-financial losses. The former includes compensation for what he might have expected to have received under the sweet equity scheme had he not been dismissed unjustifiably. That is said to include the future increased value of his interest in the scheme.
[6] The foregoing is not by any means a complete account of the allegations set out in the amended statement of claim: rather, it summarises the claims for which the interlocutory issues arise at this time.

Plaintiff's application for particulars of defence

[7] I deal first with the plaintiff's interlocutory application for orders requiring the defendant to provide further and better particulars of its statement of defence because this application was filed first in time. This application was responded to formally by the filing, on 22 August 2008, of further particulars by the defendant.
[8] Events since those documents were filed have been overtaken by the filing, also on 21 August, of an amended statement of claim by the plaintiff. No statement of defence to that amended statement of claim has yet been filed. However, the paragraphs of the amended statement of claim on which this issue turns are unchanged. It is therefore safe to assume that so too will be the statement of defence to the amended statement of claim.
[9] At paragraph 17 of his amended statement of claim, the plaintiff alleges:

At all material times during the course of the employment the plaintiff carried out his duties and responsibilities for the defendant in a diligent manner.

[10] The defendant's response to this allegation is contained in paragraph 17 of its (now) statement of defence as follows:

17. *It denies the allegations contained in paragraph 17 of the Claim. The defendant says further that throughout his term as the defendant's Chief Financial Officer, the plaintiff struggled with some of the requirements of that role.*

Particulars

(a) Throughout 2007 the plaintiff had struggled to deliver monthly financial reports promptly and accurately;

(b) Following a Board meeting on or about 25 September 2007, the plaintiff acknowledged the difficulties he was experiencing with the role to the defendant's Chief Executive, Mr Stephen, and the defendant's Chairman, Kim Ellis;

(c) By the time of the October Board meeting it became apparent that reporting was still not being adequately completed;

(d) A failure to properly monitor cash flows, and to manage company funds, meant that the defendant came to be in breach of a covenant to its financier.

[11] The plaintiff says that the defendant should provide full particulars of when, how and where *"the plaintiff struggled with some of the requirements of that role"* and should specify which, if any, are alleged to have been breaches of the employment agreement.
[12] In reply the defendant says that its paragraph 17 is sufficiently pleaded to enable the plaintiff to comprehend adequately the nature of the defence. It says, further, that the affirmative defences referred to in subparagraphs (a), (c) and (d) set out above amounted to breaches by the plaintiff of the employment agreement between the parties. Additionally, the defendant says that the particular clauses of the agreement so breached included 3.2 and 4.5 and that the conduct alleged in paragraph 17(d) is said to have amounted to a *"breach of the plaintiff's common law obligation of fidelity owed by him to the defendant"*. I assume that this reference to a common law duty is intended to refer to a term of condition implied by common law into the contract of employment.
[13] I conclude that the particulars in support of the general defence in paragraph 17 fully and fairly inform the plaintiff of the nature of the positive defence and that no further particulars are required to enable the plaintiff to both prepare for trial and to prosecute his claim.
[14] Turning to the second element of the request for further particulars, paragraph 38 of the amended statement of claim relates to one of the losses said by the plaintiff to have been incurred and for which damages are claimed. The paragraph reads:

The plaintiff has suffered loss of the $350,000 he paid to the defendant as part of the management sweet equity scheme.

[15] In response to this, the defendant says:

> 38. *It admits that the plaintiff may have lost value in his shareholding in the defendant, but denies that any loss in value is attributable to the actions of the defendant, and otherwise has no knowledge of, and therefore denies, the allegations contained in paragraph 38 of the Claim (sic).*

[16] The plaintiff now says that he requires full particulars of all facts, matters and circumstances relied upon by the defendant in support of its allegation that he may have lost value in his shareholding, but denies that any loss is attributable to any actions of the defendant. He further seeks a direction that the defendant be required to either admit or deny the claim in a way that is *"not evasive"*.
[17] The starting point for deciding this issue is that, traditionally, a defendant is entitled to either admit or deny an allegation but is also entitled to enter a denial through absence of knowledge or sufficient knowledge. This third course effectively puts a plaintiff to the proof of an allegation. It is not evasive to simply so plead.
[18] Next, it is incumbent on the plaintiff to establish his loss. He says simply that he has lost $350,000 that he paid to the defendant as part of the *"management sweet equity scheme"*. Although it is not clearly pleaded, I assume that the plaintiff says that this loss has been caused by the defendant's breaches. I take it, therefore, that the defendant's position is that if the plaintiff has lost the value of his shareholding or a part of that, such loss is not attributable to the actions of the defendant.
[19] I do not consider that the plaintiff is entitled to any further particulars to enable him to either prepare properly for trial or to prosecute his case. The onus is on the plaintiff to establish his loss and that the alleged breaches by the defendant were causative of it. The defendant is entitled to plead that it is not aware of such losses but also to take the fall-back position that if the plaintiff has incurred such losses, they were not caused by the defendant's breaches of contract which it has denied.
[20] The plaintiff's claim for further and better particulars is therefore dismissed.

Objections to document disclosure

[21] I turn next to the plaintiff's application challenging the defendant's objection to disclosure of documents.
[22] The first general class of documents that Mr Sheridan seeks to have discovered but the defendant resists, or has to date resisted revealing, are financial documents. These, in turn, fall into two broad categories. The first consists of historical data that the defendant does not now object to disclose but, rather, in respect of which it seeks appropriate guarantees of confidentiality. The second class of financial information document is prospective in nature and consists of future budgets, financial plans, and like documents that have been produced by the defendant principally, if not exclusively, for its banker to support ongoing financial arrangements with the company. Mr Sheridan says that such documents are relevant to his claim for future losses arising from the defendant's repudiation of his participation in the sweet equity scheme. The defendant, on the other hand, says that such speculative documentation is irrelevant to the calculation of such losses.
[23] Mr Sheridan has recently instructed an expert business valuer to calculate his claimed financial losses from his non-participation in the sweet equity scheme. Mr Sheridan says that it will be essential for his expert valuer to have access to such information. It seems clear, also, that such access will have to be shared by Mr Sheridan and his solicitors and counsel so that the expert valuer can both understand the information supplied in the context of the claims and make proper calculations of the plaintiff's loss to be presented to the Court in expert evidence.
[24] I deal first with the way in which documents that must be disclosed may be revealed. Although confidentiality of such financial information is frequently of great concern to enterprises like Hirequip in litigation such as this, proper arrangements for its use and distribution can be and are frequently made. The starting point is the Employment Court Regulations 2000. Such information as is disclosed is restricted in its distribution to and use by others and, if those safeguards are abused, remedies are available through the Court. Regulation 51 of the Employment Court Regulations 2000 so provides. In addition to those statutory safeguards, solemn undertakings given by counsel as to the distribution and use of that information will ensure that it can be used for proper purposes in the litigation but not otherwise. Methods include, typically, written undertakings by the party, solicitors and counsel, and by the expert witness. History shows a low rate or even absence of abuse of the procedure.
[25] Such processes and safeguards are common in litigation of this sort and should not be beyond the wit of experienced counsel to arrange without requiring the Court to make specific orders. Leave is, however, reserved to apply further if there are problems that cannot be resolved between professionals in a commonsense manner.

Classes of documents still objected to

[26] I will refer to the documents that the defendant objects to disclose by the paragraph identifiers (a) to (m) set out in the plaintiff's notice of disclosure dated 18 July 2008. This is a reference system that the parties have used in subsequent documents and which will identify the particular documents for them.
[27] There is now no objection to disclosure of the documents in (a) being financial statements sent to Westpac

Bank by the defendant including monthly financial statements, quarterly statements with covenant report, annual financial statements (audited) for the period 1 October 2007 to commencement of the trial.
[28] There is likewise now no objection to the disclosure of the documents referred to in (d) being the financial projection provided to Westpac Bank in 2006 to obtain the bank facility to purchase the business assets for the defendant in or about December 2006.
[29] Likewise there is now no objection to disclosure of the documents referred to in (g) being all correspondence, e-mails, file notes, reports, invoices between the recruitment agency Swan Group or its principal, Don Jaine, and the defendant or the defendant's chairman, Kim Ellis, in the period between 1 October 2007 and 31 March 2008 relating to the recruitment of a chief financial officer or similar person for the senior finance role, whether as a temporary or permanent appointment, or engagement of such person as a contractor.
[30] There is similarly no objection now to disclosure of the documents referred to in (h) being all e-mail correspondence, whether sent, received or copied to the defendant's chief executive, Brian Stephen, and any or all of the following persons, namely Kim Ellis, Rob Nicols, Janine Middleton and Nathan Cleary, in which the plaintiff is referred to by name, position, title or otherwise during the period 1 May 2007 to 31 December 2007.
[31] Similarly, there is no objection to the documents referred to in (j) being all correspondence, e-mails, sale and purchase agreements or other legal documents relating to the transfer by the major shareholder, Nikko Citi Holdings Inc, of its ownership interest to the Tasman Secondary Trust, as reported in a media release from the defendant dated 31 July 2008, and the sale or the possibility of the sale of the defendant's business or shares therein.
[32] The position is likewise in respect of (k) being all documents recording the resignation or appointment of directors to the defendant's board of directors during the period 30 November 2007 to the commencement of the trial in this proceeding.
[33] Into the same category fall documents in (l) being all documents relating to any offer to purchase shares pursuant to the Management Equity Scheme ("MES") in which the plaintiff participated, whether made to any of the defendant's senior managers or directors during the period from 30 November 2007 to the commencement of the trial in this proceeding.
[34] Finally, in the now agreed category are the documents referred to in (m) being all documents issued to any or all of the participants in the MES in the period from 30 November 2007 to the commencement of the trial in this proceeding.
[35] I now turn to the documents still in dispute. As already noted, these can be categorised generally as future or prospective financial documents. The defendant resists disclosing any such documents at all.
[36] Mr Sheridan has deposed to a requirement on the defendant to provide monthly and quarterly budgets, financial forecasts and projection to its banker as a condition of the provision of a facility agreement. Mr Sheridan says that he requires disclosure of these documents to have valued properly the defendant's business and its shares. He says that such documents will show whether the defendant has revised its financial projections upwards or downwards from the position originally represented to the bank when the facility was approved and on which the value of the shares was represented to him at the time he accepted the defendant's offer of employment. Mr Sheridan says that any change in the original forecast or projections may affect materially the valuation of the assets and of the defendant's shares.
[37] In respect of this category of documents, counsel, Mr Drake, submits that their relevance is the loss said to have been suffered by the plaintiff in respect of the shares and financial return on those expected by him. As Mr Drake points out, the amended statement of claim at paragraph 6 pleads that the terms offered in relation to the management sweet equity scheme and the financial return he could expect from it, probably by 2010, were themselves prospective figures. Counsel points out that reg 38(1) of the Employment Court Regulations 2000 defines relevance in proceedings such as this. Counsel submits that each of the categories of documents to which objection is taken contains documents directly or indirectly supporting or being likely to support the plaintiff's case or may prove or disprove any disputed fact: see reg 38(1)(b) and (c). Mr Drake submits that the case is set down for trial in early 2009 but by which time the valuation of the shares will still be prospective. Counsel submits that determination of share value at a future date is a proper forensic inquiry: *Walker Corporation Ltd v O'Sullivan* [1996] NZCA 710; [1996] 2 ERNZ 513 (CA).
[38] All documents in one category are objected to. They are those at (b) being all budgets, financial forecasts and projections sent to Westpac Bank by or on behalf of the defendant for the year ended 30 June 2008 and for the year ended 30 June 2009.
[39] The defendant objects to disclosure of some documents but not of others in other categories. These include (c) being all other reports provided to Westpac Bank by the defendant during the period 1 October 2007 to the commencement of the trial. As to these, Mr Sheridan says that from his experience as chief financial officer he was aware of the requirement for the company to provide other financial information and reports to its banker. He says that one such report he sought while he was employed was an information memorandum report containing long term projections over several years. He says that such documents will assist in valuing the defendant's business and its shares. Mr Sheridan deposes that any issues which affect positively or negatively the valuation or financial performance of the business must, as a condition of the bank's facility agreement, be notified to the bank in these reports.

[40] Next, the defendant objects to disclose some of the documents referred to in (e) being all bank syndication presentations presented by or on behalf of the defendant, including financial projections in the period from 30 November 2007 to the commencement of the trial. In respect of these documents, Mr Sheridan says that he is aware that the chief executive of the defendant was involved in discussions with its bank concerning a bank syndication proposal. He says that he knows that as part of these discussions the defendant was preparing presentation materials to recall the medium to long term financial expectations that the defendant's board of directors had for the company. Mr Sheridan says that these representations show the economic market, business strategy being followed, and the future business risks and opportunities. He says that this information is additional to, and different from, other information disclosed in other categories of documents but is similarly relevant to the proper preparation of a valuation of the defendant's business and its shares.
[41] Into the next category of the same objection fall the documents in (f). These include any bank syndication presentation prepared by or on behalf of any shareholder of the defendant, including financial projections in the period 30 November 2007 to the commencement of the trial. In this regard, Mr Sheridan deposes to his awareness, whilst employed with the defendant, that a majority shareholder was preparing its own presentation materials for the bank syndication proposal relating to the defendant's facilities. Mr Sheridan says that the bank syndication presentations will show the medium to long term financial expectations of the shareholders and particularly the majority shareholder for the defendant's business. Mr Sheridan also says that such documents will show the economic market and business strategy being followed by the defendant and although similar to other information sought, this is additional to it and is likewise said to be relevant for the proper preparation of a valuation of the defendant's business and its shares.
[42] The next category of documentation similarly objected to is (i) being all reports and other documents relating to any warranty claim by PES Finance Ltd against SCL No. 1 Ltd and the terms of settlement of such claim or claims. This is said by Mr Sheridan to be a warranty claim that was in the process of preparation at the time he left the defendant company. Mr Sheridan says that he had been involved in discussions about whether such a claim should be made and its effect on the defendant's overall financial position. He says that although the amount of the claim had not been finalised before he was dismissed, it seemed likely to be in excess of $15 million. The plaintiff says that a successful claim for anything like that amount would improve materially the defendant's annual EBITA. He says that if the claim is lodged and is successful this will affect materially the value of the defendant's business and its shares. It seems clear that this proceeding will come to trial before the outcome of this potential or actual warranty claim is known.
[43] In contrast to the case presented by the plaintiff for the disclosure of these documents, the defendant has not supported its opposition by relevant affidavit evidence but only by submissions through counsel. Although not to say that submissions referring to pleadings can never address adequately these issues, once the very broad tests of relevance under reg 38 are established, as I am satisfied they have been by Mr Sheridan, the onus shifts to the defendant to persuade the Court that such documents should not be disclosed. It has not so satisfied me. Relevance having been established, I suspect that the real questions are now those of how confidential information can be preserved as such when disclosed. I have already set out earlier in this judgment how that can be achieved.
[44] I have concluded that the financial documents, the disclosure of which has been sought by Mr Sheridan but opposed by the defendant, are or will be likely to be relevant to the valuation of his claim for losses from the management sweet equity scheme that is the most significant element of the case from the plaintiff's point of view. Because this valuation will necessarily involve prospective future events, it will be reasonable and proper for expert witnesses to have regard to such information as presently exists, although about future events, to value Mr Sheridan's loss. The objections to disclosure being on grounds of absence of relevance, I conclude that each of the categories identified by counsel for the plaintiff contains or is likely to contain relevant evidence and the challenge to objection to disclosure is upheld. The plaintiff is entitled to disclosure of the documents referred to in paragraphs (a) to (m) (inclusive) of the notice of disclosure dated 18 July 2008.
[45] Such disclosure should be made by the defendant in accordance with the Employment Court Regulations 2000 no later than 24 September 2008.

Confidential discussions / Without prejudice

[46] There is a further contentious area of document disclosure that overlaps with a potential evidence admissibility issue. The background to this is briefly as follows. Mr Sheridan says that when he was informed by the defendant's chief executive on 9 November 2007 that the defendant had lost confidence in him and had instructed its chief executive to terminate his employment, the advice from the chief executive to Mr Sheridan indicated that it is likely that there were and are documents relating to that advice prepared by or on behalf of the Board or received by it both before the events of 9 November 2007 and afterwards.
[47] The defendant does not seem to deny the existence of at least some such documentation. Rather, it says that the discussions between its chief executive and Mr Sheridan were either conducted "off the record" (confidentially) or are protected as having been an offer to settle without prejudice an employment dispute. So, the defendant seems to allege, not only should evidence not be given at trial of what was said between the chief executive and Mr Sheridan at that time, but that documents relating to those conversations are protected from

disclosure. Those are, of course, separate issues. Documents about evidence that may be inadmissible may nevertheless be discoverable. The principles applicable to each exercise are very different.

[48] This is an unusual assertion by the defendant although I simply have insufficient information to determine the contentions one way or the other.

[49] I agree with the defendant that these particular issues of document disclosure and evidence admissibility should be dealt with as a preliminary and separate question. The assertions of confidentiality/privilege coming from the defendant, it will be incumbent upon it to establish these. It should do so by filing and serving affidavit evidence in support of these contentions including reference to any documents associated with them, disclosure of which it intends to resist. This should then be responded to by the plaintiff, also by affidavit. Once countervailing affidavits have been filed, the Registrar should arrange for an interlocutory hearing before a Judge to determine the twin questions of evidence admissibility and associated document disclosure. It will be useful if this can be concluded and decided before the scheduled judicial settlement conference in this case early in December 2008. In this regard the defendant should file and serve its affidavit evidence to support confidentiality/without prejudice communications no later than 1 October with the plaintiff doing likewise no later than 21 October 2008.

Other questions of privilege

[50] There are some questions of legal professional or litigation privilege attaching to documents. I agree with the defendant's proposal for dealing with documents for which it claims privilege. It should include these in a separate list identifying sufficiently the nature of the document and the reason for claim to privilege. If the plaintiff disputes any particular claim to privilege, that dispute may then have to be dealt with at another interlocutory hearing in which it may be necessary for a Judge to inspect the document to determine the validity of the claim to privilege. A further interlocutory hearing may be necessary for this purpose.

[51] Other miscellaneous directions that need to be made now include the requirement for the defendant to file and serve a statement of defence to the amended statement of claim. That must be done by 26 September 2008.

[52] I confirm that the parties are keen to attempt to resolve this litigation at a judicial settlement conference chaired by a Judge (who will not be the trial Judge) in Auckland on Friday 12 December 2008. If not done already, the Registrar should now arrange for the standard judicial settlement conference directions to be given to the parties' representatives.

[53] If the matter is not settled at the conference, 5 sitting days have been held for the trial beginning Monday 16 February 2009. This is an appropriate case for hearing management under the Employment Court Regulations 2000 that will have to take place in January 2009. The hearing management meeting will need to take place on Friday 30 January and other timetabling directions for such things as the filing and serving of briefs of evidence, the compilation of a common bundle of documents, as well as the filing of hearing management memoranda, will all occur in accordance with the timing for these set out in the Regulations.

[54] The plaintiff should file and serve his hearing management memorandum and associated information by 16 January 2009 with the defendant's memorandum and associated documents to be filed and served by 23 January 2009.

[55] Although I was asked to fix costs and award these to the plaintiff on this hearing, I think the more just course is to reserve these as I do, noting that the interlocutory arguments occupied about 2 hours in Court on 8 September 2008 with appropriately proportionate preparation time for that hearing.

[56] Leave is reserved for either party to apply for further interlocutory orders or directions on reasonable notice.

GL Colgan

Chief Judge

Judgment signed at 1 pm on Wednesday 10 September 2008