IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-4288

BETWEEN	KPMG NEW ZEALAND Plaintiff
AND	BRUCE DONALD GEMMELL & ORS First Defendants
AND	ERNST & YOUNG NEW ZEALAND Second Defendant

Hearing: 27 February 2009

Appearances: M Gilbert SC and S M Hunter for plaintiff
G Hall and S Willetts for defendants

Judgment: 27 March 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on Friday 27 February 2009

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[1] The plaintiff is a national accounting partnership. The first defendants are chartered accountants practising in Christchurch. Prior to 30 June 2008 they were partners in what they allege was a separate Christchurch partnership between themselves. They say they were also members of KPMG.

[2] The plaintiff disputes that analysis. It says there was only a single KPMG New Zealand partnership of which the first defendants were members.

[3] With effect from 30 June 2008, the first defendants purported to dissolve their Christchurch partnership (so ceasing to be members of the plaintiff), and joined the partnership of Ernst & Young. The plaintiff says that in doing so the first defendants were in breach of various obligations owed by them to the plaintiff.

[4] On 10 July 2008 the plaintiff issued this present proceeding. It alleges seven causes of action against the first defendants and five against Ernst & Young.

[5] The defendants now seek orders directing that:

a) Questions of liability and quantum be determined separately;

b) The defendants' discovery be confined to liability issues until the Court's ruling on liability is available.

The statement of claim

[6] The causes of action alleged by the plaintiff may conveniently be considered in five categories. The first concerns alleged breaches of fiduciary duty and of contractual duties of good faith in respect of the first defendants' actions in relation to clients and staff of KPMG.

[7] A further cause of action alleges breach of contract by the first defendants in respect of the name "Hadlee Kippenberger", a trading name used by the first defendants in Christchurch.

[8] A third category relates to confidential financial data, business records and client files, together with other confidential information. The plaintiff alleges conversion, and misuse of confidential information, against both first and second defendants.

[9] The plaintiff further alleges that the first and second defendants conspired together to take certain actions in order to injure the plaintiff, and that they conspired unlawfully to interfere with its business relations with third parties, including clients.

[10] Finally, the plaintiff claims that the second defendant (alone) breached an agreement entered into on 4 July 2008, in which the second defendant promised to return audit files which the plaintiff says the second defendant had earlier unlawfully converted.

[11] The relief sought by the plaintiff includes damages, and at its election an account of profits in respect of claimed breaches of equitable obligation.

Litigation history

[12] This proceeding was commenced on 10 July 2008. On 16 July 2008 the parties filed a joint memorandum seeking a priority fixture for the determination of a preliminary issue as to the rights of the parties in respect of the use of the name "Hadlee Kippenberger & Partners". The first defendants alleged that this name was owned by them and/or their family trusts. On the other hand, the plaintiff alleged that the name was held on trust for all of the partners in KPMG in New Zealand.

[13] On 18 July 2008 Potter J allocated a trial fixture on 15 and 16 October 2008 for the determination of the Hadlee Kippenberger issue. Leave was reserved to both parties to apply in the event that agreement could not be reached in respect of appropriate timetable orders.

[14] There was a disagreement between the parties with respect to the ambit of initial discovery, but ultimately the solicitors for the plaintiff offered to defer discovery in relation to quantum issues: " … to a later date". The parties agreed to

do that, and on 28 August 2008 filed a joint memorandum seeking various interlocutory orders, including as to the filing of lists of documents relating to liability issues only. Those orders were made by the Court by consent on 4 September 2008.

[15] The Hadlee Kippenberger issue was resolved by agreement on 14 October 2008, the day before the hearing was due to take place. On the following day the plaintiff's solicitors wrote to the defendants' solicitors seeking a timetable for discovery in relation to quantum. There has been no substantive response.

[16] Attempts were made by the parties to resolve their overall differences by way of mediation, but a mediation scheduled for 5 February 2009 was cancelled, and it appears from the counsels' submissions on the present application that the parties remain some distance apart. Proposals on behalf of the defendants for a split trial and deferred quantum discovery were rejected by the plaintiff.

[17] Against that background the defendants bring the present application, which the plaintiff opposes.

Legal principles

[18] The defendants rely on r 10.15 which provides:

> **10.15 Orders for decision**
>
> The court may, whether or not the decision will dispose of the proceeding, make orders for—
>
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[19] An alternative jurisdictional foundation appears in r 7.9.

[20] It is common ground that earlier authorities, decided under the previous Rules 418 and/or 438, remain relevant. The starting point is the assumption that all

matters at issue in a proceeding are to be determined in one trial. The burden of displacing that presumption rests on the party contending for split trials: *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1998) 12 PRNZ 333 at 334. The burden is not insignificant. The law reports are replete with warnings as to the danger of split trials: *Windsor Refrigerator Co v Branch Nominees* [1961] Ch 375 at 396; *Esso Resources Canada Ltd v Stearns Catalytic Ltd* (1991) 77 DLR (4th) 557 at 560, and *Tepko Pty Ltd v Waterboard* (2001) 206 CLR 1 *at 55*.

[21] Some of the pitfalls were discussed by Fisher J in *Clear Communications* at p.335:

> Split trials risk a number of difficulties. It is often difficult to define with sufficient precision the demarcation between those issues to be addressed at the first trial and those left for the second (see, for example, the *Arklow* litigation). It is not always easy to see what matters have become the subject of issues estoppel. It may be necessary to prepare issue estoppel schedules and hear argument as to their scope. A Judge may inadvertently disqualify himself or herself by expressing views on matters yet to be fully addressed at the second hearing (*Winton*). Findings might be inadvertently made without the benefit of evidence and argument envisaged by a party as appropriate only for the second hearing. The second hearing can require the recalling of the same witnesses with needless extra time and cost to the parties and the public. There is duplication of time spent by counsel and the Court in re-acquainting themselves with issues imperfectly remembered from an earlier trial and the time spent retraversing those matters in Court. There can be multiple appeals (in extreme cases taking the matter to the Privy Council as in *Ryde v Sorenson*) before returning to the Court of first instance to embark upon the second phase of the case. Even without appeals, there can be delay in embarking upon a second round of discovery and other interlocutory matters and amended pleadings following the first trial and then the delay of obtaining a fixture for the second hearing. There can be difficulties in ensuring that the same Judge is available for the second hearing, bearing in mind the usual commitments, sabbaticals, retirements and deaths which are the unhappy lot of the judiciary. If a different Judge has to preside at the second hearing there can be difficulties over earlier views as to credibility and the status of the notes of evidence from the first hearing. In my view these and other difficulties together place a heavy onus on any party seeking split trials.

[22] But as Fisher J pointed out, every case must be considered individually and the possibility of a split trial should never be dismissed out of hand. Certain classes of litigation, such as intellectual property cases, are particularly suited to split trials: *Yves St Laurent Parfums v Louden Cosmetics Ltd* (1994) 8 PRNZ 238. Certain factors relevant to a decision about splitting liability and damages hearings were

usefully summarised by Asher J in *Young v St Lukes Square (1993) Ltd* HC AK CIV 2003-404-3215 17 November 2005:

a) The likely extent of the quantum evidence. If it is particularly complicated and lengthy, split trials may be indicated: *Clear Communications,* and *Rio Beverages Ltd v The Golden Circle Cannery* HC AK CL 30/91 14 February 1992 at p 5.

b) Any significant evidence overlap between issues going to liability and the quantum should be avoided. The possibility of evidence duplication will normally tell against split trials.

c) Some classes of litigation, such as intellectual property cases, will often give rise to a more distinct demarcation between liability and quantum evidence, so lending themselves more readily to split trials.

d) The prospect of multiple appeals will sometimes suggest that a single trial will be more appropriate: see for example the difficulties that arose in *Strathmore Group Ltd v Fraser* [1992] 3 NZLR 385.

e) Practical considerations include availability difficulties for the Judge who presides over the liability trial, and who ought likewise to preside at a subsequent damages trial; also relevant is the possibility that the trial Judge might become disqualified by reason of particular credibility findings in the first trial.

f) There is a risk that following liability findings the case may lose momentum; settlement may then be less likely than would be the case prior to a single trial.

[23] This last factor is perhaps counter-balanced by the consideration that, in some cases, the parties are likely to focus on the calculation of claimed losses more directly following a liability trial, rather than endeavouring to do so at a time when

they are preparing for trial in respect of both liability and quantum: *Gavey v Hay & Ors* HC Christchurch CP37/99 17 December 1999 at [17].

Discussion

[24] As a preliminary procedural point Mr Hall contends that the consent order of 4 September 2008, directing discovery in respect of liability only, is incapable of variation in a Commercial List proceeding: r 7.49 and r 29.9(4). Accordingly, he submits, the order confining discovery to liability only ought not now to be varied unless the Court considers in the exercise of its inherent jurisdiction that there are good grounds to warrant that course. There is no merit in that unduly technical argument. The Commercial List exists to facilitate the conduct of commercial cases; ultimately the Court must give such directions as will ensure the speedy and just determination of those cases.

[25] A factor that is always of some importance in split trial applications is the extent to which liability and quantum issues can conveniently be separated. Counsel are at odds on this point. Mr Hall says that questions of liability and quantum may be readily, and indeed logically, separated. He argues that all but the eighth cause of action (relating to the 4 July 2008 deed) turn upon two fundamental issues, neither of which requires any quantum evidence for its assessment:

a) The nature of the relationship between the parties and in particular the nature of, and relationship between, the partnership deeds governing the KPMG Christchurch partnership on the one hand, and the KPMG New Zealand partnership on the other;

b) The *fact* of the actions taken by the first defendant during May-June 2008 which are said to be in breach of the alleged equitable or contractual duties owed by the first defendants to the plaintiff. Mr Hall submits that while evidence of how the defendants dealt with matters such as finance and property might be relevant to determining liability, there would be no need to touch upon detailed financial matters, or upon the value of the property concerned. In other words,

he contends, the case is similar to the intellectual property cases where liability and quantum issues are routinely separated. In respect of claims to equitable relief, he argues that claims to lost profits cannot be considered until the scope of the defendants' equitable duties is determined. Mr Hall says also that the plaintiff has acknowledged that the present proceeding lends itself to convenient separation of liability and quantum trials. On that point he refers to the consent memorandum of 28 August 2008, in which the plaintiff agreed to a liability hearing in respect of the Hadlee Kippenberger name.

[26] On the other hand, Mr Gilbert says that liability and quantum issues are so closely intertwined that it is simply impracticable to separate them for trial purposes. He says that, for example:

a) The plaintiff believes that Ernst & Young made a payment to the first defendants to procure the plaintiff's business in Christchurch – the fact, timing and amount of the payment are all relevant to liability, he contends.

b) The same witnesses are likely to be called by both parties in respect of both liability and quantum, so a split trial would result in their having to give evidence twice (assuming of course the plaintiff is successful as to liability).

c) The central question of the alleged separate existence of a partnership comprising the first defendants demands a detailed analysis of such issues as client billings and partner profit allocations, so the manner in which the financial aspects of the plaintiff's business in Christchurch were handled is likely to be relevant to both liability and quantum.

[27] Although Mr Gemmell, one of the first defendants, filed a very detailed affidavit, there is only limited material before the Court about the difficulty of assembling the quantum evidence, and the extent to which it is or is not interwoven

with liability material. It seems to me that a significant proportion of the financial data that is relevant to quantum will need to be produced to the Court on the liability argument, because the manner in which the first defendants actually conducted their practice, including the manner in which revenue was shared, is likely to be relevant to a determination of the nature of the legal relationship between KPMG and the first defendants. In other words, there is no obvious and clear demarcation between liability and quantum issues, as often appears for example in some classes of intellectual property litigation.

[28] As against that, Mr Hall argues that where, as here, there are multiple causes of action, the Court must take into account the possibility that one or more of those causes of action will not succeed, with the result that the remedies claimed in respect of those unsuccessful causes of action would not need to be addressed in a quantum trial. As a result, preparation and trial time would diminish, and fewer witnesses would be required. And of course, if the plaintiff is wholly unsuccessful, no quantum trial would be necessary at all.

[29] In that respect, Mr Hall says, the Court ought to pay particular attention to the first cause of action where there is a claim for an account of profits – if that cause of action fails then there will be no need to call evidence as to the profits derived by the first defendants, nor any need to call evidence in respect of the adjustments for skill and effort discussed in cases such as *Chirnside v Fay* [2007] 1 NZLR 433. There is substance in Mr Hall's contentions, but as always in applications of this sort, there are countervailing considerations.

[30] An important factor will be the need in this case for the same Judge to deal with both liability and quantum in order (if the plaintiff is successful on the first cause of action) to ensure that liability findings are properly reflected in a subsequent grant of equitable relief. That raises judicial availability issues.

[31] It is difficult to evaluate Mr Hall's argument that the defendants ought not to be put to the trouble and expense of calling evidence as to quantum at a joint trial. There is little detailed evidence as to the extent of the task. As Mr Gilbert submits, the events with which this proceeding is concerned all occurred less than a year ago.

Documentation relating to a claim to an account of profits will be readily at hand, and unlikely to be extraordinarily extensive. The case is not, for example, comparable to *Clear Communications*.

[32] Then there is the question of appeals. I accept Mr Gilbert's argument that in this case there is a real possibility that there may be an appeal by the defendants following an adverse ruling on liability only, given the firm views held by the defendants as to the nature of their relationship with the plaintiff. In my view there is a real risk that, if the plaintiff succeeds on liability, the split trial litigation could drift on for several years.

[33] In his written synopsis Mr Hall says:

> The reality is that the parties' views in relation to liability are so diametrically opposed that, irrespective of quantum issues, this proceeding will only be settled if the plaintiff is willing to largely abandon its claim.

That suggests that an appeal would be likely to follow an adverse result in a trial on liability alone.

[34] Neither is it possible to discern an enhanced prospect of settlement in the event of a split trial. Mr Hall simply contends that, following a liability finding, settlement "would be a real possibility". However, there is nothing to suggest that the defendants would be more likely to settle following an adverse liability finding. Rather, on the material available to the Court, it is probable that an appeal would be pursued.

[35] The jurisdiction to order split trials is discretionary. But in my view, for the reasons outlined in cases such as *Clear Communications*, an order should be made only where there are plainly discernible advantages of doing so. I have not been persuaded that such advantages would accrue in this case, and in consequence decline the defendants' application. It is therefore unnecessary to consider the defendants' separate application for an order directing the deferral of discovery as to quantum until after a determination as to liability is available.

Result

[36] The defendants' applications for split trials and deferred discovery are each dismissed.

[37] The plaintiff is entitled to costs. Counsel may file memoranda if they are unable to agree.

[38] The proceeding is listed for mention in the Commercial List at 9.30 am on Friday 24 April 2009. Counsel are asked to file memoranda in advance of that hearing, which will provide a forum for the giving of directions for the further conduct of the proceeding in the light of this judgment.

C J Allan J