

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2010] NZEMPC46  
ARC 43/07  
ARC 27/09**

IN THE MATTER OF     an application for stay  
  
BETWEEN                OLDCO PTI LIMITED  
                              Plaintiff  
  
AND                      PHILIP ERIC HOUSTON  
                              Defendant

Hearing:     Auckland  
              27 April 2010

Appearances: Tony Drake and Mark Donovan, Counsel for Plaintiff  
              Penny Swarbrick and Kate Hoyle, Counsel for Defendant

Judgment:    29 April 2010

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**JUDGMENT OF JUDGE M E PERKINS**

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[1]     The plaintiff in these proceedings has brought an urgent application for stay of a determination of the Employment Relations Authority (the Authority) at Auckland dated 20 June 2007. The plaintiff has filed a challenge to that decision with the Court. In addition the plaintiff commenced a claim for damages in the Authority and those proceedings have now been removed to the Court and effectively consolidated with the challenge.

[2]     The proceedings have had a somewhat difficult passage since the filing of the challenge and the removal and a series of judgments have been issued by the Court in respect of interlocutory matters. I do not intend to re-traverse all of those proceedings. However, in a judgment dated 25 August 2008, Judge Couch, perceiving that the defendant's then application for stay of the challenge was being

sought as a means of enforcing the orders made by the Authority, commented that it was open to Mr Houston to take normal enforcement procedures of the Authority's determination. This would include if necessary, a statutory demand under the Companies Act 1993 and in default an application to have the plaintiff wound up.

[3] Mr Houston has now adopted that procedure. As the plaintiff is unable to pay its debts and has failed to meet the demand served on it by Mr Houston an application to wind up the plaintiff is due to be heard in the High Court on 14 May 2010, just over two and a half weeks away. The application for stay now made by the plaintiff would, if successful, remove the basis for the winding up proceedings pending resolution of the challenge to the Authority's determination and the separate proceedings for damages. In view of the urgency of the situation I was tempted to deliver an oral judgment but decided to reserve judgment so that I could give proper consideration to the very helpful and well prepared submissions from counsel for the parties. Nevertheless, this judgment is now being issued in circumstances of considerable urgency in view of the pending High Court proceedings.

[4] An earlier order made by this Court that the plaintiff pay security for costs into Court has been complied with by the plaintiff. However, in view of the plaintiff's impecuniosity the entire sum owing under the Authority's determination, including a separate determination on costs and costs awards against the plaintiff on interlocutory applications to this Court, remains outstanding. This is despite the fact that in respect of one of the awards of costs there is a compliance order issued by Judge Couch, which has not been adhered to. The total sum outstanding under the determinations and the costs awards amounts to \$508,635.80. In addition to that the Authority in its determination ordered the plaintiff to pay Mr Houston holiday pay outstanding for 46.53 days leave owing. The sum owing for such holiday pay has not yet been quantified.

[5] One of the grounds for the application for stay now made by the plaintiff is that if a stay is not granted and the winding up proceedings are successful the plaintiff would lose the benefit of a successful challenge to the Authority's determination and the benefit of any judgment given against the defendant for

damages for breach of the employment contract. It is alleged that a liquidator would have no enthusiasm to pursue the proceedings. It is further alleged that the defendant would not be unduly prejudiced by any stay.

[6] The circumstances surrounding the present application are somewhat unusual. The plaintiff is clearly hopelessly insolvent. Just prior to the determination of the Authority but after completion of the Authority's investigation into the matter the travel business of the plaintiff was sold. It effectively now has no assets apart from the alleged contingent liabilities of the defendant. The present litigation is being funded by what I perceive to be the major secured creditor of the plaintiff, the ANZ National Bank. That fact has been freely conceded by the plaintiff. As I have indicated, the plaintiff is concerned that if the company is placed in liquidation any liquidator would decline to pursue the challenge and the separate proceedings.

[7] Counsel in their submissions have referred to the appropriate principles to be applied by this Court on an application for stay. The Court is required to balance the competing rights of the party who has the benefit of the judgment against the need to preserve an appellant's position against the event of the appeal succeeding. The overriding consideration is that justice must be done between the parties. A non-comprehensive list of factors conventionally taken into account has been collected in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd*<sup>1</sup>. Those factors are:

1. Whether the appeal may be rendered nugatory by the lack of a stay, though this factor is not determinative.
2. Whether the successful party will be injuriously affected by the stay.
3. The bona fides of the application as to the prosecution of the appeal.
4. The effect on third parties.
5. The novelty and importance of questions involved.
6. The public interest in the proceeding.

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<sup>1</sup> (1999) 13 PRNZ 48 (CA).

7. The overall balance of convenience and the status quo, although these may be of modest relevance and in any event considered within the first two items above.

[8] In the present case, strictly speaking, the challenge, which is of a similar nature to an appeal in the ordinary civil courts, would not be rendered nugatory by the lack of a stay. Even if the company were placed in liquidation it would be open to the liquidator to pursue the matter and any liquidator may be more likely to adopt that course if the secured creditor continues to fund the legal costs of doing so.

[9] So far as the defendant's position as successful party is concerned the situation presented now is again somewhat unusual. The defendant is opposing the present application by the plaintiff. Ms Swarbrick, counsel for the defendant, concedes that apart from perhaps some commercial and taxation benefits the defendant is unlikely to obtain a benefit from a liquidation of the plaintiff so far as the amounts owing under the determination and costs awards are concerned. What the plaintiff is endeavouring to do is stave off enforcement proceedings in the event that it is successful in respect of both the challenge and the claim for damages against Mr Houston. Even if it succeeds on one and not the other there is the potential benefit of a set-off, which would then reduce the liabilities of the company. On the other hand during the hearing Mr Drake, counsel for the plaintiff, had to agree with me that if the plaintiff is unsuccessful both in respect of the challenge and the claim for damages it would be unable to meet the liabilities then owing to the defendant and would hide behind the insolvency so that the defendant would in effect get nothing. This fact I find informs on the question of the overall justice between the parties.

[10] Ms Swarbrick, in her submissions, made some attack on the bona fides of the plaintiff as to the prosecution of the challenge. She submitted that the plaintiff has been deliberately endeavouring to delay the matter in a situation where there is considerable difference between the resources available to the parties. I expressed some concern to counsel at the delay in bringing the challenge and the associated claim to a hearing in view of the fact that the proceedings were filed back in 2007. However, while the plaintiff may not have prosecuted the matter as diligently as it

might there has been some delay occasioned by vacillation on the part of the defendant.

[11] In these proceedings there is no effect on any third parties and certainly no novelty or importance of any questions involved. Nor is there any public interest, which might need protection.

[12] So far as the balance of convenience is concerned I do not accept Mr Drake's submission that the defendant will not be injuriously affected by a stay in this matter. Certainly the defendant would be substantially affected by a stay simpliciter. That would mean the defendant would be left in a quite impossible position where he could not take steps to enforce the determinations and costs awards and in the meantime would be left having to incur further costs in proceeding to a hearing on both proceedings. If he was totally successful he would then be left with completely unenforceable remedies. The overall balance of convenience and status quo in this matter heavily favour the defendant.

[13] Ironically Ms Swarbrick agreed that a favourable outcome from the present application, which has been commenced by the plaintiff, would be for a stay to be granted on conditions that the present amounts owing under the determinations and the costs awards be paid into Court and held on an interest-bearing account pending the outcome of the challenge and the separate damages proceedings. That would mean the defendant would have some security against his successful judgments and awards to date, which he could probably not achieve by winding up the plaintiff. It needs to be added, however, that even if the defendant has security in that way he may nevertheless still lose the benefit of that if the plaintiff is later placed in liquidation. The defendant would then need to participate in such liquidation as an unsecured creditor and have lower priority to available assets. That is a secondary consideration at this stage.

[14] The Court has a wide discretion to impose such conditions by analogy with how such applications are dealt with under the High Court Rules and Court of Appeal (Civil) Rules. A stay accompanied by a payment into Court in this way is generally the method adopted by the Court to meet the overall justice of the case.

That applies particularly where there is the suggestion that the challenger seeking the stay may later be found impecunious or as in the present case completely insolvent. The circumstances of each case will, however, determine the appropriateness of such an approach.

[15] That kind of approach to the present application is not unreasonable by virtue of the fact that the entity, which appears to be the major secured creditor of the plaintiff, is funding the litigation. The previous costs incurred in this matter will already be substantial and will be increased by a considerable margin by the time the hearings have been concluded. It is fair that such a party, if it wishes to have a stay, should provide security to the defendant in the event that the challenge and the claim for damages are unsuccessful.

[16] The plaintiff's application for stay is granted and the defendant shall not be entitled to take any enforcement proceedings in respect of the two determinations of the Authority and the subsequent costs awards of this Court pending the outcome of the challenge and the associated proceedings in this Court. To be effective there should also be a stay of Judge Couch's order for compliance dated 25 August 2008. The stay is conditional upon the plaintiff paying into the Registrar of the Court the following sums:

- a) The sum of \$508,635.80 being the total of the sums awarded under the two determinations together with the presently unmet costs awards of this Court.
- b) Interest on the sum of \$494,688.30 calculated at the rate of the current 90 day bill rate plus 2 percent from 20 June 2007 to 28 April 2010 amounting to \$67,091.81.

[17] Such sums are to be paid to the Registrar on or before 4.00 pm on 5 May 2010 and be held pending further order of the Court in an interest bearing account. Failure to make payment by that time will mean the stay shall not take effect. In calculating such sums I have not taken account of the outstanding holiday pay as that has not been quantified to date. I perceive there may be some difficulty in doing so and there is potential for dispute.

[18] At the conclusion of the submissions Mr Drake sought an award for costs against the defendant in respect of the stay application. While the application has been successful it does not necessarily follow that the successful plaintiff should be entitled to an award for costs. As I did not hear from Ms Swarbrick on the matter of costs they are reserved. Costs on the present application will be dealt with on receipt of memoranda from counsel, which are to be filed within 14 days.

[19] Finally I repeat my concern at the delay in having this matter concluded. I am informed that there are one or two outstanding interlocutory matters. It is necessary that strict timetabling now be set and a fixture allocated. Accordingly, the Registrar is to allocate time for a telephone call-over conference with counsel so that a fixture date can be set and time allocated for the hearing of any outstanding disputed interlocutory matters. In the meantime, counsel should give serious consideration to the duration of the hearing when it proceeds.

M E Perkins  
Judge

Judgment signed at 3.00 pm on 29 April 2010