**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI**
**TĀMAKI MAKAURAU ROHE**

[2024] NZERA 754
3345780

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| | BETWEEN | THE FLETCHER CONSTRUCTION COMPANY LIMITED<br>First Applicant |
| | AND | BRIAN PERRY CIVIL LIMITED<br>Second Applicant |
| | AND | RODNEY MARK APPLEBY<br>First Respondent |
| | AND | MICHAEL GEORGE ABBOTT<br>Second Respondent |
| | AND | GLEN AARON BUDDEN<br>Third Respondent |
| | AND | SAMUEL BALLANTYNE<br>Fourth Respondent |
| | AND | TRAVIS HENRI<br>Fifth Respondent |
| | AND | REVEX PILING LIMITED<br>Sixth Respondent |

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| Member of Authority: | Rachel Larmer |
| Representatives: | Philip Skelton KC, Rebecca Rendle and Anita Birkinshaw, counsel for the Applicants<br>Paul Wicks KC, Emma Peterson, and Kieron Creagh, counsel for the First, Second, Third and Sixth Respondents<br>Rebecca White, counsel for the Fourth and Fifth Respondents |
| Investigation: | On the papers |

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| Other information: | 11 December 2024 from the First, Second, Third and Sixth Respondents<br>13 December 2024 from the Fourth and Fifth Respondents<br>16 December 2024 from the Applicants |
| Date of Determination: | 17 December 2024 |

## DETERMINATION OF THE AUTHORITY

### Employment relationship problem

[1] The parties asked the Authority to remove matter 3173362 to the Employment Court in the first instance under s 178(1) of the Employment Relations Act 2000 (the Act). The grounds for removal in the removal application are those in s 178(2)(a)(b) and (d) of the Employment Relations Act (the Act), namely that:

(a) The matter involved important questions of law that arose other than incidentally;[1]

(b) The matter was of such a nature and of such urgency that it was in the public interest to remove it;[2] and

(c) The Authority was of the opinion that the Court should determine the matter in the first instance.[3]

### The Authority's investigation

[1] The Authority held a case management conference (CMC) with the parties on 9 December 2024, which predominantly focused on whether removal of the original matter to the Employment Court in the first instance was appropriate.

[2] After discussing removal related issues, the Authority and parties agreed removal was appropriate. On that basis, Mr Wicks KC agreed to take the lead on lodging a removal application on behalf of the first, second, third and sixth respondents. The applicants and the fourth and fifth respondents agreed with that course of action.

[3] The parties agreed the removal application would be determined 'on the papers' and based on the information they had shared with the Authority during the CMC. The

[1] Section 178(2)(a) of the Act.
[2] Section 178(2)(b) of the Act.
[3] Section 178(2)(d) of the Act.

fourth and fifth respondents formally supported the removal application on the basis the ground in s 178(2)(a) of the Act had been established. The applicants also confirmed in writing that they did not oppose the removal application.

**Issues**

[4] The following issues are to be determined:

(a) Have any of the grounds for removal in s 178(2) of the Act been established?

(b) If so, should the Authority exercise its discretion not to remove this matter to the Court?

(c) What, if any, costs should be awarded?

**Have any of the s 178(2) grounds for removal been established?**

*Section 178(2)(a) of the Act – did an important question of law arise other than incidentally?*

[5] A question of law under s 178(2)(a) of the Act did not need to be complex, tricky or novel to warrant being an important question of law. A question of law would be sufficiently important if the answer to it was likely to be of broad effect or could assume significance in employment law generally. However, the question of law was not required to have an impact beyond the particular parties. A question of law could therefore be said to be important if it would be decisive of the case, or an important aspect of it, or it would be strongly influential in terms of the determination of the case, or a material part of it.[4]

[6] The following questions of law were identified by Mr Wicks KC in the removal application:

(a) Whether the respondents were jointly employed by the applicants;

(b) Whether the respondents owed any limited fiduciary duties;

(c) Whether there is any relevant cause of action against the sixth respondent given the withdrawal of a claim for penalties;

[4] *LDF v EZC* [2024] NZEmpC 109 at [13].

(d) Whether damages are available as a remedy for the alleged breach of good faith claims;

(e) Whether sufficient causation existed to support the applicants' claim for damages; and

(f) Whether the applicants are entitled to an account for profits.

[7] It was acknowledged by all of the parties that this matter requires a complex and highly detailed analysis of whether the respondents had liability for the various claims against them and, if so, whether their actions had caused the losses that the applicants claimed to have suffered.

[8] The Employment Court last considered these types of issues in *Rooney Earthmoving Limited v McTague*.[5] However, the current matter involved an additional question of law, and developing legal issues related to whether or not limited fiduciary duties are owed and whether damages were available for a breach of good faith.

[9] The Authority was satisfied that the following questions in the removal application were important questions of laws that would arise other than incidentally:

(a) Whether the respondents owed any limited fiduciary duties; and

(b) Whether damages were available as a remedy for an alleged breach of good faith claim; and

(c) Whether the applicants were entitled to an account for profits.

[10] Accordingly, the ground for removal in s 178(2)(a) of the Act has been established.

*Section 178(2)(b) of the Act – whether the case was of such a nature and of such urgency that it was in the public interest that it be removed to the Court?*

[11] There are significant factual disputes in these proceedings. The parties agreed that a formal discovery process in line with what is required by the High Court Rules is necessary and appropriate due to the likely production of a high volume of documents that will be required as a result of the disclosure process.

[12] At this stage in the process there are still disputes in relation to the relevance and scope of the categories of documents sought by way of discovery. The parties

[5] *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63.

anticipate that once a formal discovery process has been finalised, there may be further disputes in relation to claims of commercial confidentiality of documents.

[13] Given the high volume of documents that the parties envisaged would be required for the hearing of this matter, and the likelihood that the disputes between the parties would result in the need for intervention from the Authority, the formal disclosure regime and interlocutory procedure of the Employment Court was considered by the parties to be better suited to dealing with such issues.

[14] The Authority is aware that there has been an extraordinarily high volume of documents in this matter. For example, the volume of documents that the parties attempted to lodge with the Authority regarding a preliminary privilege related issue was so voluminous (in the hundreds of thousands) that the Authority's case management system was unable to cope with it.

[15] The Authority has explored with the parties the likely volume of documents that will be required in respect of a substantive investigation meeting, but they are not currently in a position to be able to give any clarity or confirmation around that, other than to agree that it is likely to be voluminous.

[16] The nature of the case, the entrenched views of the parties and the considerable amou8nts in issue meant that any determination of the Authority is likely to be subject to challenge in the Employment Court by the unsuccessful party, regardless of the outcome.

[17] While that is normally a neutral factor in removal applications, in this particular case there would need to be a preliminary determination on admissibility and that is a matter that cannot be challenged until after the Authority had completed its investigation which would not be before 2026, if liability was established and a remedies/damages investigation meeting was required.

[18] The parties would therefore get a timelier and more cost effective final outcome if the Employment Court was to deal with this matter in the first instance.

[19] The parties and Authority agreed that the particular nature of the claims in this matter, and the time that had elapsed to date in addressing disputed preliminary matters means that it would be a better use of the parties' time and resources to apply them to an Employment Court hearing in the first instance, rather than having to deal with

further preliminary matters in the Authority and then go through a substantive investigation meeting and possibility a remedies/damages investigation meeting.

[20] The parties and the Authority had agreed that if this matters was investigated by the Authority then that would occur in two parts. The first stage would involve an investigation meeting to establish liability. If the applicants succeed with that then the second stage would be a separate investigation meeting on remedies/damages. It would therefore be the most efficient use of the parties' time and resources for them to have all matters before the Employment Court from the outset.

[21] However, the Authority did not accept that there was any urgency in respect of this matter. Although the statement of problem was initially lodged by the applicants in May 2022, the various document/discovery and disputed privilege issues have taken considerable time and resources to get them to the point where the Authority was able to hold a case management conference with the parties on 9 December 2024.

[22] The Authority was not satisfied that the urgency requirement in s 178(2)(b) had been established to the required standard of proof, so this ground for removal was not met.

*Section 178(2)(d) of the Act – was the Authority of the opinion the Court should determine the matter?*

[23] This is a discretionary ground in which the Authority may assess factors that it considers are relevant to the exercise of its removal discretion. In this particular case there is a legal complexity to these proceedings, formal discovery will be required and that will involve a substantial number of documents.

[24] There will be preliminary admissibility issues that will need to be determined, and which cannot be challenged until after the Authority has completed its investigation. That is likely to involve considerable delay because it had been agreed that this matter would be investigated first by way of a liability investigation meeting and then if liability was established, by way of remedy/damages investigation meeting.

[25] There was a high likelihood of the unsuccessful party bringing a de novo challenge in the Employment Court. There will be significant costs for the parties in having to go through the Authority's investigation process and then subsequently

challenging the Authority's determinations, noting that admissibility issues could not be challenged until the matter had been finally concluded by the Authority.

[26] The proceedings will consume a significant amount of Authority resources and will require a more formal approach which is well suited to the structured processes of the Employment Court. For these reasons the Authority was satisfied that this matter should be removed to the Court.

*Findings – s 178(2) grounds for removal*

[27] Two grounds for removal specified in s 178(2) of the Act were established, namely:

(a) Section 178(2)(a) of the Act - this matter involved an important question of law that would arise other than incidentally; and

(b) Section 178(2)(d) of the Act - the Authority was of the opinion that in all the circumstances the court should determine this matter.

**Should the Authority exercise its discretion against removal?**

[28] Having concluded that two of the grounds for removal that are set out in s 178(2) of the Act had been met, the Authority still had to consider whether to exercise its discretion against removing this matter to the Court.

[29] The parties and Authority did not consider that there were any factors that weighed against removal to the Employment Court. Likewise, the relevant factors that were discussed with the parties during the CMC weighed strongly in favour of removal.

**Outcome**

[30] The removal application succeeded. Accordingly, matter 3173362 is to be removed to the Employment Court.

**Costs**

[31] During the case management conference all of the parties agreed that removal of this matter to the Employment Court was appropriate. The Authority considered that in these particular circumstances costs should therefore lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority