IN THE SUPREME COURT OF NEW ZEALAND

SC 103/2013
[2014] NZSC 158

BETWEEN	LSG SKY CHEFS NEW ZEALAND LIMITED Appellant
AND	PACIFIC FLIGHT CATERING LIMITED First Respondent
	PRI FLIGHT CATERING LIMITED Second Respondent

Hearing:	19 August 2014
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	P G Skelton QC, A Borchardt and G M Pollak for Appellant R B Stewart QC and J K Goodall for Respondents
Judgment:	5 November 2014

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellant is to pay the respondents costs of $25,000 and reasonable disbursements as fixed by the Registrar.**

REASONS

(Given by William Young J)

Introduction

[1] The appellant, LSG Sky Chefs New Zealand Ltd (LSG), and the respondents, Pacific Flight Catering Ltd and PRI Flight Catering Ltd (together "Pacific"), are competitors. Both provide airline meals for passenger aircraft operating out of Auckland Airport. Following a tender process in late 2010, LSG replaced Pacific as the supplier of meals to Singapore Airlines. This took effect in February 2011.

[2] For the purposes of pt 6A of the Employment Relations Act 2000, the replacement of Pacific by LSG was a "restructuring" with the result that the affected employees of Pacific were entitled to transfer their employment to LSG. Such transfers were required to be on the existing terms and conditions of their employment and LSG was required to recognise their accrued entitlements to annual holidays, alternative holidays and sick and bereavement leave.

[3] LSG now seeks reimbursement from Pacific on the basis that that when it discharged the liabilities associated with those entitlements, its payments were to the use of Pacific and under compulsion of law.

[4] In the High Court, Woolford J upheld LSG's claim[1] but Pacific's appeal to the Court of Appeal was successful.[2]

Overview of our approach to the case

[5] *Halsbury's Laws of England* sets out the elements that have to be established to support a claim for money paid to the use of another by compulsion of law. They are:[3]

> (1) the claimant must have made an actual or virtual payment of money; neither the incurring of a liability nor the loss of goods can be treated as money paid;
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> (2) the claimant must have been compelled, or compellable, to pay this money to a third party, or have been requested by the defendant to pay it;
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> (3) the claimant must not officiously have intervened so as to expose himself to the liability to make the payment; and
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> (4) the defendant must have been legally liable to pay the third party, though the reason for that liability need not be the same as the one which induced the claimant to pay the third party.

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1 *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2012] NZHC 2810 [*LSG Sky Chefs* (HC)].

2 *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] 2 NZLR 1 (O'Regan P, Ellen France and Harrison JJ) [*LSG Sky Chefs* (CA)].

3 *Halsbury's Laws of England* (5th ed, 2012) vol 88 Restitution at [463] (footnotes omitted).

[6] In the High Court and Court of Appeal, the case was addressed primarily on the basis that (a) this passage accurately states the law,[4] (b) LSG can satisfy the first three elements just identified,[5] and (c) accordingly the critical issue is whether Pacific continued to be liable in relation to the entitlements of the transferred employees after the transfer date.[6] In this Court, however, Mr Skelton QC suggested that Pacific's liability to reimburse LSG did not necessarily depend upon Pacific having a continuing and post-transfer liability in relation to those entitlements.

[7] LSG's claim has always been premised on the basis that the payments which it made were for the "use" or "benefit" of Pacific. This premise can only be made out if Pacific received a benefit from the payments. It could only have received such a benefit if the payments discharged continuing liabilities. That the discharge of an existing liability of the defendant is fundamental to the cause of action is consistent not only with the passage from *Halsbury's Laws of England* which we have just cited but also the discussion in the current edition of *Goff and Jones*: *The Law of Unjust Enrichment*.[7] It also conforms to the way in which the principles have been stated in cases in which recovery has been directed[8] and denied.[9]

[8] In the course of argument, members of the Court raised with Mr Skelton the suggestion that the focus of the claim should perhaps be on what happened at the point of transfer, at which time LSG relieved Pacific of its obligations in respect of the accrued entitlements of transferring employees. This, however, was not the way the case was pleaded or argued in the courts below and Mr Skelton disavowed any attempt to pursue such an argument before us.[10]

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4 *LSG Sky Chefs* (HC), above n 1, at [29]; *LSG Sky Chefs* (CA), above n 2, at [15].

5 *LSG Sky Chefs* (HC), above n 1, at [30] and [37]; *LSG Sky Chefs* (CA), above n 2, at [16].

6 *LSG Sky Chefs* (HC), above n 1, at [37]; *LSG Sky Chefs* (CA), above n 2, at [17].

7 Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff and Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [20–01], [20–03] and [20–04].

8 See for instance *Moule v Garrett* (1872) LR 7 Exch 101 (Exch Ch).

9 *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 (CA).

10 Such an argument might have been along the lines that LSG's compulsory assumption of Pacific's liabilities gave rise to a reimbursement obligation on the part of Pacific. This argument would have required an extension of the existing common law principles. There would also have been an issue whether imposition of such an obligation would be congruent with the statutory scheme, see for instance the discussion at [24] below.

[9] It follows that we are of the view that LSG can only succeed if it can establish that Pacific's liabilities in respect of accrued entitlements persisted after transfer of its employees to LSG. As will become apparent, we consider that its liabilities did not continue post-transfer and for this reason, the appeal must be dismissed.

The entitlements in question

[10] Under the Holidays Act 2003, an employee is entitled to not less than four weeks' paid annual holidays after each completed 12 months of continuous employment.[11] One of these weeks may be swapped for cash.[12] At termination of employment, an employer is entitled to be paid for any accrued but untaken holidays.[13] As well, an employee who works on a public holiday is entitled to an alternative holiday on another day and, on termination of employment, to be paid for any accrued entitlement to alternative holidays.[14]

[11] Under the same Act, an employee is entitled to five days' paid sick leave after six months' continuous employment.[15] There are similar entitlements to paid bereavement leave.[16] But in contradistinction to the position in relation to holiday and alternative holiday entitlements, at termination of employment, an employee is not entitled to be paid in relation to untaken sick or bereavement leave.[17]

[12] The statutory entitlements under the Holidays Act can be added to under collective or individual employment agreements and to some extent were in the case of Pacific's employees. The detail of this, however, is not material to the outcome of the case.

[13] Pacific's payroll records recorded the value of the entitlements of employees in relation to holidays, alternative holidays and sick and bereavement leave.

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11 Holidays Act 2003, s 16.
12 Sections 28A – 28F.
13 Sections 16 and 24.
14 Sections 56, 60 and 61.
15 Sections 63, 65 and 71.
16 Sections 63, 69,70 and 71.
17 See s 67 in relation to sick leave. There is no similar provision in relation to bereavement leave, but nor is there is any provision requiring an employer to make payment.

Counsel, however, were not able to tell us whether these entitlements were expensed in respect of the period in which they accrued or rather were accounted for when paid.

Part 6A of the Employment Relations Act

[14] Part 6A was introduced into the Employment Relations Act in 2004[18] and subsequently amended in 2006.[19] Its purpose is to provide protection for employees working in specified service industries involving cleaning and food catering.[20] Contracts for the provision of such services tend to be short-term and regularly put out to tender. Contractors are thus susceptible to replacement (as Pacific was by LSG). In the absence of pt 6A, the employees of such contractors would have little job security. This is addressed by pt 6A, which provides that, where there is a transition from one contractor to another, employees of the previous contracting party (or old employer) may elect to transfer to the new contractor (or new employer) on their existing terms and conditions of employment.[21] When this happens, the new employer must recognise all existing accrued entitlements.[22]

[15] As explained, pt 6A was engaged by the termination of Pacific's contractual arrangement with Singapore Airlines and its replacement by LSG. Under ss 69F and 69I, employees of Pacific who had worked on the provision of food catering services to Singapore Airlines and were no longer required by Pacific were entitled to transfer to LSG.

[16] The following provisions of the Act are particularly relevant as to how that transfer was to be effected and any associated rights and responsibilities:

> **69I Employee may elect to transfer to new employer**
>
> (1) An employee to whom this subpart applies may … elect to transfer to the new employer.

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18 Inserted by the Employment Relations Amendment Act (No 2) 2004.
19 Amended by the Employment Relations Amendment Act 2006.
20 Employment Relations Act, ss 69A, 69F and sch 1A.
21 Section 69I.
22 Section 69J.

(2) If an employee elects to transfer to the new employer, then to the extent that the employee's work is to be performed by the new employer, the employee—

(a) becomes an employee of the new employer on and from the specified date; and

(b) is employed on the same terms and conditions by the new employer as applied to the employee immediately before the specified date, including terms and conditions relating to whether the employee is employed full-time or part-time; and

(c) is not entitled to any redundancy entitlements under those terms and conditions of employment from his or her previous employer because of the transfer.

…

69J Employment of employee who elects to transfer to new employer treated as continuous

(1) The employment of an employee who elects to transfer to a new employer is to be treated as continuous, including for the purpose of service-related entitlements whether legislative or otherwise.

(2) To avoid doubt, and without limiting subsection (1),—

(a) in relation to an employee's entitlements under the Holidays Act 2003,—

(i) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer for the purpose of determining the employee's entitlement to annual holidays, sick leave, and bereavement leave; and

(ii) the employer must not pay the employee for annual holidays not taken before the date of transfer; and

(iii) the new employer must recognise the employee's entitlement to—

(A) any sick leave, including any sick leave carried over under section 66 of that Act, not taken before the date of transfer; and

(B) any annual holidays not taken before the date of transfer; and

(C) any alternative holidays not taken or exchanged for payment under section 61 of that Act before the date of transfer:

> (b) for the purposes of determining an employee's rights and benefits to parental leave and parental leave payments under the Parental Leave and Employment Protection Act 1987,—
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> (i) the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer; and
>
> (ii) the new employer must treat any notice given to or by the employer under the Act as if it had been given to or by the new employer.

[17] We note in passing that s 69J(2)(a)(iii) does not specifically address bereavement leave. But given that s 69J(2) is only for the avoidance of doubt and illustrates the intended operation of s 69J(1), bereavement leave should be dealt with on the same basis as sick leave. In other words, the entitlement of a transferring employee to bereavement leave falls to be determined on the basis of continuous service.

[18] Also of some significance are the provisions of subpt 2 of pt 6A. At the time of the tender process, it would have been open to LSG to utilise these provisions to obtain disclosure of "employee transfer costs information".[23] This would have encompassed, inter alia, the number of Pacific employees who would be able to elect to transfer,[24] and:[25]

> (iv) the cost of service-related entitlements of the employees whether legislative or otherwise; and
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> (v) the cost of any other entitlements of the employees in their capacity as employees, including any entitlements already agreed but not due until a future date or time.

The approach of Woolford J

[19] Woolford J held that the starting point under the Holidays Act and the collective agreement between Pacific and the relevant union was that there was an obligation on Pacific to pay the transferring Pacific employees for their annual holidays, alternative holidays and sick and bereavement leave not taken, despite their

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23 Section 69OC.
24 Section 69OB(1)(b)(i).
25 Section 69OB(1)(b).

transfers to LSG.[26] He held that Pacific's liabilities in this regard had not been displaced by the Employment Relation Act.[27] His reasons were summarised by the Court of Appeal as follows:[28]

> (a) There was a presumption that Parliament does not intend to change the common law unless such a change is clearly indicated in the legislation. The Judge considered that no intention was evident in Part 6A to abrogate the common law right of the new employer to be reimbursed for sums paid to discharge the old employer's obligations to transferring employees for pre-transfer entitlements.
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> (b) Section 69I(2)(c) provides that a transferring employee may not claim redundancy from the old employer. There is no equivalent provision providing that the transferring employee may not claim his or her entitlement to accrued leave from the old employer.
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> (c) Although s 69J(2)(a)(ii) provides that the old employer must not pay the transferring employee for annual holidays not taken before the date of transfer, that does not signal a legislative intention that the old employer is no longer liable for holiday entitlements of transferring employees. Rather, the purpose of the provision is to prevent transferring employees from having all of their accrued holiday entitlement cashed up, leaving them with no holiday entitlement with the new employer.
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> (d) Section 69J(2) creates, in effect, a form of statutory guarantee under which the new employer must recognise the accrued leave entitlements of the transferring employees but the employees do not lose their statutory or contractual rights against the old employer for pre-transfer leave entitlements.
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> (e) The fact that there is a disclosure regime in Part 6A does not necessarily mean that Parliament intended that the new employer would lose the right to recover from the old employer amounts paid to transferring employees for pre-transfer entitlements.

[20] The Judge thus concluded that Pacific's liability to its former employees in relation to pre-transfer accrued entitlements enured until discharged by LSG. He was also of the view that, as between LSG and Pacific, the primary liability for accrued annual holidays, alternative holidays and sick and bereavement[29] leave lay

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26 *LSG Sky Chefs* (HC), above n 1, at [31]–[41].

27 See at [49]–[66].

28 *LSG Sky Chefs* (CA), above n 2, at [19] (footnotes omitted).

29 The Judge was not entirely explicit as to bereavement leave which he sometimes discussed in conjunction with sick leave and sometimes did not mention. It seems likely that he treated "sick leave" as encompassing bereavement leave.

with Pacific and that it was accordingly right to require the latter to reimburse LSG.[30]

The approach of the Court of Appeal

[21] The reasons of the Court of Appeal for allowing the appeal are sufficiently similar to the approach we have adopted as to make it unnecessary to discuss them.

Our approach

[22] We see the critical features of the scheme of the legislation as follows:

(a) Employees of Pacific who were affected by the restructuring were not required to transfer to LSG. It was their choice to do so which, on the approach we favour, served to release Pacific from liability in respect of the entitlements in question.

(b) The transferring employees became the employees of LSG on the transfer date on the same terms and conditions as applied immediately before that date (that is, under their employment agreements with Pacific).

(c) The transferring employees had no redundancy entitlements as against Pacific.

(d) For the purpose of service-related entitlements, the transferring employee's employment with LSG was to be treated as continuous and, at least in the context of entitlements under the Holidays Act, as encompassing the period of employment with Pacific which ended at the transfer date as if that period of employment had been with LSG. LSG was thus required to recognise entitlements to sick and bereavement leave, annual holidays not taken and alternative holidays not taken or paid for.

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30 *LSG Sky Chefs* (HC), above n 1, at [66] and [71]–[72].

(e) Pacific was prohibited from paying transferring employees for untaken holidays. The purpose of the prohibition is presumably to ensure that transferring employees retain the ability to take annual holidays. Its corollary is that Pacific's transferring employees were not entitled to payment from Pacific for untaken holidays. Instead, they were required to look to LSG for the honouring of their entitlements.

[23] The overall effect of the legislative scheme makes it clear that LSG was substituted for Pacific and leaves no room for residual liability on the part of Pacific for the Holidays Act entitlements which LSG was required to recognise.

[24] We see this result as consistent with the disclosure regime to which we have referred.[31] The expression "employee transfer costs information" suggests that liability will be transferred from the old employer to the new. So too is the inclusion in the definition of that phrase of "service-related entitlements" (which must include annual holidays, alternative holidays, and sick and bereavement leave) which is also indicative of an understanding that associated liability will be transferred from the old to the new employer. Indeed, there would not be much point in providing for a disclosure regime as to service-related entitlements unless a new contractor would be responsible for them. We were told that that the disclosure regime is of limited utility because the information which can be obtained is aggregated and a tenderer will not know how many employees of the existing contractor will elect to do so.[32] We, however, do not see this as detracting from the point we have just made. On the basis of the information obtainable under this regime and using its own knowledge of the industry, LSG would have been able to arrive at a reasonable estimate of the likely accrued entitlements of such employees who did transfer.

[25] It may be that the absence of a reimbursement obligation is to the advantage of an incumbent contractor in a tendering process. But the extent of such advantage is comparatively limited and might be off-set, at least in part, by the benefit to a new contractor of being able to take on experienced workers (with, in this instance, the

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31 See [18] above.

32 LSG did not seek disclosure, presumably for this reason.

required security clearances) and thus the avoidance of recruitment and training costs which would otherwise have to be incurred.

[26] It follows that the payments which LSG made and for which it now seeks reimbursement did not discharge any residual indebtedness of Pacific with the result that LSG's appeal must be dismissed.

[27] The claim for reimbursement faces other difficulties in relation to sick and bereavement leave entitlements. Because an employee is not entitled to be paid for untaken sick and bereavement leave, it is particularly difficult to see how Pacific could sensibly be seen to have been under any continuing obligation after the transfer date (and thus termination of the employment agreements) in respect of such leave.

Disposition

[28] For the reasons given, the appeal must be dismissed. The appellants are to pay the respondents costs of $25,000 and reasonable disbursements as fixed by the Registrar.

Solicitors:
Garry Pollak & Co Ltd, Auckland for Appellant
Kensington Swan, Auckland for Respondents