IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 94
WRC 37/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for joinder of a third party on costs
BETWEEN	JENNIFER GINI Plaintiff
AND	LITERACY TRAINING LIMITED Defendant

Hearing: (consideration of submissions filed 21 May 2012 and 1, 8 and 13 June 2012)

Counsel: Patrick O'Sullivan, advocate for the plaintiff
Tim Cleary, counsel for the defendant

Judgment: 15 June 2012

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

Background

[1] There are two applications before the Court. First, on 7 May 2012, the plaintiff sought a costs order in respect of costs incurred in the investigation before the Employment Relations Authority (the Authority). Secondly, on 11 May 2012, the plaintiff filed an application for joinder of Ms Lynda Sturgess as a party to the proceeding for the purposes of costs. Both applications are opposed and as the case has been set down for a three-day hearing commencing on 11 July 2012, there is some urgency in dealing with the matter. Unfortunately, the background to the applications has become rather complicated. I will try to summarise the position as succinctly as possible.

[2] The plaintiff, Ms Jennifer Gini, brought a claim before the Authority alleging that she had been unjustifiably dismissed by the defendant from her employment as a literacy tutor at Wellington Prison. Literacy Training Ltd is owned by a trust and its sole director is Ms Sturgess. In her proceeding before the Authority, Ms Gini claimed substantive relief against Literacy Training for the alleged unjustifiable dismissal and she also claimed a penalty against Ms Sturgess for allegedly "inciting, instigating, aiding or abetting breaches of her employment agreement by Literacy Training."

[3] In a determination[1] dated 3 November 2011, the Authority upheld Ms Gini's claim of unjustifiable dismissal on the part of Literacy Training and awarded her the sum of $10,140 in lost remuneration and $5,000 in compensation. The Authority dismissed the claim for a penalty against Ms Sturgess, however, holding that the claim for a penalty had been raised outside the 12-month limitation period prescribed in s 135(5) of the Employment Relations Act 2000 (the Act). The Authority further held that the 12-month time limit, "should not be extended given that penalties are quasi-criminal proceedings in nature."[2] Costs were reserved.

[4] Literacy Training then filed a challenge in this Court seeking a de novo hearing of the Authority's determination. At the same time, Literacy Training deposited with the Court the sum of $15,140 pursuant to an agreement that had been reached between the parties whereby there would be a stay of enforcement of the Authority's determination pending the outcome of the challenge.

[5] In her statement of defence dated 9 December 2011, Ms Gini cross-challenged seeking increases in the amounts awarded for loss of remuneration and compensation. She also sought an order for costs in both jurisdictions. On 21 December 2011, the plaintiff filed a defence to Ms Gini's cross-challenge.

[6] When the matter came before the Court it was referred to mediation but the mediation proved unsuccessful. In a minute dated 30 April 2012, following on from

[1] [2011] NZERA Wellington 169.
[2] At [42].

a telephone conference on 27 April 2012, I issued timetabling directions for the filing of briefs of evidence leading up to the fixture scheduled for 11 July 2012.

[7] The next development occurred on 3 May 2012 when Literacy Training filed a notice of withdrawal of proceedings accompanied by an application for leave to file an amended statement of defence to the cross-challenge and an application for ancillary orders following on from the filing of the notice of withdrawal. Mr O'Sullivan, for the plaintiff, duly filed a memorandum in response. On 9 May 2012 I issued a minute reversing, by consent, the names in the intitulment so that in future they would appear as shown above and I made the ancillary orders sought, including an order confirming that the case would proceed to a hearing on the basis of a de novo challenge by Ms Gini to the remedies awarded by the Authority. Mr O'Sullivan indicated at that stage that the hearing was still likely to occupy three days.

[8] Against that background, I now turn to consider the two applications before the Court. The parties agreed that the applications could be dealt with on the papers.

Costs award

[9] Mr Cleary, for the defendant, submitted that costs in the Authority should not be decided by the Court until the substantive hearing. His principal ground was that, notwithstanding the discontinuance of the original challenge, it was part of the plaintiff's cross-challenge that costs in the Authority should be decided by this Court and in its defence to the cross-challenge the defendant has denied that particular claim pleading:

> (d) It says Authority costs, having been reserved, should be dealt with in that jurisdiction.

[10] In response, Mr O'Sullivan submitted, inter alia, that:

> 3. Because the Authority's decision was challenged the Court acquired jurisdiction to make an order for costs in the Authority with respect to the matter challenged.

[11] No legal authorities were cited as to whether, on a de novo challenge to a determination, the Court can make an order encompassing costs in the Authority

when the Authority itself has made no order but simply reserved the question of costs. The issue was raised, however, by the full Court in *PBO Ltd (formally Rush Security Ltd) v Da Cruz*.[3] In *Goodfellow v Building Connexion Ltd trading as ITM Building Centre*,[4] which was a case where costs had not been fixed by the Authority, Judge Couch, following *Da Cruz*, confirmed that this Court has jurisdiction to fix costs relating to proceedings in the Authority following a successful challenge. Judge Couch recorded that the plaintiff also had the option available to him of seeking a costs determination from the Authority. Although at this stage there has not been a "successful challenge" in the present case, the question of costs in the Authority is clearly in issue and under the authorities referred to, this Court has jurisdiction to make the award sought.

[12] Mr Cleary has not disputed the fact that costs are in issue and that the Court does have jurisdiction to determine costs in the Authority but, as I understand his submission, he claims that it is more appropriate in the circumstances of this case that the question of costs in the Authority should be referred back to the Authority. However, I would need to hear an argument on that proposition. Unless there are special factors warranting an award of costs in excess of the standard award in the Authority, then I would have thought it would be more appropriate for this Court to fix costs rather than have the matter referred back to the Authority for determination. I do agree, however, with Mr Cleary's further submission that the issue should be held over for the substantive hearing in July.

Joinder

[13] The plaintiff seeks an order joining Ms Sturgess as a party in this proceeding. The application expressly states that it "seeks to join Linda Sturgess as a party for the purposes of costs." The basis for the application is twofold. First, it is said that Ms Sturgess "was the guiding mind" of the defendant and its "sole and absolute decision maker" and that her ownership and control "was so comprehensive, and beneficial to her that effectively Linda Sturgess was acting in her own interests and was thus the real party." The second stated ground is that "There was immediate,

[3] [2005] ERNZ 808.
[4] [2011] NZEmpC 58 at [13].

relevant and material impropriety on the part of Linda Sturgess as Governing Director of the defendant".

[14] The plaintiff submits that, "the Employment Court has jurisdiction to award non party costs given the broad and untechnical language of s 221 [of the Act] and the finding of the Court of Appeal in *Kidd v Equity Realty*."[5]

[15] The application is opposed by the defendant principally on the grounds that leave had not been obtained. In this regard Mr Cleary referred to reg 6(2) of the Employment Court Regulations 2000, which incorporates the provisions of the High Court Rules where no other form of procedure is provided, and he submitted that under 7.18 of the High Court Rules no interlocutory application or other step may be taken in any proceedings after the setting down date without leave. The application for joinder was made 11 days after the setting down date and no leave had been sought for filing any interlocutory application.

[16] Mr Cleary opposed the granting of leave on the grounds that the application was without merit but in the alternative he submitted that, if leave is to be granted, the application for joinder ought to be refused on the grounds that Ms Sturgess will not be directly affected by any order which may be made in the proceedings – *Auckland Regional Services Trust v Lark*[6] as she is a separate legal entity from Literacy Training – *Salomon v A Salomon and Company Ltd*.[7]

[17] In reference to *Kidd*, Mr Cleary submitted that that case can be distinguished on the grounds that the defendant company was in liquidation whereas there is no evidence in the present case that Literacy Training is insolvent.

Discussion

[18] Clause 19 of sch 3 to the Act permits the Court to award costs but the Court has no jurisdiction to make costs orders against non-parties. Section 221 of the Act gives the Court jurisdiction to join a party to proceedings in order to enable the Court to more effectively dispose of any matter before it according to the substantial merits

[5] *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452.
[6] [1994] 2 ERNZ 135.
[7] [1897] AC 22 (HL).

and equities of the case. As with the exercise of any discretion, the ultimate consideration must be the interests of justice.

[19] I do not consider that rule 7.18 of the High Court Rules is applicable to the application for joinder under s 221 of the Act in the present case. Section 221 specifically provides that application for joinder may be made "at any stage of the proceedings" and there is no provision in the Act or the Regulations requiring leave to be obtained if the proceeding has been given a fixture date. Indeed, reg 74 provides that no other regulation (including reg 6) limits the powers of the Court under s 221. If a late application is likely to lead to any prejudice then the Court has broad powers under s 221 to join a party "upon such terms as it thinks fit".

[20] Turning to the merits of the application, in *Kidd*, the Court of Appeal confirmed that this Court has jurisdiction under s 221, in an appropriate case, to join a party for the purpose of making an award of costs.[8] As was stated by Mummery LJ in *Dolphin Quays Development Ltd v Mills*:[9] "A costs order against a non-party can be made by the court in its discretion, which, like all discretions, involves a balancing exercise controlled by principles of justice." In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*,[10] Lord Brown of Eaton-under-Heywood, delivering the advice of the Privy Council, stated:

> Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order.

[21] The issue in *Kidd* was whether the action of the Chief Employment Court Judge in joining Mr Kidd so as to make an order for costs against him was appropriate. The Court of Appeal noted that there had been no finding that the company (Axiom) had been insolvent at the time of the litigation. It concluded that the reasons given by the Court did not warrant the making of eventual orders for costs against Mr Kidd and on that basis, the orders for his joinder and for the payment by him of costs were set aside.

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[8] At [12].
[9] [2008] EWCA Civ 385, [2008] 4 All ER 58 at [91].
[10] [2004] UKPC 39, [2005] 1 NZLR 145 at [25].

[22] After referring to the recent authorities on the general jurisdiction to award costs against non-parties, including the judgment of the Privy Council in *Dymocks*, the Court of Appeal stated:

> [15] The core features of the present case are routine. Mr Kidd was the guiding mind of Axiom and in this way was responsible for the litigation strategy it pursued. By the time costs came to be fixed Axiom was insolvent.
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> [16] We think it clear that those factors do not in themselves warrant an award of costs against Mr Kidd personally. Something more is required. In the present context, the requirement for "something more" might be satisfied if:
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> (a) there was any relevant impropriety on the part of Mr Kidd; or if
>
> (b) Mr Kidd was relevantly acting not in the interests of Axiom but rather in his own interests and was thus the real party. ...

[23] The Court of Appeal clarified that the type of "relevant impropriety" required would be that akin to the impropriety established in *Goodwood Recoveries Ltd v Breen*.[11] In that case, the English Court of Appeal concluded that the whole of the costs of the litigation pursued by the claimant company (controlled by the appellant third party Mr Slater) had been caused by Mr Slater's "dishonesty or impropriety".[12] The trial judge had made a costs order against Mr Slater and had harsh things to say about his conduct in the course of the proceedings including a finding that he had lied in his evidence before the Court. The Court of Appeal dismissed the appeal. In the present case there is nothing in the Authority's determination that would support a finding of relevant impropriety against Ms Sturgess and no affidavit evidence has been filed on the issue.

[24] Turning to the second criteria referred to in *Kidd*, the Court of Appeal accepted that where a closely held company is a litigant, those who control it "necessarily control its conduct of the litigation" and, "it is almost always going to be possible to say that such litigation is conducted by them for their personal benefit."[13] Relevantly, however, the Court of Appeal went on to hold:

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[11] [2005] EWCA Civ 414, [2006] 1 WLR 2723.
[12] At [72].
[13] At [17].

> [20] Where a company litigant was insolvent at the time of the litigation, a court may well be easily persuaded that its directors were acting for their own purposes rather than those of the company and its creditors. If so, the court will conclude that they therefore were the "real parties" and ought to pay costs accordingly. The same conclusion is likely to be reached where those promoting litigation have sought to take advantage of the insolvency of the company by taking, either expressly or by implication, a "heads I win, tails you lose" approach. In circumstances where the claim was speculative and/or devoid of merit, a court may well conclude that this was the approach of the director or directors concerned. But ... we consider that the sort of circumstances which are routinely present when closely held companies litigate do not in themselves warrant an order for costs against those who control them.

[25] In his submissions, Mr O'Sullivan contended that the Court of Appeal in *Kidd* had posed a "trinity of tests" for determining whether it is appropriate to join a party for the purpose of making an award of costs and an applicant "need only establish the pertinence of one of these tests to justify joinder". The "tests" were said to be insolvency; impropriety or misconduct on the part of the non-party and whether the non-party was conducting the litigation in their own interests rather than the interests of the company. Mr O'Sullivan then went on to make lengthy submissions about alleged impropriety on the part of Ms Sturgess but, as I have already observed, there is no evidence before the Court to support those allegations.

[26] With respect, I cannot accept the "trinity of tests" proposition advanced by Mr O'Sullivan. Unless the "core features" identified by the Court of Appeal, including insolvency, are established then allegations of the non-party's impropriety or of the non-party being the real party are in themselves insufficient to warrant an award of costs against a non-party. As the Court of Appeal stressed, when the core features are present something more is still required such as the examples it gave of relevant impropriety or evidence of the non-party being the real party in the proceeding. In *Dolphin Quays*, Lawrence Collins LJ spoke of impropriety or unreasonableness as "elements in the discretion".[14]

[27] In *Dymocks*,[15] the Privy Council recognised that a number of the decided cases have sought to catalogue the main principles governing the proper exercise of

[14] At [66].
[15] At [25].

the discretion to order costs to be paid by a non-party and proceeded to summarise those cases concluding:

> [29] In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an **insolvent company** solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests.
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> (emphasis added)

[28] One of the authorities referred to and accepted in *Dymocks* was the decision of the High Court of Australia in *Knight v FP Special Assets Ltd*[16] where Mason CJ and Deane J said:[17]

> For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of the case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.

[29] I consider that the present case falls within the general category of cases recognised in *Kidd* and in the extracts quoted from *Dymocks* and *Knight*. In such situations insolvency, receivership or inability of the litigant company to meet a costs award together with evidence that the non-party played an active part in the conduct of the litigation are essential prerequisites to the making of a joinder order against a non-party director. Once those "core features" are established then the other elements referred to by the Court of Appeal in *Kidd* such as impropriety on the part of the non-party or evidence that the non-party was acting in his or her own interests rather than the interests of the litigant company can appropriately be taken into

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[16] (1992) 107 ALR 585.
[17] At 595.

consideration in the exercise of the Court's overall discretion in determining the justice of the case.

[30] In the present case, there has been no suggestion that the defendant company is insolvent or unable to meet its costs. On the contrary, the fact that the defendant has voluntarily paid into the Court in excess of $15,000 militates against any suggestion that the company is not able to pay its debts.

[31] For the reasons stated, I do not consider that a case has been made out which would warrant the making of a costs order against Ms Sturgess and on that basis the application for joinder is declined.

Conclusions

[32] The application by the plaintiff for Authority costs to be fixed by the Court is adjourned until the substantive hearing on 11 July 2012.

[33] The further application by the plaintiff for joinder of Ms Sturgess as a party to the proceeding is declined.

[34] Costs on both applications are reserved.

A D Ford
Judge

Judgment signed at 9.30 am on 15 June 2012