

ROCHESTER v FUJITSU GENERAL NEW ZEALAND LTD

Employment Court, Wellington (WC1/04)
Goddard CJ

15 December 2003;
10 February 2004

Practice and procedure — Application for rehearing — Applicants left employment to work for competitor — Respondents brought action for breach of contract — Employer identity issue — Application for rehearing of Court's refusal to decide employer identity as preliminary issue — Elementary rule that parties are entitled to sue in the alternative where identity uncertain — Court acceptance of evidence from bar not miscarriage of justice — Court not required to take into account affidavits prepared after hearing, but before judgment — Concise consideration of employer identity issue not inadequate — Court regard to novel legal arguments raised by respondents not miscarriage of justice — Court entitled to conclude defendants resisting disclosure of tax records — Insufficient explanation by applicants of merits of deciding employer identity as preliminary issue — Application for rehearing dismissed — Costs reserved, but quantum of costs of present hearing fixed at \$2,000 plus disbursements.

The first respondent was the New Zealand subsidiary of the second respondent, an Australian company. The applicants had been employed by one of the two respondents. The applicants both left their employment and began work for one of the respondents' competitors. The respondents subsequently brought an action against the applicants alleging various breaches of their employment contracts.

The applicants brought an application before the Employment Court to have the identity of their previous employer determined as a preliminary issue before trial. They also applied for summary judgment against the respondents, or for an order striking out the first respondent's claim.

The Court refused the applications for summary judgment, or for a strike out order. It also refused to order that the employer identity issue be determined as a preliminary issue before trial. It considered that the factual matrix of the substantive proceedings was complex, and it would have been artificial to decide the question of employer identity in isolation.

The applicants focused on the Court's refusal to order that the employer identity issue be decided separately. They submitted that there had been a substantial miscarriage of justice justifying a rehearing. In particular, the applicants argued that the Court had failed to adequately consider whether the employer identity issue should have been resolved before trial, especially given possible jurisdictional issues. They also argued that the Court was wrong to have been influenced in its decision by the possible novel legal arguments concerning employment status raised by the respondents during the hearing. The applicants argued that the Court should not have had regard to a blank tax form handed up from the bar during the hearing, or to the applicants' apparent failure to disclose certain tax records in

response to a recent notice for discovery. They also argued that the Court should have considered affidavits concerning the disclosure issue which were filed by the applicants after the hearing, but before judgment. Finally, the applicants argued that the overall merits of the application to have the employer identity issue decided separately were relevant to the question of whether there should have been a rehearing.

Held, (1) it was an elementary rule of civil procedure, that where there was doubt as to the identity of an employer, then the entities potentially qualifying for that description were entitled to sue in the alternative. It did not seem that any serious inconvenience to the applicants was involved in such a practice, or that they would have suffered any detriment if the case proceeded. That was so even if there was a strong possibility that one of the respondents was not the employer, and therefore the Court would have ended up having no jurisdiction to entertain a claim by that respondent based on an employment contract. The first respondent was entitled to allege that it was the employer and the Court plainly had jurisdiction to investigate that allegation and also the further allegation that the first respondent had a claim against the applicants based on an employment contract. It would have been a far greater inconvenience to run an entire case against the wrong defendant, or in the name of the wrong plaintiff, and then have had to start again. (para 28)

(2) The receipt by the Judge of a blank tax return form for the purpose of demonstrating that such a form was required to contain the name of the employer did not constitute any kind of miscarriage of justice. It was open to the Judge to have received the form under the very wide power that the Court possesses to receive any evidence that may have seemed relevant. (para 29)

(3) The affidavits concerning the disclosure issue did seem to show that some weeks after the hearing the applicants were not resisting disclosure of the tax records in question. However, there was no reason for the Judge, in the absence of any request from the parties to do so, to have taken the affidavits into account for the purposes of the judgment then under consideration and, in all likelihood, nearing completion. To have considered them, the Judge would have been bound to reconvene the hearing or to convene a hearing in chambers for the purpose of receiving argument as to the relevance and impact of the affidavits. Moreover, it was not possible to submit material without leave after the conclusion of a hearing and before judgment. (para 30)

(4) The Judge was not be criticised for having considered the employer identity issue concisely. She did not fail to consider that issue adequately. There had been no miscarriage of justice in that regard. (para 32)

(5) There was no substance in the associated argument that the Judge did not sufficiently consider the applicants' jurisdictional arguments. Plainly, she was conscious of them but it was open to the respondents to sue in the alternative. The Judge's reference to novel legal arguments raised for the first time at the hearing by the respondents did not constitute a miscarriage of justice. The possibility raised by those arguments that both respondents were the employer or employers would have militated against ordering an inquiry into that issue in advance of the trial. However, if the plaintiffs seriously intended to advance those novel arguments they would have had to modify their present pleading which did not allude to them. In any case, the reference to novel legal arguments did not appear to have been a major factor in the Judge's decision. (para 33)

(6) There was no basis for finding that there was no material before the Judge from which she was able to reach the conclusion that the defendants were resisting discovery of their tax records as at the date of hearing. In any event, the Judge's reliance on resistance to discovery was limited to the context of the summary judgment application which was not in issue in the present application for rehearing. (para 34)

(7) There was no validity in the complaint that the Judge had failed to consider the merits of the application to have the employer identity issue decided separately. The fact that an issue could have been isolated and separated from a long trial did not automatically mean that it should have been. There needed to be a tolerably clear case made out of a likely cost saving before a hearing was split in that way. Sometimes such a course could have been beneficial. However, there were many cases in which it would have seemed undesirable to split off a single issue. One reason for that was the multiplication of rights of appeal; another reason was that parties should not have been discouraged from suing defendants in the alternative where there was doubt as to the parties properly to be joined. In the present case, the applicants had failed to explain what difference, in terms of either cost or convenience, could have been made by a finding that the second respondent was the employer rather than the first respondent, or vice versa. (paras 35, 36)

(8) Although costs were reserved, the Court fixed the quantum of costs of the present hearing at \$2,000, plus disbursements. (para 37)

Application dismissed; costs reserved.

Application

This was an unsuccessful application for rehearing of an Employment Court judgment which refused to determine the identity of the applicants' employer as a preliminary issue before trial.

C A Reaich counsel for applicants (Darryl Michael Rochester and Peter Mihu)
J G Miles QC and *C L Elliott* counsel for respondents (Fujitsu General New Zealand Ltd and Fujitsu General (Aust.) Ltd)

GODDARD CJ (reserved): [1] This judgment decides an application by the defendants ("the defendants" in proceeding WEC50/00) for a rehearing of the matters decided by her Honour Judge Shaw in a judgment dated 13 May 2003 (*Fuji General NZ v Rochester*, unreported, 13 May 2003, Shaw J, EC Wellington WC14/03) refusing an application for the following order:

- (a) an order that the issue of the identity of the employer of the first and second defendants be determined as a preliminary issue before trial. That is, were the defendants ever employed by Fujitsu General New Zealand Ltd (FGNZ), or were they employed exclusively by Fujitsu General (Aust.) Pty Ltd (FGA)?;
- (b) an order of summary judgment against the first plaintiff;
- (c) in the alternative, an order striking out the first plaintiff's claim;
- (d) directions and a timetable, and costs.

[2] The defendants argue that there has been a miscarriage of justice justifying the rehearing arising out of the following:

- (a) the Court took into account material that in the circumstances it was inappropriate for it to consider. That material consists of:
 - (i) evidence about PAYE tax forms that the plaintiffs' counsel handed up from the bar in the course of the hearing, and
 - (ii) the finding that the defendants were resisting particular discovery;
- (b) the Court failed to take into account material that it should have considered in the circumstances, namely the defendants' affidavits of 2 and 5 May 2003. It was in the interests of natural justice that if the material relating to the PAYE tax forms was to be taken into account, with the result that the Court held that the defendants were 'resisting' discovery, then defendants' affidavits of 2 and 5 May 2003 should have been considered;
- (c) the Court failed to have appropriate regard to the desirability of resolving issues of the correct identity of the defendants' employer at the earliest opportunity;
- (d) the Court was wrong in law to find that novel legal arguments, that were not asserted in the pleadings, were relevant to any of the issues for determination.

[3] To give these arguments meaning it is necessary to say something briefly about the history of this litigation. That history is by now notorious and has been described in other judgments. For present purposes, the following account will suffice. As matters stand now, the case is proceeding on the basis of a fifth amended statement of claim and statements of defence to it. The plaintiffs are two companies, Fujitsu General New Zealand Ltd ("FGNZ") and Fujitsu General (Aust.) Pty Ltd ("FGA"). Collectively, I will call them the plaintiffs. The defendants are D N Rochester and P Mihu. In their statement of claim the plaintiffs allege that they are respectively a New Zealand and an Australian company, that FGA carried on business in New Zealand as a supplier of air-conditioning units between 1 July 1998 and 31 August 1998, that FGNZ was incorporated on 28 August 1998 and is a subsidiary and customer of FGA, and that FGNZ took over the entire New Zealand business of FGA as supplier of air-conditioning units. It is further alleged that FGNZ is a competitor in the New Zealand air-conditioning market with a company called Melco New Zealand Ltd ("Melco"). The plaintiffs claim that they owned or were in lawful possession of certain information, materials, and property, all of which were used in the course of their business and to which they gave access to the defendants solely for the purposes of undertaking their employment duties.

[4] The plaintiffs further allege that the first defendant, Mr Rochester, was employed by FGNZ at all material times from its date of incorporation until 11 November 1999 but that, in the alternative, he was employed by the second plaintiff, FGA, from 4 March 1998 until 11 November 1999 to manage its New Zealand operation and to manage FGNZ after its incorporation. Since 17 November 1999 Mr Rochester has been employed by Melco. The plaintiffs allege that Mr Rochester breached express and implied terms of his employment contract in numerous ways that are specified at length in the statement of claim. The plaintiffs seek an inquiry as to damages and an order for delivery up of documents, and damages assessed as a result of the inquiry.

[5] The plaintiffs go on to say that the second defendant, Mr Mihu, was employed by the first plaintiff from its date of incorporation until 12 June 2000 as the first plaintiff's northern region sales representative or, in the alternative, that he was employed by the second plaintiff, FGA, from 28 May 1998 until 12 June 2000 in the same capacity for its New Zealand operation and later for the first plaintiff, FGNZ, after its incorporation. He is said to have been employed by Melco since

19 June 2000. Similar allegations are made against him and similar relief is sought from him.

[6] The defendants have filed separate statements of defence. However, they are substantially similar in their purport. To take Mr Rochester as an example, he admits that he was employed by FGA from 1 July 1998 until 11 November 1999 and that, during his employment, he managed air-conditioning sales and sales representatives in New Zealand and also that he was employed by FGA to manage FGNZ from the date of FGNZ's incorporation until 11 November 1999. However, he denies that he was ever employed by FGNZ and he denies the allegations against him of breach of contract.

[7] It is as well to mention that approximately parallel proceedings are taking their course in the High Court.

The application before Judge Shaw

[8] I have already described in general the nature of this application. As appears from the judgment, and as is the fact, affidavits were filed in support of the application and in opposition to it. The essence of the affidavits is set out in the judgment in paragraphs 8] to 27]. However, as appears from the application for a rehearing, the defendants criticise the findings so made, at least in part, because the Court received some evidence from the Bar and also because it did not take into account further affidavits sworn and filed after the hearing but before judgment. The hearing was on 20 and 21 March 2003 and the judgment was delivered on 13 May 2003. The affidavits in question were sworn on 2 and 5 May 2003. As stated, the defendants also complain that the Court failed to have appropriate regard to desirability of resolving issues of the correct identity of the defendants' employer at the earliest opportunity.

The argument for a rehearing

[9] Counsel told me that the purpose of the defendants' original application and of their present application for a rehearing is to determine who was their employer, the defendants' position being they were employed exclusively by FGA, while the plaintiffs admit that the defendants were employed initially by FGA but assert other possible scenarios, five in number according to the defendants. Counsel told me that the defendants Rochester and Mihi have always denied being employed by FGNZ and did so when they filed their original statements of defence in August 2000. FGA became a plaintiff only in March 2002, resulting in the vacation of a fixture then in place for 8 April 2002 and subsequent days. FGA itself had sought resolution of the preliminary issue earlier in 2002 claiming that the issue of the identity of the employer was fundamental to the proceedings and suggesting that this issue could be addressed either in its entirety in advance of the substantive hearing or as part of the substantive hearing. The defendants initially opposed that course of action as they wanted to preserve their fixture, and they accepted that the then third defendant, Mr Wheeler, had been employed by FGNZ at all material times and therefore FGNZ was the appropriate plaintiff in respect of him. The plaintiffs elected to be non-suited as against Mr Wheeler in July 2002 and from that time on the position adopted by the remaining defendants was that FGNZ had no further role in the proceedings as they were at all times employed by FGA.

[10] It was then they decided that the issue of who was the correct plaintiff should be decided as a preliminary issue. Their position is that —

- FGNZ was never their employer, has no standing in these proceedings, and should not take part in them;
- the determination of the issue before trial will streamline the pleadings and shorten the duration of the trial;
- it is oppressive and inefficient to prepare evidence in circumstances where the identity of the employer has not been determined;
- they are entitled to certainty and so is the Court.

[11] In relation to the evidence counsel has explained that on 14 March 2003 the plaintiffs filed a notice of application for orders for particular discovery against the defendants. This required the defendants to disclose any documents submitted to and received from the Inland Revenue Department relating to the 1998-99 and 1999-2000 years. Mr Mihu swore an affidavit on 19 March 2003, the day before the hearing commenced and which was handed in at the hearing on 20 March, in which he addressed the issues raised in the plaintiffs' notice and which exhibited certain relevant records. As stated, two additional affidavits concerning the defendants' tax records were filed after the hearing.

[12] After discussing the authorities bearing upon the Court's power to grant rehearings contained in s 125 of the Employment Contracts Act 1991 (which, as is common ground, continues to apply to this case) counsel addressed the various complaints made about Judge Shaw's judgment amounting, it is said, to miscarriages of justice. The first of these was labelled failure to consider or to consider adequately the preliminary issue, that issue being whether the identity of the defendants' employer should be determined separately in advance of trial. The defendants seem to accept that they may not have been entitled to summary judgment against FGNZ but still complain that the Judge did not have adequate regard to the considerations which would apply when considering whether to determine the preliminary issue before trial. They focus on two paragraphs of the judgment:

[39] The defendants argue that should summary judgment be refused the question of the identity of the employer should be determined before the substantive trial. They say that this would avoid an unnecessarily complex trial by resolving a critical issue. The plaintiffs, who on an earlier occasion have also suggested that the Court follow this procedure, now resist the suggestion.

[40] These proceedings have been belaboured with preliminary issues for too long. The factual matrix of the substantive proceedings is complex. It is inextricably linked with the operation of two major companies and much will turn on the relationship between these. On the material before the Court so far it appears that, in spite of their size, the companies were not over-zealous in recording their inter-contractual relations. The issues of what confidential information belonged to whom is part of that factual matrix. To decide this point in isolation would be artificial.

[13] The defendants argue that this assessment was flawed for the following reasons:

- (a) there was no assessment of the applicable test for determining the preliminary issue or of the basis for the plaintiffs' assertion that issues were 'disputed';

- (b) there was no assessment of the benefits of determining that preliminary issue before trial. Nor was there any consideration of what, if any, prejudice would result in doing so;
- (c) while the 'factual matrix' of the plaintiffs' allegations may be complex, determination of which employer employed the defendants is not complex and can be readily determined; and
- (d) determination of the preliminary issue of whether the defendants were employed by FGA, FGNZ, or both, does not involve any assessment of confidential information.

[14] The defendants argue that the learned Judge did not assess the preliminary issue question on its merits, saying that such an assessment would have involved consideration of the actual principles, the relevant evidence, and the possible consequences of the application, and the Court's failure to do so constituted a miscarriage of justice.

[15] The next complaint is that the Judge failed to consider whether FGNZ had jurisdiction to pursue a claim against the defendants in this Court if its claim is not founded on an employment contract. They say that the Judge did not advert to the defendants' jurisdictional arguments in her judgment, nor did she deal with any of the submissions concerning the law relating to the transfer or assignment of employment contracts. They point out that they referred the Judge to authorities in which this Court and the Court of Appeal had emphasised that an employee's contract cannot be transferred from one employer to another without the employee's assent. Further, they claim that the plaintiffs had adduced no evidence as to how, when, with whom, and in what way the defendants' employment contracts were transferred from FGA to FGNZ. They argue that the contended failure to address these issues constituted a miscarriage of justice sufficient to warrant a rehearing.

[16] The second head of miscarriage was the acceptance by the Judge of possible arguments, criticised by the defendants as novel, that a number of possible employment relationships might have existed such as joint employers, borrowed employees, a secondment, or some other arrangement. The defendants, while accepting that these may constitute grounds for refusing summary judgment, submit that the Court erred by having regard to them as a reason for refusing to determine the preliminary issue. They say that the Court should have had regard to the following considerations:

- (a) there was no evidence to substantiate the novel legal arguments. There was no discussion of them in Mr Naylor's affidavit of 8 March 2003, which was the only evidence filed by the plaintiffs in opposition to the application. Nor did the pleadings allege any facts to substantiate those arguments;
- (b) the plaintiffs had been served with the defendants' application on 27 November 2002. They had nearly 4 months to submit evidence to substantiate those novel legal arguments, or to amend their pleadings, but did not do so;
- (c) the novel legal arguments were not pleaded in the plaintiffs' pleadings;
- (d) the novel legal arguments were not referred to in the plaintiffs' notice of opposition dated 27 November 2002. Nor were they referred to in any of the other memoranda filed by the plaintiffs;
- (e) the novel legal arguments were raised for the first time in the course of submissions. The defendants were taken by surprise by them.

[17] The defendants claim that the Court erred by having regard to submissions that were without any evidential foundation and which were not even pleaded by the plaintiffs. They claimed that the defendants' applications should have been assessed on the pleadings and on the admissible evidence, not on the basis of speculative and novel arguments raised in submissions for the first time during the hearing.

[18] The third head of miscarriage is the complaint that the Judge considered tax records and related affidavits. They complain particularly about the Judge's finding of fact that the defendants were presently resisting the disclosure of their PAYE forms. They say this perception was wrong and that it was not only a reason for refusing summary judgment but also presumably coloured the Judge's approach to the decision whether to determine the preliminary issue in advance of trial. They refer to the statement in para 25 of the judgment that the defendants are resisting an application by the plaintiffs for disclosure of PAYE forms. The defendants say that this finding was in error because the defendants had only been served with a form 17 discovery notice in the course of the hearing, so the Judge should not have made any findings on their attitude to discovery. They also say that the Judge was wrong not to have regard to the subsequent affidavits by Messrs Rochester and Mihi which responded to the plaintiffs' application for particular discovery. The essence of this complaint is that, at the time of the hearing, the defendants had not had time in which to comply with the recent notice to make discovery.

[19] A secondary complaint is the Court's failure to have regard to three affidavits filed at or after the hearing but before judgment in which the defendants disclosed documents in compliance with the plaintiffs' notices. These were the affidavits sworn by Mr Mihi on 19 March and 5 May 2003 and by Mr Rochester on 2 May 2003.

[20] The fourth head of miscarriage relates to a complaint that the overall merits are relevant to the consideration whether there should be a rehearing. Counsel analysed the affidavit evidence in detail and went on to complain that, while Judge Shaw referred to some of the documents in her judgment, there was no analysis or discussion of their effect. Rather, there is a brief conclusion that a full hearing of all the evidence is required before the sufficiency of the proof of the plaintiffs' claim can properly be determined.

[21] The defendants acknowledge that the Judge accepted that, for FGNZ to succeed substantively, it must prove on the balance of probabilities that it was the defendants' employer (para 29). They complain, however, that she did not actually assess the evidence adduced by the parties to determine whether it had done so. In conclusion, the defendants submit that they are entitled to know who employed them and that both parties would benefit from that issue being resolved. Neither this issue, nor the evidence relevant to it, is particularly complex or novel, they assert. The defendants submit that to allow the plaintiffs to go to trial with this basic issue unresolved is not in the interests of justice and that there is a real likelihood of a miscarriage of justice if the application to hold a rehearing is not granted.

[22] Mr Miles, leading counsel for the plaintiffs, defended the Judge's decision saying that it is clear that she considered all the relevant arguments and the evidence before her and that the decision she reached in dismissing the application was a proper exercise of her discretion and which was clearly an outcome open to

her. He referred to the additional delay being caused by this application. In relation to the May affidavits, he points out that they were filed and served 6 weeks after the hearing and barely a week before the judgment, and that the Court was under no duty to take into consideration the affidavits since they were not filed before or during the hearing. They were not subject to consideration, submission, or objection, and simply did not feature in the hearing. Counsel pointed out that no application for leave to adduce further evidence was made, no warning was given to the Judge or the plaintiffs that the defendants were intending to rely on this later filed evidence, and no opportunity was given to the plaintiffs to challenge that evidence or to make submissions on its admissibility or weight.

[23] By contrast, counsel argued, the IRD evidence tendered during the hearing was merely a prescribed blank form of which proper judicial notice could be taken, was subject to submission from both counsel, was read in part and was considered by the Court, and formed an integral part of the hearing. Mr Miles referred to s 126 of the Employment Contracts Act 1991. He also argued that the material in the affidavits did not amount to fresh evidence as defined for the purposes of applications for rehearing; and, even if it does, it is not likely to have been influential.

[24] Turning to the merits, Mr Miles submitted that dealing with the employer issue separately would not substantially reduce the length of the trial but would simply result in another preliminary hearing which in itself would consume substantial resources and time. Mr Miles suggested that a preliminary hearing was not the most economical, swift, and efficient means of progressing the matter to trial, and could create duplication requiring a substantial hearing in a matter which is clearly more appropriate for trial.

[25] Mr Miles also addressed the summary judgment and striking out applications but I do not understand the defendants to be seriously arguing for a rehearing of the decision refusing these remedies. The application was directed almost entirely to obtaining a rehearing of the application for an order that the issue of the identity of the employer be determined in advance of the trial.

Decision

[26] I do not consider that this matter requires extensive discussion. The law relating to rehearings is well-settled and has been considered in detail by full Courts of this Court and by the Court of Appeal in recent years. There is no need to go beyond these authorities, especially as counsel were agreed as to the principles to be applied.

[27] A curious feature of the case was that originally the defendants intended to be represented at the hearing by Mrs Ablett Kerr QC who, unfortunately, was prevented from appearing by a murder trial overrunning its estimated length. In declining the defendants' application for adjournment, I reserved leave for Mrs Ablett Kerr to file supplementary written submissions covering any point not dealt with by Mr Reaich to her satisfaction. She filed extensive submissions which, however, do not add, except to provide stylistic differences, to Mr Reaich's able argument. Accordingly, I do not need to refer to Mrs Ablett Kerr's further argument or to the answer to it provided by Mr Miles.

[28] It is an elementary rule of civil procedure that, where there is doubt as to the identity of — in this case — an employer, then the entities potentially

qualifying for that description are entitled to sue in the alternative. Such a practice is expressly recognised in the High Court Rules, r 73. Similarly, where there is doubt about the identity of a defendant, a plaintiff may sue two or more defendants in the alternative. The consequence of so proceeding can be inconvenient in that, in the former case, only the successful plaintiff will be entitled to costs against the defendant, while in the latter case a successful plaintiff will be entitled to costs against one defendant but will have to pay costs to the other defendant. It does not seem to me that any serious inconvenience to the defendants is involved in such a practice or that they would suffer any detriment if the case proceeds even if there is a strong possibility that one of the plaintiffs was not the employer and therefore the Court will end up having no jurisdiction to entertain a claim by that one based on an employment contract. FGNZ is nevertheless entitled to allege that it was the employer and the Court plainly has jurisdiction to investigate that allegation and also the further allegation that FGNZ has a claim against the defendants based on an employment contract. It is a far greater inconvenience to run an entire case against the wrong defendant, or in the name of the wrong plaintiff, and then have to start again.

[29] I cannot accept that the receipt by the Judge of a blank tax return form for the purpose of demonstrating that such a form is required to contain the name of the employer can constitute any kind of miscarriage of justice. It was open to the defendants to advance any argument they saw fit about the reception of the form or inferences to be drawn from it, and no doubt they did advance such arguments. But it was also open to the Judge to receive the form under the very wide power that the Court possesses to receive any evidence that may seem to be relevant.

[30] As to the failure or alleged failure to have regard to subsequent affidavits, I agree that they seem to show that some weeks after the hearing the defendants were not resisting disclosure of this material. However, there was no reason for the Judge, in the absence of any request from the parties to do so, to take them into account for the purposes of the judgment then under consideration by her and then, in all likelihood, nearing completion. To consider them, she would have been bound to reconvene the hearing or to convene a hearing in Chambers for the purpose of receiving argument as to the relevance and impact of this material. Moreover, no material can be submitted without leave after the conclusion of a hearing and before judgment.

[31] Having made these general observations, I return to the heads of alleged miscarriage of justice.

[32] In relation to what is criticised as the Judge's failure to give adequate consideration to the preliminary issue, I do not think the Judge is to be criticised for having done so concisely. She was of the view that this case has been "belaboured with preliminary issues for too long" and that, for the brief reasons she gave, it would be artificial to decide this point in isolation. The defendants disagree and wish to contradict the Judge's conclusion but that is not an appropriate approach to an application for a rehearing. Nor is it a question whether I agree with the Judge's conclusion. I do not have to consider that at this point. The only question for me is whether there has been a miscarriage of justice. I am not persuaded that there has been any such miscarriage of justice or that, as claimed, the Judge failed to consider the preliminary issue adequately.

[33] For reasons I earlier outlined as part of my general observations, I do not think that there is any substance in the associated argument that the Judge did not sufficiently consider the defendants' jurisdictional arguments. Plainly she was conscious of them but, as I have said, it is open to FGA and FGNZ to sue in the alternative. Nor do I think that the reference to novel legal arguments raised for the first time constituted a miscarriage of justice. One of the matters that the Judge had to consider was whether the determination of the identity of the employer as a preliminary point would be likely to confer any benefit on the parties in terms of shortening the hearing overall and the preparation for it. The possibility that it might be accepted that both plaintiffs were the employer or employers would militate against ordering an inquiry into that issue in advance of the trial. However, I accept that if the plaintiffs seriously intend to advance such arguments they will need to modify their present pleading which does not allude to them. The defendants are plainly entitled to know the basis on which the plaintiffs are proceeding and, as it is known to them now, that basis does not include these novel arguments or scenarios. On the present pleadings, the plaintiffs are not entitled to rely on these points. However, it appears that the pleadings are not yet concluded and the Judge was, in my view, quite right to have regard to the possibility, even if it was a slight one, that they may yet undergo amendment. I express the hope, however, that the pleadings will soon be closed and that this point of novel legal arguments will not arise. I do not think it was a major factor in the Judge's decision.

[34] The Judge was plainly under the impression that the defendants were resisting discovery of their tax records as at the date of the hearing. I have no basis for finding that there was no material before the Judge from which she was able to reach those conclusions. On the contrary, I incline to the view that the defendants' initial reaction to the request for further disclosure was hostile. They first took the point, which they still complain about, that, instead of giving a notice to disclose as provided for by the Employment Court Regulations 1991, the plaintiffs applied to the Court for orders. They plainly should not have done that and, realising that error, served a notice to discover on the defendants. This was done while the hearing was in progress. Mr Mihu's affidavit tendered during the hearing provided only partial disclosure. There may well have been statements made in the course of the hearing — indeed, there must have been — that induced the Judge to think that the defendants were, at that point, resisting discovery. Later, with the benefit of advice, they adopted a different stance and complied. In any event, the Judge's reliance on resistance to discovery was limited to the context of the summary judgment application.

[35] The last complaint made is that the Judge failed to consider the merits of the application to split the hearing. I do not accept the validity of that complaint. The fact that an issue can be isolated and separated from a long trial does not automatically mean that it should be. Indeed, there are many cases in the books where a Court of first instance has been criticised by the Court of Appeal for adopting this course. I accept that that was in days when a stricter approach was favoured and a more liberal attitude is now considered more useful. One reason why it is unsatisfactory to apply it is that it can then give rise to two opportunities for appeal to the Court of Appeal. There needs to be a tolerably clear case made out of a likely cost saving before a hearing is split in this way. Sometimes such a course can be beneficial. There are, however, many cases in which it would seem

undesirable to split off a single issue. One reason for that is the multiplication of rights of appeal; another reason is that, as stated earlier, parties should not be discouraged from suing defendants in the alternative when there is doubt as to the parties properly to be joined.

[36] In the present case it has not been explained to me what difference, in terms of either cost or convenience, could be made by a finding that FGA was the employer rather than FGNZ, or vice versa. Presumably, whichever of the plaintiffs was the employer, it will be relying on the same duties and the same breaches of those duties and the same losses arising from those breaches, if proved. No doubt Judge Shaw could not see the point of the application either, and that may explain her somewhat terse comment — which, in my view, is entirely justified — that there have been too many interlocutory applications in this case.

[37] The application for a rehearing is dismissed for the reasons stated. Costs will be reserved as being costs in the cause. I was asked to fix the costs of the hearing before me. It occupied half a day and an appropriate quantification, given the number and seniority of counsel engaged, is \$2,000 plus disbursements (including counsels' air fares, if any) to be fixed, if necessary, by the Registrar.