IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 80
ARC 22/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
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
AND BETWEEN	MALCOLM JAMES BEATTIE First Plaintiff
AND	ANTHONY JOSEPH REGAN Second Plaintiff
AND	PATRICIA PANAPA Third Plaintiff
AND	PREMIER EVENTS GROUP LIMITED First Defendant
AND	BA PARTNERS LIMITED (IN LIQUIDATION AND RECEIVERSHIP) Second Defendant

Hearing: 30 April, 1-4, 7-11 and 14-15 May 2012
(Heard at Auckland)

Counsel: Aaron Lloyd and Vonda Hodgson, counsel for Premier Events Group Limited
David Neutze and Natalie Lord, counsel for BA Partners Limited (in liquidation and receivership)
John Eichelbaum, counsel for Malcolm James Beattie, Anthony Joseph Regan and Patricia Panapa

Judgment: 15 May 2012

ORAL INTERLOCUTORY JUDGMENT NO 5
OF CHIEF JUDGE G L COLGAN

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[1] After all three parties (and, in that respect, I combine the individual parties together as one) have closed their cases and at the start of Mr Lloyd's submissions for Premier Events Group Limited (PEGL), Mr Eichelbaum drew to Mr Lloyd's attention the existence of a proceeding that had not been referred to by Mr Lloyd in his opening.

[2] Whether that is extant and, if so, what are the consequences of that, are now the subject of disagreement, submissions, and this judgment. I have to say that probably each of the people involved has been less than completely astute at some stage of this process and I no less than any of the others.

[3] Although contained now within a single file number, these are essentially multiple proceedings in which plaintiffs are defendants and vice versa. They are proceedings which were removed from the Employment Relations Authority and there have been multiple iterations of pleadings.

[4] The claim now in issue is one brought by Malcolm Beattie and Anthony Regan against PEGL and BA Partners Limited (in liquidation and receivership) (BAPL) although it is acknowledged and accepted that the liquidation status of

BAPL and the absence of consent to the continuation of that proceeding against it of either the liquidator or the High Court means that the claim cannot proceed against it.

[5] On 5 October 2011 the solicitors for Messrs Beattie and Regan filed what is entitled a "Second Amended Statement of Claim dated 5 October 2011". This followed, by only a matter of days, the filing of predecessor documents, a marked up second amended of claim dated 1 October 2011 and, at the same time (on 3 October 2011), an unmarked version of the 1 October 2011 document.

[6] The second amended statement of claim of 5 October 2011 makes a series of claims against PEGL which are contained in that and on which I will not elaborate. It is not insignificant, in my view, that this second amended statement of claim was not pleaded to by PEGL. Assuming, as I do, that it was served on PEGL within a matter of a few days of its filing on 5 October 2011, the period for filing and serving a statement of defence to it would have expired by the time the matter was next before the Court.

[7] That next Court event is relied on by Mr Lloyd who submits that, as a result of it and a subsequent Chambers hearing, the second amended statement of claim dated 5 October 2011 must be regarded as a nullity. Counsel says in effect that the plaintiffs abandoned this proceeding in the following circumstances.

[8] On 17 November 2011 the files came before her Honour Judge Inglis at a conference of counsel in Chambers. I cannot and will not speculate on why the Judge may have done what she did and I rely simply on my knowledge of the file prior to that time and on the wording of her Honour's minute. The relevant part of that minute is dealt with under a heading "Strike out application" where, at para 5, her Honour said:

> I declined to deal with the application for strike out today given the current state of the pleadings. It was agreed that there would be considerable value in the pleadings being clarified to make it clear what claims are being advanced against which parties and what defences are being raised in relation to which plaintiff's claims. Mr Lloyd indicated that a separate statement of claim would be filed on behalf of the first plaintiff.

[9] The Judge then gave some timetabling directions for the filing of amended pleadings and confirmed the fixture date for 30 April 2012.

[10] I do not think I would be safe in assuming that, by giving those directions, the Judge intended to mean that any statement of claim or defence no so amended would be regarded as thereafter being a nullity. There are at least two ways in which proceedings can meet that fate. The first is that they are struck out by court order and that clearly did not happen in this case. The second is that they are discontinued by the party filing them and equally that has not been the case here.

[11] Mr Lloyd says that his position, that the second amended statement of claim dated 5 October 2011 is no longer an operative pleading in this case, is strengthened by the contents of a minute that I issued on 26 January 2012. That was a minute which I sent out after I had attempted to prepare for a telephone conference call with counsel about these cases which was to be held on Tuesday 31 January 2012. I recorded at paragraph 1 of that minute that I had read what I understood were then the operative pleadings. I, perhaps like Judge Inglis, complained mildly about, not the multiplicity of these, but the less than helpful waistband descriptions on them, and I recorded that I hoped to assist counsel by outlining what I understood were the pleadings at that stage on which the trial would be based, and to raise some matters arising out of those.

[12] I accept that I should have expressed my views and defined the issues more clearly. What I was anticipating were strike-out and other like applications that had been heralded and were to come up for hearing in February 2012. I did not intend to indicate that that was a definitive list of the pleadings but, rather, those which would be affected by the forthcoming applications. I accept that I should have been more careful in examining all of the pleadings and recording that assessment more precisely.

[13] The next relevant point is that when Mr Eichelbaum opened his case for the individual defendant parties on 1 May 2012 at the start of the case, counsel did refer to the second amended statement of claim dated 5 October 2011. Mr Lloyd has very fairly conceded, and I too must do so for myself, that he did not realise the import of

Mr Eichelbaum's reference to the statement of claim at that time and it is unfortunate that the matter has only now emerged.

[14] Mr Lloyd advances three grounds to support his contention that this pleading should be regarded as a nullity.

[15] The first relies on the timeline that I have just summarised. For the sake of completeness I do not accept that it is fatal to Mr Eichelbaum's pleading that the contents of my minute of 26 January 2012 were not contradicted expressly by him. That would be to put the same value on the frailty that Mr Lloyd no doubt concedes in relation to Mr Eichelbaum's opening on 1 May 2012, that he did not contradict that opening at that time.

[16] The second argument advanced by Mr Lloyd is one of impracticability. I do not accept that the contents of that second amended statement of claim dated 5 October 2011 are so confused or defective that it cannot survive. I agree that if it does, then PEGL will need leave to defend it but, in the circumstances outlined, it would be a harsh decision to refuse leave. I do not understand, from Mr Lloyd's third ground, that there would be further evidence called on behalf of PEGL if the pleading is now regarded as operative.

[17] That leads me to Mr Lloyd's third point which is prejudice or, more precisely, the absence of it to the individual parties. It is notable that Mr Lloyd does not assert prejudice to his client but simply says that the individual parties represented by Mr Eichelbaum will not be prejudiced if the pleading cannot be relied on.

[18] That may or may not be so but I think, on balance, that the question of prejudice is neutral as between PEGL on the one hand, and Messrs Beattie and Regan on the other. So I do not accede to PEGL's request that the proceeding be declared to be a nullity simply because there is no prejudice to the individual parties in doing so.

[19] The ultimate test to be applied by the Court is what is necessary to do justice in the particular circumstances of the case. Although regrettable and inconvenient, I

conclude that to do justice to the case, even at this relatively late stage, I must have regard to the second amended statement of claim of the individual parties dated 5 October 2011 and will hear, of course, any consequent applications that PEGL may have as a result of that.

GL Colgan
Chief Judge

Judgment delivered orally at 3.08 pm on Tuesday 15 May 2012