Employment Court of New Zealand

Eden Group Limited v Jackson [2017] NZEmpC 53 (12 May 2017)

Last Updated: 16 May 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 53

EMPC 135/2016

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER of an application for stay of proceedings

BETWEEN EDEN GROUP LIMITED Plaintiff

AND TIMOTHY NIGEL JACKSON First Defendant

AND PHILLIP ANDREW KITE Second Defendant

AND CHRISTOPHER JOHN BLACKMAN Third Defendant

AND NEW SPACE LIMITED Fourth Defendant

Hearing: 2 May 2017

(heard at Auckland)

Appearances: J Billington QC and T Drake, counsel for plaintiff

B O'Callahan and M Chen, counsel for defendants

Judgment: 12 May 2017

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves the plaintiff's application for a stay of proceedings.

[2] The first, second and third defendants are former employees of the plaintiff, Eden Group Ltd (Eden Group); they resigned and established a new business, using

the vehicle of a company which was incorporated for the purpose. That company

was named New Space Limited (New Space), and is the fourth defendant in this proceeding.

[3] Those causes of action which arise from these circumstances which can properly be heard in this Court, are the subject of the present proceeding; those causes of action which also arise from these circumstances which cannot be heard in this Court, are the subject of proceedings in the High Court. That proceeding involves additional parties.

[4] In this Court, Eden Group has applied for a temporary stay until determination of the High Court proceedings between the

parties to this proceeding.

[5] The stay application was opposed by the defendants on the ground that the proceeding in this Court was essentially ready for hearing and that it was desirable for the case to be heard as soon as possible; alternatively, an order for stay should be subject to a condition that there be a modification of undertakings given by the first, second and third defendants at an earlier point in the present litigation, when an application for freezing orders had been made.

[6] In order to understand the competing contentions, it is necessary to outline the background of both the Employment Court proceeding and the High Court proceeding in some detail.

Employment Court proceedings

[7] Eden Group applied without notice for search and freezing orders on

20 May 2016. On 23 May 2016, the application was granted and Chief Judge Colgan issued an oral judgment granting Eden Group both search and short-term freezing orders, with some modifications.1

[8] Reasons for judgment were delivered the next day;2 these provide a summary of the facts which is sufficient for present purposes. It is to be noted, however, that since the orders were sought without notice, the defendants took no part in the

hearing which resulted in the orders being made. It was not possible, therefore, for their points of view to be considered.

[9] The Court found that Eden Group is engaged broadly in the building or construction industry. One of its divisions is known as Sector One, which deals with fit-outs and maintenance work for commercial and industrial premises, but also engages in residential work.

[10] Mr Jackson had been General Manager of Sector One until he resigned with effect from 18 December 2015; he had been a director and shareholder in Eden Group but resigned the directorship with effect from 16 December 2015 and subsequently sold his shares.

[11] Mr Kite was until 4 February 2016, Sector One's Contracts Manager.

[12] Mr Blackman was previously a Contracts Manager for Sector One. Following Mr Jackson's resignation he had been promoted to be Sector One's General Manager but ceased that role when his resignation took effect from

26 February 2016.3

[13] New Space had been incorporated by Mr Kite during 2015. On a preliminary basis it was found that between April 2015 and early 2016, Messrs Jackson, Kite and Blackman prepared to establish New Space in the market as a direct competitor of Eden Group's Sector One.

[14] There was also evidence of removal of physical files and records which was the property of Eden Group, and the copying of Eden Group's electronic data records and subsequent attempts to delete these.4

[15] The Court found that during their employment, the former employees prepared quotations for Sector One's customers, including its then largest customer, from mid April 2015. In December 2015, while the three individuals were still employed by Eden Group, a quotation for work to be performed for a Sector One

customer was also submitted, for performance in February or March 2016. For interim purposes, the Court found that there was a strong inference this work was to be performed by New Space rather than by Sector One.

[16] There was also evidence that suggested Mr Jackson had attempted unilaterally to vary the share sale agreement which he had entered into with other shareholders in Eden Group, when they purchased his shares in that company for

$220,000.

[17] Chief Judge Colgan was satisfied that there was evidence of loss of its usual work from longstanding customers since late 2015, and that New Space was now undertaking the work that Sector One would previously have expected to perform, findings which were of course made only for provisional purposes. The Court recorded that it was Eden Group's case that its former employees were now performing ongoing work for several longstanding customers of Sector One who had cancelled their arrangements with Eden Group. There was evidence that at least one subcontractor, a painting and decorating company, understood that Mr Jackson was working with an apparent subsidiary company of Eden Group – New Space. There was other evidence that Sector One contracts had been diverted away from that company or cancelled.

[18] Chief Judge Colgan found it established for interlocutory purposes that the nature of the work being carried out by the defendants was in direct competition with Sector One and Eden Group.

[19] At the time of the consideration of the applications for search and freezing orders, an employment relationship problem

was about to be filed in the Employment Relations Authority (the Authority) which alleged:

a. a breach of the previous and enduring provisions of the individual employment agreements with each former employee; and

b) a breach of s 4 statutory obligations of good faith under the Act. [20] The main remedies which were to be sought in the Authority were for:

- interim injunctive relief to restrain the former employees from committing breaches;

• a permanent injunction to like effect;

• awards of special and general damages; and

• penalties for the breaches.

[21] The Court found that there were strongly arguable cases for the applicant in respect of these remedies.5

[22] Accordingly, it was appropriate to make the without notice search order. Although the grounds for a freezing order appeared at least initially to be less strong than those for a search order, the Court was also satisfied that it should make a freezing order for a limited period, which could be reviewed soon after on 10 June

2016.

[23] The search order was executed on 25 May 2016 in the presence of an independent lawyer, a forensic computer expert and the plaintiff's counsel.

[24] The employment relationship problem was removed by the Authority to this Court in a determination dated 7 June 2016.6 Thereafter, Eden Group filed a statement of claim in this Court, which repeated the causes of action which had originally been raised before the Authority. Subsequently, the defendants filed a statement of defence denying that they were liable for any of the alleged losses.

[25] The interlocutory orders were reviewed on 10 June 2016 and appropriate directions were given to deal with the items that had been uplifted when the search

order was executed.[7] The freezing order was continued until 21 June 2016.

5 At [5].

6 *Eden Group Ltd v Jackson* [2016] NZERA Auckland 175.

7 *Eden Group Ltd v Jackson* [2016] NZEmpC 72.

[26] Various procedural issues were dealt with thereafter; ultimately the freezing orders were replaced by undertakings which were given by each defendant on 20 and

21 June 2016, as mentioned earlier.

[27] By 24 June 2016, the Court was able to offer a two-week fixture to hear the substantive matters, to commence on 14 November 2016.

[28] Detailed directions for such a hearing were made in a minute issued on

15 September 2016. However, by 7 October 2016, those directions were set aside because by then it had become apparent that there were several pre-trial issues which now required resolution, a possibility that the pleadings would need to be refined, and there were issues relating to the parallel proceedings in the High Court. Subsequently an interlocutory application was filed by the defendants who sought orders setting aside the plaintiff's claim to confidentiality in respect of certain documents; and Eden Group filed an application for further and better disclosure. These matters were resolved, essentially by agreement, on 25 November 2016.

[29] There the matter lay until Eden Group filed its application for stay of proceedings on 24 February 2017.

High Court proceedings

[30] On 20 July 2016, Eden Group, together with three other plaintiffs, filed a statement of claim in the High Court; an amended statement of claim was filed on

6 December 2016.

[31] The pleadings as amended allege the following causes of action:

a) That Mr Jackson breached duties owed as a fiduciary and director of

Eden Group.

b) The other two former employees and the fourth defendant were accessories to Mr Jackson's breaches of his duties as a fiduciary and director of Eden Group; or were liable for having given dishonest assistance to him.

c) That Mr Jackson breached fiduciary duties owed to those shareholders who are plaintiffs.

d) That Mr Jackson induced all the plaintiffs to enter into a sale transaction by misrepresentation.

e) That Mr Jackson induced all plaintiffs to enter into a share sale transaction by a mistake.

f) That there was a conspiracy by the defendants which caused Eden Group loss.

g) That the defendants had induced breaches of contract of employment, of the employment agreements of the three former employees, and of contracts of employment of five other employees of Eden Group who now work for New Space.

h) That the defendants misused Eden Group's confidential information. i) That the defendants converted Eden Group's property.

j) That each former employee breached ss 9, 11 and 13 of the Fair Trading

Act 1986.

[32] Damages for up to 2.7 million dollars are sought.

Stay issues

[33] It is now necessary to record how the present application came to be made. In this Court's minute of 25 November 2016, it was recorded:

a) That counsel for the plaintiff had indicated that Eden Group was likely to proceed in the High Court, and therefore seek a stay of the proceeding in the Employment Court.

b) That in view of this, counsel had agreed that inspection of certain additional documents would not take place pending clarification of the forum issue.

c) This was likely to occur on or before 7 December 2016, when a High

Court case management conference was to be convened.

[34] The issue as to which matter should proceed first was discussed with

Associate Judge Doogue on 7 December 2016 who recorded:

a) Counsel for the defendants had indicated that he would seek to have an agreement between the parties regarding the terms in which the Employment Court proceeding would be stayed.

b) If no satisfactory agreement was reached, the defendants indicated they may apply for a stay of the High Court proceeding.

c) If the defendants were to apply for a stay of the High Court proceeding, then any such application was to be filed and served by

23 December 2016.

[35] The parties were unable to agree that the Employment Court proceeding be stayed by consent. No application for stay of the High Court proceeding has been filed by the defendants to date.

[36] A second case management conference was conducted on 8 March 2017. Following the conference, Associate Judge Doogue issued a minute allocating a three-week trial in the High Court commencing 12 February 2018.

[37] Mr Billington QC, counsel for Eden Group, told this Court that Eden Group considered it was unsatisfactory to have an issue as to which proceeding should go first unresolved, there having been uncertainty on this point since late November

2016. He said that in order to clarify the issue, Eden Group had filed its application to stay the proceeding in this Court, temporarily, and on appropriate conditions.

Jurisdictional difficulties

[38] As Mr Billington correctly emphasised, the problem which has arisen in the present instance is caused by the jurisdictional difficulties that have existed since

2000. Both the Employment Court on the one hand, and the High Court on the other, are empowered to deal with different aspects of certain types of employment-related cases.

[39] These difficulties have been commented on more than once. They were, with respect, well described by Chief Judge Colgan in *Transpacific All Brite Ltd v Sanko* in 2012, and bear repeating:8

[4] Before turning to its decision, I wish to emphasise that this is one of a number of cases identifying the very unsatisfactory consequences of the current legislative state of the boundaries between this Court's (and the Authority's) jurisdiction and the jurisdictions of the courts of ordinary jurisdiction, principally the High Court. This is a matter of litigation procedure, about which Judges have a legitimate concern, and not of employment policy on which we do not comment.

[5] This issue has been identified persistently by Judges for many years in the hope that Parliament would clarify and simplify these issues in the interests of parties and, as in this case, principally, but not exclusively, of employers or former employers. As in this case, the difficulties arise typically where a former employee acts in concert with a new entity (either a new employer or the former employee's own new corporate entity) allegedly in contravention of contractual obligations to the former employer. Again typically, that may be allegedly breaching a restraint of trade, misusing confidential information, or enticing other staff of the former employer to breach their contracts with it. There are, of course, many other examples but these serve to illustrate the problem.

[6] A former employer's causes of action against a former employee personally, are principally in breach of contract. These proceedings must be brought in the Authority but they sometimes find their way (as in this case) to this Court at first instance. However, proceedings against persons who were not in an employment relationship with the former employer and/or for causes of action other than breach of the employment contract (for example in equity or tort), must be taken in the courts of ordinary jurisdiction. That is the effect of longstanding case law interpreting those jurisdictional boundary questions. That is how parties find themselves involved in concurrent proceedings in separate judicial bodies but which proceedings arise essentially out of the same former employment-related transactions.

[7] Especially where the proceedings for breach of contract are brought to and remain in the Authority, the systems by which the dual proceedings are dealt with are very different. The courts of ordinary jurisdiction (and especially the High Court) deal with cases as adversarial litigation encompassing relevant interlocutory measures such as discovery of documents. In contrast, the Authority is intended to operate as a low level, informal, speedy, investigative tribunal that is directed to resolving employment relationship problems, although in such cases as these, the employment relationship is almost inevitably a former employment

8 *Transpacific All Brite Ltd v Sanko* [2012] NZEmpC 7.

relationship. In practical terms, matters generally move more swiftly in the Authority (and in this Court where they come here upon their removal) when compared to the High Court. That is, of course, not a criticism of the High Court but a reflection of the means by which civil litigation is dealt with and the current delays to it, at least in major High Court centres. In this case, however, events in the High Court at Napier appear to be moving at a faster pace than in this Court, illustrating the need to speak generally and not absolutely.

[8] Such a situation leads, not infrequently, to an application such as this to stay proceedings in one forum or, as this Court is aware, informal agreement between the parties to progress one proceeding before the other, in other words an informal stay.

[9] It is unsatisfactory that there should be concurrent proceedings between the parties over essentially the same matters in different courts. That is because there should be inter-curial comity and the system of civil justice should operate efficiently. There are also significant practical disadvantages in such a situation. Effort and, therefore, costs are duplicated. There is a temptation for a party to progress or delay the litigation in one or other jurisdiction to gain purely tactical advantage. The legal process and respect for it suffers. Litigants ask why this should be so, and the difficulty lawyers have in explaining it convincingly should in itself be an incentive for timely reform. This unsatisfactory position can only be addressed by legislative change.

[10] That said, it is necessary to determine whether in this case a stay should be granted and, in effect, whether the issues between the parties should be progressed in this Court or the High Court.

Appropriate principles for stay

[40] The applicable stay principles when situations such as the present occur have been considered in several instances. Two High Court cases are of particular assistance: *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd*9 and

Rooney Earthmoving Ltd v McTague.10 Each sets out appropriate factors for

consideration when there are parallel proceedings. In the subsequent decision of *Transpacific*, Chief Judge Colgan emphasised that the principle consideration is the interests of justice in a particular case,11 but indicated that the following factors, as

set out in *Mackay* may well be of assistance:12

a) which proceeding commenced first;

9 *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Co Ltd* [1997] NZHC 1852; [1997] 3 NZLR 476 (HC).

10 *Rooney Earthmoving Ltd v McTague* HC Christchurch CIV-209-476-471, 30 April 2010.

11 *Transpacific All Brite Ltd v Sanko*, above n 8, at [34].

12 *Mackay Refined Sugars (NZ) Ltd v New Zealand Sugar Company Ltd,* above n 9.

b) the potential effect on the other proceeding were a stay to be granted;

c) the public interest;

d) duplicate witnesses;

e) duplication and waste;

f) state of advancement; and

g) multiplicity of proceedings.

[41] There was common ground between counsel that these factors provided a convenient means for considering how the interests of justice should be addressed in the present case.

Analysis

Which proceedings were commenced first?

[42] Proceedings in this Court were issued first, in late May 2016. The High

Court proceedings were commenced on 20 July 2016.

[43] However, that sequence is unsurprising. The genesis of the matters which will be considered in both proceedings was the employment relationship between Eden Group on the one hand, and Messrs Jackson, Kite and Blackman on the other. This Court had the exclusive jurisdiction to make any search order based on those

employment relationships.13 Once the search order had been executed, by which

relevant evidence was obtained, it appears that Eden Group was then able to formulate its claims in the High Court on the basis of causes of action which had to be brought in that jurisdiction.

[44] Accordingly, I regard this particular factor as being neutral.

13 Employment Relations Act 2000, s 187(1)(m) and (3); and s 190(3).

The potential effect on the other proceeding

[45] There were two particular aspects of this factor which were the subject of detailed submissions from counsel.

[46] Mr Billington submitted that the issue was straightforward. He said that a stay of the Employment Court proceeding would provide a sensible basis for the High Court proceeding to be heard first. He submitted that it obviously involved a wider range of issues, as well as additional parties; and that there was then a “remote” possibility only of the parties needing to return to the Employment Court in order to determine the contractually based causes of action.

[47] Mr O’Callahan, counsel for the defendants, submitted in contrast that it would be preferable for the Employment Court hearing to take place in the relatively near future – a possibility which this Court could accommodate. He said that a prompt hearing in this Court would be in the interests of justice.

[48] He emphasised that the issues in the Employment Court proceedings would relate to:

a) the preparatory work which was allegedly undertaken by the defendants;

b. the fact that confidential information was allegedly taken and used when it should not have been; and

c) the fact that work was allegedly diverted when it should not have been.

[49] He also submitted that this Court would need to determine whether there was in essence an unlawful agreement to compete; and that this component underpinned several of the High Court causes of action.

[50] He went on to submit that if these issues were resolved promptly in the Employment Court, unnecessary duplication would be avoided because there would be issue estoppels. That meant that many matters would not have to be reconsidered in the High Court proceeding.

[51] In reply, Mr Billington argued that a detailed analysis of the various causes of action in each proceeding indicated there was less commonality than might be thought. He said that the possibility of issue estoppel findings would be confined. The High Court proceedings brought into play a significant springboard issue, leading to a range of claims brought in equity and tort; and that these would involve wholly different damages assessments than that which would be required under contractual principles in this Court.

[52] It is clear that the nature and range of issues in the High Court proceedings will be significantly broader than those in this Court; and that, legally, different concepts will be invoked. Undue complexity could arise in the process of determining the extent of any alleged estoppel; and there could well be debate as to whether any such findings could provide a satisfactory basis for the non-contractual causes of action which that Court will have to consider. On the basis of the information before the Court, I am not satisfied that the possibility of issue estoppel findings is a persuasive factor.

[53] Further, were the Employment Court proceeding to be heard first, there would nonetheless need to be a second trial in the High Court to deal with the range of issues that must be determined in that jurisdiction. On the other hand, were the High Court trial to occur first, I accept there is only a limited prospect of the parties having to return, at that point, to the Employment Court.

[54] These considerations strongly favour the grant of a stay of the Employment

Court proceeding.

[55] A second issue which Mr O'Callahan raised in this context related to the undertakings which have been given by each defendant. He said that since it was being argued for the plaintiff that these should remain in place for the duration of any stay, unfair prejudice would be caused to the defendants by having to maintain those undertakings until some point after the High Court hearing, well into 2018.

[56] He argued that the undertakings were restrictive, and had been given in lieu of the making of a freezing order in June 2016 at a point when it was reasonably anticipated there would be a hearing in late 2016.

[57] Elaborating, Mr O'Callahan referred to the content of the undertakings, in which the former employees agreed:

... Not to deal with all property of every kind, whether tangible, real or personal, corporeal, or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise, [held] as bare legal owner or as beneficial owner, including but not limited to the assets set out in the attached Schedule, otherwise than in accordance with the ordinary course of business or in accordance with usual and typical day to day living expenses or ordinary family decisions, providing that any spending on capital items beyond $10,000 per annum will require consent of Eden Group Limited, which consent shall not be unreasonably withheld, or the consent of the Court, and in any event not to diminish any property or assets for the purpose of defeating [the] ability or the ability of [New Space Limited] to meet a judgment in this proceeding.

[58] In summary, Mr O'Callahan said that if a stay was to be granted in respect of the Employment Court proceedings it would be unfair to maintain the restriction on capital expenditure. Mr Billington said that his instructions would allow some modification of that aspect of the undertakings.

[59] Following an adjournment, the Court was advised that the parties had agreed that the undertakings could be varied by the removal of the cap on expenditure on capital items.14

[60] Mr O'Callahan confirmed that although the defendants' preferred position was that the Employment Court hearing take place first, as discussed above, the defendants' secondary position was that any order of stay should be subject to undertakings being given on this modified basis. Mr Billington confirmed that Eden Group would accept modified

undertakings, as agreed, were the stay to be granted.

[61] These developments removed the apparent prejudice which would have existed were the undertakings to remain without variation while the High Court

proceedings were resolved.

14 That is from the words “providing that any spending ... the consent of the Court”.

[62] These considerations favour the grant of a stay order.

The public interest

[63] Both counsel emphasised the desirability of making best use of court resources.

[64] In my view, given the prospect that the High Court proceeding would be more likely to resolve most issues between the parties, without the complicating factor of issues estoppel having to be considered and resolved, a stay of the Employment Court proceeding would be in the public interest. Such a course was more likely to ensure a better use of judicial resources.

Duplicate witnesses

[65] Final decisions had not been taken by the parties as to precisely which witnesses would be called. It would seem that the witnesses required for each proceeding would be the same.

[66] This is a neutral factor.

Duplication and waste

[67] There was common ground that any trial in the Employment Court would occupy up to three weeks; and as already noted, three weeks have been set aside in the High Court.

[68] If no stay were to be granted so that both proceedings go to trial, there will obviously be significant duplication of preparation. On the other hand, if a stay is granted there is a reasonable prospect that the High Court proceeding will resolve most matters, thus avoiding unnecessary duplication.

[69] This factor favours the grant of a stay.

State of advancement

[70] It is evident from the foregoing analysis that, subject to some discovery issues which could be resolved in the relatively near future, the Employment Court proceeding could be brought on for hearing in the fairly near future, although there are some difficulties as to the availability of counsel on the three dates which were offered to the parties in this Court during July, August and September.

[71] As already noted, the High Court proceeding has been timetabled to trial in early 2018.

[72] However, I do not regard this particular factor as being unduly significant, when considered beside the factors identified earlier relating to the desirability of the High Court matter proceeding in the first instance.

Multiplicity of proceedings

[73] Obviously it is undesirable that the present dispute has to be considered in two fora, but that follows from the jurisdictional issues which were outlined earlier.

Conclusion

[74] Standing back, I am satisfied that the interests of justice clearly favour the granting of a stay, subject to conditions which will ensure that the question of which proceeding should be heard first can be revisited if necessary.

[75] I conclude that the Employment Court proceeding should be stayed temporarily until determination of the High Court proceedings between the parties, and other persons, on the following conditions:

a) The plaintiff must prosecute the High Court proceedings expeditiously.

b. Any party may apply, on reasonable notice, to review the order for stay if material circumstances change.

c. The proceedings in this Court are to be the subject of a telephone directions conference with a Judge approximately six months after the

date of this order for stay, so as to review that order in light of the progress of the High Court proceedings.

[76] The above order is subject to the filing of amended undertakings by the first, second and third defendants. Those undertakings:

a) Should be in the same form as the undertakings which those defendants had previously signed dated 21 June 2016, save for exclusion of the words:

... provided that any spending on capital items beyond $10,000 per annum will require consent of Eden Group Limited, which consent shall not be unreasonably withheld or the consent of the Court ...

b) Should also refer to the fact that it will remain effective until 14 days after the date when the High Court has issued its substantive judgment, or such other date as this Court may determine.

c) Should be filed and served within seven days of this judgment, that is, by

19 May 2017.

[77] Because the order for stay is temporary, and subject to review, I do not consider it appropriate to deal with cost issues arising from the present application, as yet. Costs are accordingly reserved.

B A Corkill

Judge

Judgment signed on 12 May 2017 at 12.35 pm
