

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2015-404-3135
[2017] NZHC 709**

BETWEEN

DETECTION SERVICES LIMITED
First Plaintiff

DETECTION SOLUTIONS LIMITED
Second Plaintiff

DETECTION SERVICES PTY LIMITED
Third Plaintiff

DETECTION SOLUTIONS PTY
LIMITED
Fourth Plaintiff

STEPHEN CARL JOHN SIMMONS
Fifth Plaintiff

AND

CHRISTOPHER LORRAINE
PICKERING
First Defendant

CONTINUED OVERLEAF

Hearing: 7 March 2017

Appearances: Mr S C Dench for the Plaintiffs
Mr A R B Barker for the Defendants

Judgment: 12 April 2017

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

*This judgment was delivered by me on
12.04.17 at 10 a.m, pursuant to
Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar*

Date.....

AND

AQATAR LIMITED
Second Defendant

AND

JAKE VAN DER PEYL
Third Defendant

Background

[1] This proceeding arises out of the development of a system for detecting water leakages in high pressure lines. During the period when development of the system was carried out, the first defendant, Mr Pickering, was the general manager of the first plaintiff, Detection Services Limited (DSL). The second defendant, Aqatar Limited, is a company that Mr Pickering incorporated.

[2] Broadly, the substantive dispute between the parties concerns the question of who owns both the technology and know-how that was developed and acquired in the creation of the leakage detection process. It also concerns the manufacture of a prototype of the equipment, which was part of the process. The plaintiffs, and in particular Mr Simmons, who is the person behind the corporate plaintiffs, assert that the system was devised, developed and created by Mr Simmons and Mr Pickering in a joint development for DSL.

[3] Mr Pickering, on the other hand, claims that he or his company solely owned the system and the rights in it. It is alleged against Mr Pickering that he wrongly appropriated the system and refused to allow the plaintiffs to use or access the system unless they purchased it from him or his company.

[4] Consistent with their claim that it was a joint development, the plaintiffs assert that a fiduciary relationship existed between the two sides. They allege that, as a result, Mr Pickering was required to act loyally and in the interests of developing a system for the plaintiffs in conjunction with them. He was thus precluded from appropriating the development and from preferring his own interests in relation to it.

[5] The fiduciary relationship was said to arise from the trust and friendship that existed between Mr Pickering and Mr Simmons; that the development was in the nature of a joint venture and that Mr Pickering held an additional position of trust as general manager of the first plaintiff. He was therefore well placed to complete the development without close supervision and without disclosing his intentions or actions. There are other particulars given in the statement of claim as to how the

fiduciary duty came into existence and the ways in which Mr Pickering and the second defendant breached it. The plaintiffs say that they suffered loss in a number of ways, such as having to build a new system. They seek equitable compensation in excess of AU \$1.5 million.

[6] The plaintiffs also claim against the defendants on the basis of estoppels, breach of contract and misuse of confidential information.

[7] In August 2011, the first plaintiff dismissed Mr Pickering from his position as general manager. Mr Pickering brought a proceeding alleging wrongful dismissal in the Employment Relations Authority (ERA). In the course of that proceeding, the plaintiffs relied upon the fact that Mr Pickering had been working on the system that they owned. The ERA rejected the defendant's claim that he had been developing his own system and found that he had been engaged in a joint development outside the scope of his employment contract.

[8] Nevertheless, the ERA concluded that the first plaintiff was not justified in dismissing Mr Pickering on the stated grounds that he refused to hand over the development and sign an undertaking relinquishing all rights in it. The ERA concluded:¹

[95] The dismissal was unjustified because Mr Simmons could not dismiss Mr Pickering for refusing to hand over the development to DSL as the development did not belong in its entirety to DSL...

[96] However, Mr Simmons conclusion that he could no longer trust Mr Pickering to act in the best interests of DSL or to act honestly and ethically on behalf of the business was valid.

[9] The ERA therefore seems to have concluded that, while the plaintiffs had some interest in the development, Mr Pickering did too. That appears to follow from the earlier passages in the decision of the ERA:

[76] For the purposes of this decision, it is sufficient that I consider the context in which the system development took place. Mr Simmons maintained it was a joint development. I agree with his assessment. Mr Pickering was not developing a separate system.

¹ *Pickering v Detection Services Ltd* [2012] NZERA Auckland 260.

[77] When Mr Pickering commenced his employment any development he did on the system was not as an employee as it was not part of his job description and employment duties.

[78] Neither did he carry out the development as an individual without any obligations to anyone else. During the time he was employed he was developing the system outside the employment relationship on a joint basis with Mr Simmons and DSL. The issue of who owns what with regard to the system is one which I neither need to nor can determine. I cannot determine it because there is insufficient evidence.

[10] While the ERA apparently determined that the plaintiffs and Mr Pickering had an interest in the development, the latter because of the work that he had carried out on it, the decision did not attempt to measure the extent of the respective interests of the parties or to describe in detail what their respective interests comprised or what the value of those interests might be.

[11] The position that the plaintiffs take is that the conclusions of the ERA give rise to an issue estoppel and that, as a consequence, it is not open to Mr Pickering to put forward in this proceeding contentions which are inconsistent with the decision of the ERA.

[12] In particular, the plaintiffs submit that it is not open to Mr Pickering to revive his earlier claim that he alone developed the system. He is stuck with the conclusions of the ERA that the system was developed jointly by him and DSL.

[13] The plaintiffs have anticipated in their statement of claim that Mr Pickering and his company might wish to re-litigate the question of whether the system was developed by way of a joint enterprise (as they allege) or was the outcome solely of the efforts of Mr Pickering (which he is expected to claim). In order to prevent Mr Pickering adopting such a strategy, the plaintiffs assert that Mr Pickering is estopped from maintaining that he and or Aqatar own the system and/or the rights in it.

[14] It is clear that the plaintiffs are correct in anticipating that Mr Pickering will be claiming that the system was his development alone. In his statement of defence in this proceeding, Mr Pickering asserts that there were in fact two independent systems under development. He says that the first plaintiff was developing a system called "InScan", while he was developing a system referred to as "DPX".

Mr Pickering said that the development of the DPX system was not part of the employment responsibilities that he had in his role at the first plaintiff. He says that the plaintiffs became interested in purchasing DPX, a working version of which Mr Pickering said he personally constructed for a cost of \$180,000. Mr Pickering says that the plaintiffs declined to pay the agreed price for DPX, namely \$257,170 + GST. He said that he was thereafter suspended as general manager of DSL in July 2011 and unjustifiably dismissed on 15 August 2011.

[15] The plaintiffs appealed from the determination of the ERA (which ruled that the DPX system was a joint development between the plaintiffs and Mr Pickering) to the Employment Court. The proceeding, though, was settled before the appeal could be heard on the basis of a substantial payment being made to Mr Pickering. The statement of defence states, apparently accurately:

As part of the settlement, the parties agreed that the rights or remedies in respect of ownership of the DPX systems were reserved and unaffected.

[16] The compromise was reached by means of a deed of settlement, which was executed on 14 November 2013. The arrangement reached was stated to be in full and final settlement of all issues arising out of the employment relationship between the parties and the termination thereof including arising in the proceedings. Clause 5 stated:

The parties agree that these terms of settlement do not affect either of their rights and/or remedies in respect of the ownership of and/or rights in any leak detection systems including those identified in the proceeding, or parts of those systems.

[17] As a result, Mr Pickering also denies that he owes any fiduciary duty because, amongst other reasons, the plaintiffs made no material contributions to the development of the DPX system.

Current proceedings

[18] In September 2016, the plaintiffs filed an application to have a separate question tried in the present proceedings. The preliminary question was stated in the following terms in the application:

Whether by virtue of the employment relations authority determination dated 31 July 2012 in case number 5350102, the defendants are estopped from maintaining that the leak detection system issue in this proceeding was developed separately by the first and/or second defendants, and that the first and/or second defendants alone own the system and/or the rights; or such question as the court determines is appropriate.

[19] The plaintiffs have made an application for an order pursuant to r 10.15 of the High Court Rules (HCR). The plaintiffs rely on a number of grounds in support of the application for a finding that the defendants were estopped from raising the issue stated above. Firstly, they allege that it would substantially reduce the length of the hearing time that would otherwise be required. They also say that it would assist the parties and the Court to know in advance whether an issue estoppel exists.

[20] The defendants oppose the making of an order for the separate determination of the question. The grounds of opposition in summary are as follows:

- a) Any finding by the ERA that the system was a joint development is irrelevant to the issues that the Court has to consider in the present proceedings. The ERA did not decide issues as to ownership of the system, whether the joint development of that system gave rise to a joint-venture and whether the joint development gave rise to a fiduciary relationship between the parties.
- b) The defendants also say that there is no benefit to be gained by a separate trial. They allege that it would potentially incur significant additional delay and cost.

Principles relating to separate questions

[21] The principles in relation to applications under r 10.15 of the HCR are not in dispute. I accept Mr Barker's submissions for the defendants that:²

- a) The starting point is the presumption that all matters in issue between the parties should be determined in one trial. That will usually be the most expeditious and efficient way of dealing with the proceeding.

² See generally Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR10.15.05].

- b) Given that starting presumption, the purpose of an application under Rule 10.15 is to expedite the proceeding, by limiting or defining the matters that will have to be dealt with at trial, or indeed to avoid the need for trial altogether.
- c) The onus of establishing that the determination of a separate question will be the most expeditious and efficient way of dealing with the proceeding lies on the applicant. The burden is not insignificant. It must show that there are “good, preponderant reasons” in favour of the separate question being determined.
- d) The granting of an order involves the exercise of a discretion by the Court. The factors that the Court will consider were exhaustively listed in *Turners & Growers Ltd v Zespri Group Ltd* as follows:³
 - i) The likelihood of delay in finally resolving the proceeding.
 - ii) The probable length of the hearings if there is a split trial.
 - iii) Whether a decision one way or the other on the separate questions would end the litigation.
 - iv) The impact on the length of any subsequent hearing.
 - v) A balancing of the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by parties opposing a split trial.
 - vi) Demarcation difficulties in defining issues to be addressed at the first trial.
 - vii) Resulting difficulties of issues estoppel.
 - viii) Inadvertent disqualification of a Judge who has expressed views at the first trial on matters for decision at the second trial.
 - ix) Inadvertent findings at the first trial upon matters that are for full evidence and argument at the second hearing.
 - x) The need to recall some witnesses at the second hearing.
 - xi) The duplication of time involved in the Court and counsel “coming up to speed” again for the second hearing.
 - xii) The prospect of multiple appeals.

³ *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [11].

- xiii) A second round of discovery or other interlocutories and amended pleadings following the first trial.
- xiv) Rostering difficulties in ensuring that the same Judge is available for the second hearing.
- e) In general terms, the Court has to weigh up the benefits to be gained from the separate trial process, against the burdens that it will impose on the parties.
- f) The case law contains many warnings by judges, based on experience, that the apparent shortcut offered by the separate question procedure, rarely turns out as hoped.

[22] I also intend to be guided by the decision of Kós J in *Haden v Attorney-General*.⁴ In turn, Kós J cites the judgment of Fisher J in *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* where, after referring to the potential difficulties that can be caused by split trials, the Judge said:⁵

In my view these and other difficulties together place a heavy onus on any party seeking split trials.

In the end, however, every case must be considered individually and the possibility of a split trial should never be dismissed out of hand. The most important single question is usually the interaction between the issues intended to be traversed at the first hearing and those for the second. The very difficulty in defining the division in the present case immediately puts one on guard against difficulties which could arise.

[23] In the present case, the issue that arises is whether this is genuinely a case where, as Mr Dench for the plaintiffs contended, there is an issue which can be neatly isolated out, making it suitable for determination as a separate question.

Discussion of suitability of issue for determination by separate question procedure

[24] The principles in relation to issue estoppel (which is the basis for seeking determination of a separate question) require consideration as well. I accept that these have been correctly stated by Mr Dench in the following passage taken from his submissions:

⁴ *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC).

⁵ *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1998) 12 PRNZ 333 (HC) at 335.

14. An issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceeding. This is a rule of public policy.

Talyanicich v Index Developments Ltd [1992] 3 NZLR 28, 37-9 (CA).

15. It is difficult to find a single decision that sets out the criteria that need be met but it is generally accepted that the following are required:

- A final judgment
- Between the same parties and/or their privies.
- Litigating in the same capacity.
- On the same issue
- Which must be pleaded.

16. The issue must also have been an essential and fundamental step in the logic of the judgment.

[25] Mr Barker was prepared to assume that the decision of the ERA in this case is capable of giving rise to an issue estoppel. His contention was that, even if that were so, there were difficult questions of overlap which would arise. This would make it very difficult to separate out those issues which the Court dealing with the trial would be precluded from inquiring into because of the issue estoppel.

[26] Part of the problem is that the case in the ERA was concerned with quite a different issue from the present one.

[27] In the ERA proceedings, Mr Pickering claimed that he had been wrongfully dismissed and that the grounds put forward to justify his dismissal were wrong. Essentially, the plaintiffs contended that Mr Pickering was in breach of his employment obligations because he did not cooperate in making available the InScan/DPX system when he was subject to an obligation to do so. That obligation allegedly arose out of the fact that he had performed work on the system as an employee. The essential reason of the ERA was that, while they found that Mr Pickering had done work on the system or made a contribution to it, they went on

to find that such contribution occurred outside the framework of the employment relationship between the two sides. The questions of the extent of the “contribution” that Mr Pickering made were understandably not gone into. It was enough for the ERA to conclude, although it did not explicitly set out these conclusions, that:

- a) Mr Pickering had contributed to the development of the system;
- b) Therefore, he had some proprietary interest in the system which would justify him in retaining the results of his efforts, unless he was able to come to an agreed payment or some other mutually acceptable basis for handing them over; and
- c) No agreement had been made under which he relinquished his interest in the development; and
- d) The work was carried on outside the framework of the employment relationship.
- e) Therefore, Mr Pickering had his own entitlements in respect of the development and was not required by his contract of service to hand the system over to the plaintiffs. He was not therefore in breach of his contract.

[28] The judgment, understandably, did not analyse what rights came into effect and the effect of any agreement(s) that the parties may have entered into which would affect Mr Pickering’s entitlements.

[29] The High Court at trial will be invited to conclude that Mr Pickering was under an obligation to make the development available to DSL, not as a consequence of his employment relationship, but because of the factual context in which he became involved in and advanced the work on the system. The position of the plaintiffs will be that Mr Pickering did not provide any of the intellectual assets, in the form of ideas and know-how, which made the system possible. The defendants wish to estop the plaintiffs from going into this question at all, by placing reliance on

the alleged estoppel arising from the remarks that the ERA made to the effect that in fact Mr Pickering had made some contribution.

[30] The issue that is to be decided at this stage of the decision is not whether or not an estoppel arose or the extent of it. The issue that I have to decide is whether the question of estoppel should be dealt with in isolation from the other aspects of the case.

[31] Mr Barker submitted that it was not general practice that the Court, in considering an application of this kind, would attempt to come to its own provisional assessment of the merits of each party's position on the separate question. Even if it were not the general practice, it would be very difficult in the circumstances of this particular case for the Court to embark upon any such provisional assessment.

[32] The situation could arise where, following the hearing of the separate question, the Court might determine that the estoppel did apply to prevent Mr Pickering alleging that he made the sole contributions to the project. Nevertheless, it would still be necessary to schedule a further trial, which would then consider what the extent of the contributions by the respective parties was and what interest in the development arose therefrom. The Court would, in all likelihood, be required to make assessments as to the relative value of the contributions each party made and to the general background bearing upon the existence and extent of any fiduciary duty.

[33] Therefore, hearing this issue separately will not resolve all the issues at trial or end the litigation. The claim of the plaintiffs involves the proposition that the terms of the joint-venture were such that the plaintiffs acquired unrestricted rights in the system. As I understand it, the ERA concluded that Mr Pickering would be prepared to accede to the plaintiff commercially exploiting the system, so long as they paid him for it. The plaintiffs did not therefore have an unconditional right to require the system to be made available to them without paying for it. Even if the estoppel was thus found to apply, a trial would be inevitable anyway because the Court would have to quantify Mr Pickering's interest. The additional question of whether he was justified in refusing to hand over the system without conditions

would seem to be a matter that will also almost inevitably come up at the trial in any case.

[34] All of these considerations mean that the inquiry in the High Court will travel a long way beyond the terrain visited by the ERA.

[35] Furthermore, Mr Dench considered that, if the Court heard the question and resolved it in favour of his client, then that could save the Court as much as 10 days of hearing time. I am not convinced that that is a realistic summary of the position though. A High Court case which in its entirety takes 10 days is a substantial case and, in that time, the Court would typically hear much evidence and resolve quite a number of issues. The suggestion that such an amount of time might be expended by the parties in this case on resolving the issue of whether both or only one of the parties developed the system seems to me unlikely.

[36] It is very difficult to look ahead and conclude what other issues might arise. But it cannot be ruled out that, even if there was a joint-venture, the respective rights of the parties and the resulting fruits of the venture would somehow have to be measured. This could possibly be on the basis of the value of the respective contributions that each party made. The willingness or ability of the plaintiffs to satisfy Mr Pickering's justified entitlement to be rewarded for his part in the development of the system is another question. If Mr Pickering was found to be doing no more than insisting on his lawful entitlements, how could it be that his actions caused loss to the plaintiffs? For these reasons, even if the estoppel took effect, it would not necessarily clear the way for the plaintiffs to claim damages.

[37] In summary, there is a substantial possibility that if the Court ordered a separate question to be argued, with all the disadvantages that that procedure involves, it could still turn out that adopting the process had in the end been futile in the sense that it did not save the Court any time at all.

[38] For those brief reasons, notwithstanding the very informative submissions which Mr Dench filed, I consider that the application ought to be dismissed and there will be an order accordingly.

[39] Counsel sensibly agreed that costs should follow the event and should be fixed on a 2B basis. Accordingly, the plaintiffs are to pay costs to the defendants on a 2B basis.

[40] The parties have also asked for leave to be reserved for the application for security for costs, which was adjourned at the hearing on 7 March to be brought back on for hearing in case further directions are required. There will be leave accordingly.

J.P. Doogue
Associate Judge