

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 47
ARC 65/12**

IN THE MATTER OF an application for compliance order

BETWEEN HOWARD DELL
 Plaintiff

AND ABC01 LIMITED (FORMERLY
 PRIMARY HEART CARE LIMITED)
 First Defendant

AND JOHN WILLIAM HINCHCLIFF (ALSO
 KNOWN AS JOHN-WILLIAM:
 HINCHCLIFF)
 Second Defendant

Hearing: 27 March 2013
 (Heard at Auckland)

Appearances: Plaintiff in person by video link
 Sheila McCabe, counsel for defendants

Judgment: 27 March 2013

**ORAL INTERLOCUTORY JUDGMENT (NO 3)
OF CHIEF JUDGE G L COLGAN**

[1] On 15 March 2013 I adjourned¹ Mr Dell's applications for a financial penalty, sequestration of Mr Hinchcliff's assets, and for an order for Mr Hinchcliff's imprisonment, to today's date upon condition that ABC01 Limited was to apply promptly to the Employment Relations Authority to reopen its investigation and, if it did so, on condition that ABC01 Limited prosecuted promptly those proceedings in the Authority. Ms McCabe advises me, and I accept, that the application to reopen has been made to the Authority and although Mr Dell has been notified of that

¹ [2013] NZEmpC 37.

application by email, the company will need to obtain an order from the Authority giving it leave to serve that proceeding overseas because Mr Dell has declined to accept service by email. I would simply note that, if it assists the parties, Mr Dell has, of course, an address for service in New Zealand, which is the address, I think, of the Baycorp company, in relation to these proceedings.

[2] The other condition of the adjournment granted on 15 March 2013 was that, no later than three working days before today's hearing, both defendants were to file and serve better affidavit evidence about the first defendant's financial circumstances.

[3] Some progress has been made in doing so although, as Mr Dell points out, it was not strictly earlier than three days before today's hearing.

[4] The company's accountant is overseas and uncontactable but there is some information, including draft accounting information, before the Court which Mr Hinchcliff has undertaken will be finalised as soon as the company's accountant returns to New Zealand. Mr Dell is right that the time was not satisfied strictly but, on the other hand, and compared to previous non-compliance by the defendants in this case, some progress has been made and I think some credit should be given for that.

[5] For the reasons set out in my judgment of 15 March 2013, I still decline to make an order for sequestration of the assets of either defendant.

[6] Also for the reasons set out in that earlier judgment, and because Parliament has not provided the Court with a statutory scheme to make effective orders for imprisonment of non-compliers, I decline to make an order for Mr Hinchcliff's imprisonment. Mr Dell's pleas for that outcome come close to asking for imprisonment for debt and that is not how debts are punished and enforced any longer. I reiterate also what I explained to Mr Dell, that the compliance order made against Mr Hinchcliff does not require him to make payment of the sums owing by ABC01 Limited to Mr Dell. Rather, that compliance order requires Mr Hinchcliff to use his best efforts to persuade the company to make that payment. If the company

is unable to do so, then it would seem futile to require Mr Hinchcliff to attempt to persuade it to do the impossible. I am not yet in a position to reach such a conclusion and, indeed, Mr Dell says that there is much in the background to the relationship between Mr Hinchcliff and ABC01 Limited (and its former identity as Primary Heart Care Limited) which should be examined carefully and which may mean that Mr Hinchcliff is in a much stronger position in relation to the company than he now says he is.

[7] That leaves Mr Dell's application for a financial penalty against Mr Hinchcliff. In view of the progress to which I have referred since the last hearing on 15 March 2013, I propose to adjourn further that application for an order for a penalty against Mr Hinchcliff.

[8] I think I need to emphasise that this case is a debt recovery exercise. As I have mentioned, an application has been made to the Employment Relations Authority to reopen its investigation and if there is a good case to do so, then I should not prejudice that by cutting off the defendants' opportunities today.

[9] Also as I have said, some evidence has now been adduced that appears to disclose the first defendant's financial state. It may be that it is not solvent in the sense that it is unable to pay its debts or at least that which it has to Mr Dell.

[10] As I have mentioned also, Mr Dell has, and has begun to use, other debt recovery mechanisms available to him and nothing that this Court has done stands in the way of further pursuit of those. Indeed, counsel for the defendants has acknowledged that if insolvency proceedings are continued against ABC01 Limited, it will probably not be in a position to defend those.

[11] I have, however, been persuaded to change my mind about my earlier disinclination that the defendants' jointly and severally should contribute to Mr Dell's costs in this Court. Because he has been unrepresented, there are no legal costs payable by Mr Dell. I accept, however, that he has paid a number of disbursements including the costs of attending the numerous hearings by video conference calls, process services costs, and the like. Subject to their verification by

the Registrar, Mr Dell is entitled to an order for reimbursement of these litigation-associated costs. The defendants will be liable for those jointly and severally. Mr Dell will, however, need to prove those costs to the satisfaction of the Registrar, following which the Court will order a further judgment to enable them to be enforced.

[12] Although, as I have said, Mr Dell is really fast reaching the end of the road in his enforcement proceedings in this Court, I am nevertheless prepared to grant a further adjournment to the defendants. That will be until Friday 19 April 2013 at 10 am when the matter will be back before the Court.

[13] That adjournment will enable the defendants to make good their promise that they will provide the Court and Mr Dell with accurate financial information about the first defendant's circumstances, to enable the Court to consider on that occasion whether a penalty should be imposed on Mr Hinchcliff for his alleged non-compliance with the Court's compliance order. Again, I direct that, in fairness to Mr Dell, that information should be provided to the Court and to Mr Dell no later than 48 hours before the hearing, that is two clear days before the hearing on 19 April 2013.

GL Colgan
Chief Judge

Judgment delivered orally at 10.34 am on Wednesday 27 March 2013