IN THE EMPLOYMENT COURT
AUCKLAND

AC 26/08
ARC 43/07
ARC 46/07

ARC 43/07 IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	applications for stay of proceedings and security for costs
BETWEEN	OLDCO PTI LIMITED Plaintiff
AND	PHILIP HOUSTON Defendant
ARC46/07 IN THE MATTER OF	an application for a compliance order
BETWEEN	PHILIP HOUSTON Plaintiff
AND	OLDCO PTI LIMITED Defendant

Hearing: 25 August 2008
(Heard at Auckland)

Appearances: Tony Drake and Mark Donovan, Counsel for Oldco PTI Limited
Penny Swarbrick, Counsel for Philip Houston

Judgment: 25 August 2008

ORAL INTERLOCUTORY JUDGMENT OF JUDGE AA COUCH

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[1] Before the Court today are three interlocutory applications on behalf of Mr Houston in proceedings between him and Oldco PTI Limited ("Oldco").

[2] There are two proceedings currently before the Court. Under reference ARC 46/07 there is an application by Mr Houston for a compliance order in relation to an order for costs which I made on 6 June 2006. That order for costs followed a challenge by Oldco to an interlocutory determination of the Employment Relations Authority.

[3] The other proceedings under reference ARC 43/07 are a challenge by Oldco to the determination of the Authority in Mr Houston's favour dated 20 June 2007. In relation to those proceedings, Mr Houston seeks an order for security for costs. He also seeks a stay of those proceedings unless and until all money currently outstanding in relation to the orders made by the Authority are paid.

[4] Evidence in relation to these applications has been given in the form of two affidavits by Mr McCloy, a chartered accountant involved in the affairs of Oldco, an affidavit by Mr Donovan, a solicitor involved in the affairs of Oldco, and an affidavit by Mr Houston.

[5] The thrust of much of the evidence given by Mr McCloy is that Oldco is hopelessly insolvent, that it has no assets, and is therefore unable to pay any debts it may have to Mr Houston.

[6] The affidavits filed on behalf of Oldco also deal with other issues. These include the basis for the challenge to the Authority's determination and a description of other claims which Oldco has against Mr Houston but which were not dealt with by the Authority in the original proceedings. Those claims have very recently, indeed as recently as 31 July 2008, become the subject of further proceedings before the Authority. I am advised that those proceedings were accompanied by an application to remove them into the Court for hearing along with the challenge but that application is yet to be heard or determined by the Authority. I therefore proceed on the basis that the matters before the Court are only those which I described earlier.

[7] I deal first with the application for a compliance order. The judgment of the Court dated 6 June 2006 remains entirely unsatisfied. Oldco has not paid Mr

Houston all or any part of it. It is therefore clearly established that there has been a breach of the Court's order.

[8] The sole ground on which Mr Drake seeks to resist the making of a compliance order is that to do so would be futile. He submits, and indeed he does so on good authority, that the Court will not normally make an order for compliance where there is no prospect of the party against whom the order is made complying with that order. I accept that the authorities to which he referred me in this regard are valid and persuasive. A key part of the rationale is that a party ought not to be exposed to the serious consequences of failing to comply with a compliance order if it is unable to do so.

[9] A peculiar feature of these proceedings, and indeed the proceedings which have been before the Authority and those which are now before the Authority, is that Oldco has been represented by counsel throughout. Indeed, it is notable today that Oldco is represented by two counsel. Mr Drake confirmed to me that counsel are not acting pro bono. The inevitable inference I draw from this is that Oldco's role in this litigation is being funded by a third party. There is nothing in the affidavits which is inconsistent with that conclusion but equally there is no explanation in the affidavits of the source of those funds. From the bar, Mr Drake informed me that the litigation on behalf of Oldco is being funded by the ANZ National Bank as part of a wider process of managing the affairs of a group of companies of which Oldco is one. That statement is consistent with the evidence that Mr McCloy gave of very large demands being made on Oldco by the ANZ National Bank in relation to unsatisfied debts. Those demands exceed $20 million.

[10] In relation to the history of litigation between these parties thus far, I infer that a significant sum has been provided for representation of Oldco. So far, Oldco has been represented for at least 2 days before the Authority, 1 day before the Court in February 2006, and another day today. It was also implicit in everything that Mr Drake said on behalf of Oldco that it intends to proceed, not only with the challenge which is currently before the Court, but also with the proceedings that have just been issued in the Authority. I was provided with a broad estimate of 2 days of hearing likely to be required for the challenge and, given the nature of the issues likely to be

involved in the recently commenced claim, those proceedings could well take considerably longer again.

[11] I conclude from this that Oldco has access to a substantial and ongoing source of funds for its litigation with Mr Houston in this jurisdiction. This fact has significance in relation to all three of the applications before me and I will refer to it again in all three contexts.

[12] Coming back to the application for a compliance order, it seems to me that, if Oldco has access to funds for the purpose of pursuing litigation, it should equally have access to those funds for the purposes of dealing with the immediate effect on the other party of its pursuit of that litigation. That should include payment of an order for costs in litigation commenced by Oldco and which I found to be very largely unmeritorious. I am therefore prepared to exercise my discretion to make the compliance order sought.

[13] I turn now to the application for security for costs. Mr Drake very helpfully referred me to a number of the leading authorities in relation to applications for security for costs in the High Court. In particular, he referred me to a decision of the Court of Appeal in *AS McLachlan Ltd v MEL Network Ltd* 16 PRNZ 747 where the essential considerations were discussed and enunciated.

[14] The starting point for considering an application for security of costs must be whether there is a real likelihood that the plaintiff will be unable to meet an adverse award of costs. There can be little doubt about that in this case simply on the basis of the affidavits sworn by Mr McCloy.

[15] In the decision to which I have referred, the Court of Appeal went on to say that in those circumstances an order for substantial security which had the effect of preventing the plaintiff from pursuing the claim ought not to be made without careful consideration, and then only in a case where the claim has little chance of success. Relying on that proposition, Mr Drake addressed me at length about the potential merits of the challenge which is currently before the Court. Without going into those submissions in detail, it does seem to me that the challenge is not frivolous and that I

have no reason to conclude that Oldco is other than a genuine plaintiff in relation to those proceedings. In particular, there appears to be evidence suggesting that Mr Houston resigned his position of employment with immediate effect rather than, as the Authority found, in circumstances which gave rise to the very substantial payment provided for under his employment agreement. It is Oldco's right, pursuant to s179 of the Employment Relations Act 2000 ("the Act"), to elect a judicial hearing of the matters which were the subject of the Authority's determination and it seems to me in this case that this right is being acceptably exercised in terms of the basis for the challenge. I note here that I was referred to a good deal of other evidence in relation to the merits of the claim but I do not deal with that because the matter is the subject of a challenge before the Court and it will be for the trial Judge to resolve all issues.

[16] While I am satisfied, therefore, that this claim cannot be said to have little chance of success, to use the words of the Court of Appeal in the *AS McLachlan Ltd* case, I am not satisfied that an order for security for costs would effectively prevent Oldco from pursuing the claim. That is for the reasons which I have discussed earlier. Oldco has already initiated, and been party to, significant proceedings before the Authority and the Court without expending any of its own resources. Its involvement in litigation to date has been entirely funded by a third party. Also, as I have said earlier, there is a clear intention by Oldco to participate just as fully in further litigation. There is no suggestion in any of the affidavits that an order for security for costs would affect that intention to pursue the litigation further. In these circumstances, it seems to me that an order for security for costs would not in any way prevent the plaintiff from pursuing its claim.

[17] A further issue raised by Mr Drake was that Oldco's impecuniosity was due to the actions of Mr Houston. The extent to which an impecunious plaintiff's position has been the result of the defendant's actions is a factor which has been taken into account in many cases where security for costs is sought. It must, however, be established to an acceptable degree by evidence. In this case Mr McCloy gives some broad evidence to the effect that Oldco's current financial position was the result of Mr Houston's actions but that evidence is far from sufficient to satisfy me that this was definitely or even probably so. Equally, it does not establish that the whole or

even the majority of Oldco's indebtedness is the result of Mr Houston's actions. I therefore find that this factor does not weigh in the balance in this case.

[18] In the exercise of discretion whether or not to order security, I must have regard to the balance of interests of the parties. In this case that is clear in terms of costs awarded following conclusion of the proceedings currently before the Court. If Oldco is successful against Mr Houston and obtains an order that he pay costs, there is no doubt Oldco would enforce that order against him. There is certainly nothing to suggest otherwise. On the other hand, the clear inference from Mr McCloy's affidavits is that any orders for costs made against Oldco would not be paid. The effect of Oldco's litigation being funded by a third party in this way is, therefore, to create an entirely one-sided environment for the costs of the litigation. Mr Houston is inevitably, and I infer unwillingly, being drawn into substantial litigation commenced by Oldco. As a result, he is being compelled to incur costs of representation which he has no prospect of recovering if he is successful in resisting Oldco's claims. To my mind, that is entirely inequitable and, given the other conclusions I have reached in this regard, calls for an order for security for costs to be made.

[19] The best estimate counsel are able to give me of the likely duration of a hearing for the challenge is 2 days. Obviously a good deal of the necessary preparation will have been done in relation to the Authority's investigation but, on the other hand, Mr McCloy says Oldco intends to adduce additional evidence and that will inevitably mean that a significant amount of preparation will still need to be done on behalf of Mr Houston.

[20] Balancing these various considerations, I conclude that an order for security for costs in the amount of $7,500 should be made in proceedings ARC 43/07..

[21] I turn then to the application for stay of proceedings. The application is made on six grounds.

[22] The first is that the plaintiff delayed the Authority's proceedings by pursuing the challenge to the interlocutory ruling which I heard in February 2006. That proceeding is entirely concluded and is not a valid consideration now.

[23] The second and third grounds are that Oldco has failed to pay the money to which Mr Houston was entitled in terms of the Authority's determination and my order for costs made in June 2006.

[24] The fourth ground is that Oldco resisted Mr Houston's application for costs in the Authority. It does not seem to me that that can have any bearing on this application as that was a position Oldco was entitled to take.

[25] The fifth ground really overlaps the second and third by saying that Oldco filed the challenge without first making any attempt to pay the sums ordered by the Authority. I return to that when I deal with the second and third grounds.

[26] Finally, the application is said to be made on the basis that Oldco has asserted that it is impecunious and therefore unable to pay any orders which the Court might make. That seems to me an irrelevant ground also because in electing to challenge the determination of the Authority, Oldco was doing no more than exercising its statutory right pursuant to s179(2) of the Act. I could only be persuaded that that would be a ground for stay if it could be established to my satisfaction that the proceedings were vexatious or frivolous. For the reasons I have given earlier, I do not find that they are either frivolous or vexatious.

[27] The remaining grounds on which the application is based, therefore, all relate to Oldco's failure so far to satisfy all or any part of the orders for payment to Mr Houston which have been made by the Authority and the Court.

[28] As I have said, Oldco's challenge was commenced in this Court as of right pursuant to the statute. It would be a very significant and grave step indeed to effectively deny Oldco the right to pursue that statutory right, even conditionally so. I add that point because Ms Swarbrick has invited me to make an order for stay on

condition that it would apply only until Oldco had paid all the monies it currently owes to Mr Houston.

[29] It seems to me that a very significant factor here is that a stay is being sought as a means of enforcing orders made by the Authority and the Court. In my view, it would not be a proper exercise of discretion to grant a stay in those circumstances where other procedures for enforcing those orders are available to Mr Houston and he has not availed himself of them.

[30] Section 141 of the Act provides that any order made or judgment given by the Authority or the Court may be filed in any District Court and is then enforceable in the same manner as an order made or judgment given by the District Court. It follows that all of the execution processes available in the District Court are available to Mr Houston. Equally, it is open to any party with a judgment in the District Court to remove it to the High Court and to have recourse to the methods of execution available in that Court. It is also open to Mr Houston to simply make statutory demand under the Companies Act 1993 and, in default of that demand being met, to seek to have Oldco wound up. Those are very powerful remedies.

[31] Mr Houston may have very good reasons for not having recourse to those remedies. That does not matter for the purposes of my decision because I was not told what they were. Having made the decision not to have recourse to those other remedies, however, it seems to me inappropriate to make an order for stay on the grounds sought.

[32] I note here that Mr Drake addressed me on the issue of jurisdiction to make the order for stay sought. I do not rule on that issue as I have no need to do so. I find on the merits that, assuming I had jurisdiction to grant the order sought, it would not be appropriate to do so.

[33] In conclusion, the orders I have made are:

a. A compliance order as sought in the application in proceedings ARC 46/07; and

b. An order that the plaintiff in proceedings ARC 43/07 provide security for costs in the sum of $7,500 to the satisfaction of the defendant or to the satisfaction of the Registrar of this Court. If security is provided in money, then it should be placed on interest bearing deposit.

[34] Counsel made submissions to me about costs relating to these applications. Mr Drake submitted that they should be reserved and dealt with as part of the overall costs of the proceedings ARC 43/07. Ms Swarbrick submitted that I should deal with them in differing ways depending on the outcome. She suggested that if Mr Houston were successful with the applications, then costs should be determined now but, otherwise, they should be reserved until the conclusion of the proceedings.

[35] In relation to the proceedings ARC 46/07, the order I have made brings them to a conclusion. It is therefore appropriate that costs should be fixed now in relation to that proceeding. In relation to proceedings ARC 43/07, these interlocutory issues have to a large extent been pursued and determined as an exercise separate from the merits of the challenge itself. In those circumstances, it seems to me that costs in relation to these applications should be determined in those proceedings at this stage also.

[36] Ms Swarbrick should file a brief memorandum as to costs by 4 pm on Monday 1 September 2008. Any memorandum in response should be filed by 4 pm on Monday 8 September.

AA Couch
Judge

Judgment delivered orally at 1.16 pm on Monday 25 August 2008