IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA647/2021
[2022] NZCA 173

BETWEEN	JEREMY WALTER CLAXTON Applicant
AND	SMITHS CITY (SOUTHERN) LIMITED (IN RECEIVERSHIP) Respondent

Court: Miller and Collins JJ

Counsel: K T Dalziel for Applicant
R L Towner and J L Libbey for Respondent

Judgment: (On the papers) 10 May 2022 at 11.00am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is declined.

C The applicant must pay costs for a standard application on a band A basis.

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment responds to an application for leave to appeal against an Employment Court judgement on the ground that there is a question of law which by reason of general or public importance ought be submitted to this Court for decision.

The application focuses on an award of damages for breach of his employment contract.

[2] Mr Claxton also seeks an extension of time to appeal an earlier interlocutory decision of the Employment Court, in which he sought a stay of proceedings on the ground that the respondent was receiving financial support to pursue the litigation from another company, Smith's City (2020) Ltd, which had recently purchased the respondent. The delay has been explained and the application is not opposed. We accordingly grant the extension of time to seek leave to appeal under r 16A and turn to the merits of the application for leave.

[3] Mr Claxton was an employee of the respondent, which sued him (and another employee who has since abandoned his appeal) for breach of his employment contract. The employer alleged that over a substantial period Mr Claxton had used his role to run his own business in competition with it.

[4] Before the hearing in the Employment Court, it was discovered that the respondent was receiving financial support to pursue the litigation from Smith's City (2020) Ltd, which had acquired the business including the benefit of claims against Mr Claxton and his fellow employee. Mr Claxton argued that it was an abuse of process to fail to disclose the litigation funding arrangement, further that there had been an illegal assignment of the employer's rights to which he had not consented. These claims were dismissed in the interlocutory judgment.

[5] In the substantive judgment Judge Smith found for the respondent, rejecting a defence that Mr Claxton had its permission. The Judge fixed damages at $732,399.

[6] Mr Claxton submits that the Employment Court erred in law by: finding there was no abuse of process to the late disclosure of litigation funding; finding that Mr Claxton did not have the consent of the respondent to operate a competing business; and finding that the respondent had proved loss attributable to the breach. The respondent replies that these are alleged errors of fact not law, and they are not of sufficient importance to justify leave.

[7] With respect to the litigation funding question, Mr Claxton claims that the litigation funding arrangement amounted to an assignment of the claim which should have been disclosed and was not, resulting in an abuse of process. This claim raises a question of law but we do not consider that it has reasonable prospects of success. As the Supreme Court held in Waterhouse v Contractors Bonding Ltd, a stay for abuse of process should be granted only where (relevantly) the funding arrangement constitutes the assignment of a cause of action to a third party in circumstances which such an assignment is not permissible. In this case the judge found there was an effective assignment and that it ought to have been disclosed, but he was not satisfied that there was an abuse of process and he found that the arrangement was lawful. The contract between the respondent and Smith's City (2020) was an orthodox business sale and purchase transaction.

[8] With respect to the question of consent to run a competing business, Mr Claxton argues that the judge erred in his approach to the evidence, treating his defence as an implied permission claim rather than one of consent manifested through inaction by managers who knew of his activities. We see this as almost entirely a question of fact. The defence of consent was the crux of the case, as the Judge put it. It failed essentially because Mr Claxton engaged in subterfuge to conceal the size and geographical extent of his competing business, indicating that he knew he did not have his employer's permission. He was also found to have been in breach of his duty of fidelity as a senior employee.

[9] With respect to compensation, the respondent sought an account of profits. Mr Claxton did not make full disclosure of his accounts, so the respondent's expert witness used what she had to estimate his profit (revenue less direct costs). The Judge rejected an argument that compensation should be assessed by deducting the costs that the respondent would have incurred on the same transactions, so arriving at the profit it would have made. Mr Claxton claims that the objective should have been to restore the respondent to the position it would have been in but for the breach. Only if damages could not be calculated on that basis would it be appropriate to turn to unjust enrichment principles.

[10] We accept that this raises a question of law. However, the information before the Judge was the best available. Mr Claxton was responsible for any deficiency in it. It appears the experts agreed that it would not have been practical to calculate damages on an alternative basis. We observe that there was in the end a substantial measure of agreement between the expert witnesses about quantum. The amount ultimately awarded was a substantial sum, but that is because Mr Claxton carried on his business for a long time and on a significant scale. A number of adjustments were made in Mr Claxton's favour. The Judge found the resulting sum a reasonable assessment of the loss actually suffered. That is the ultimate objective of damages. In the circumstances, we are not persuaded that there is a reasonable prospect that a different outcome would result on appeal.

[11] With respect to loss, Mr Claxton also says that any debt had been satisfied by Smith's City (2020), in the form of consideration for the respondent's loss. We find this claim difficult to follow and observe that the Judge found there was no evidence that the receivers had in some way received compensation for the subject matter of the litigation. On the face of it, the sale of the respondent's business appears to have included its right to compensation as against Mr Claxton for past breaches of his employment agreement. The Judge found that the transaction did not amount to an impermissible assignment of a contract for personal service.

[12] The application for leave to appeal is declined. Mr Claxton must pay costs for a standard application on a band A basis.

Solicitors:
Cook Morris Quinn, Auckland for Respondent