

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 7/09
ARC 31/08**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF a further extension to pay money into Court

AND IN THE MATTER OF an application for strike out

BETWEEN PACIFIC PALMS INTERNATIONAL
 RESORT & GOLF CLUB LIMITED
 Plaintiff

AND BRUCE WALTON SMITH
 Defendant

Hearing: 5 March 2009
 (Heard at Auckland)

Appearances: Samuel Hood (by telephone), to withdraw as counsel for Pacific
 Palms International Resort & Golf Club Limited
 Robert Cribb, representative for Pacific Palms International Resort &
 Golf Club Limited
 Danny Jacobson, counsel for Mr Smith

Judgment: 5 March 2009

ORAL JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff's solicitor has successfully sought the leave of the Court to withdraw from acting for the plaintiff company on the grounds that the plaintiff has not paid the legal fees of its solicitor. Mr Hood's application was heard by way of a telephone conference convened in open Court to deal with the plaintiff's application for an extension of time for the payment of money into Court, which application is opposed by the defendant, who seeks an order dismissing the plaintiff's challenge.

[2] Mr Robert Clifford Hoani Cribb, the director and shareholder of the plaintiff company, has filed an address for service and now wishes to act for the plaintiff.

[3] In my oral judgment of 13 October 2008, I recorded that the defendant, Mr Smith, had applied for orders in relation to the alleged failure of the plaintiff company to comply with the compliance order made by the Employment Relations Authority on 5 August 2008. The defendant sought that the challenge be dismissed because of this failure, but more realistically, also sought in the alternative that the challenge be stayed until the amount of the compliance order, together with the interest that was ordered by the Authority was paid into Court.

[4] He also sought a fine from Mr Cribb for failing to take steps to ensure the plaintiff complied with the compliance order.

[5] The defendant's application was opposed by the plaintiff and Mr Cribb. The plaintiff company and Mr Cribb then filed an application for a stay of the proceedings before the Authority which included the awards made in settling the defendant's personal grievance and compliance orders made on 5 August 2008 against the plaintiff and Mr Cribb which required inter alia payment of \$204,750 plus interest within 7 days. I ordered that the plaintiff's challenge be stayed on condition that the sum of \$228,687 which included interest until 13 October 2008, together with the costs agreed in the Authority of \$2,137 be paid into Court on or before 19 December 2008.

[6] At that stage the defendant accepted that his further enforcement steps against the plaintiff and Mr Cribb should also be stayed until that date and, providing the condition was met, the stay of enforcement of the Authority's orders would continue in effect. I also provided that if the condition was not met and, unless the Court otherwise ordered on the basis of an application for extension filed by the plaintiff before 19 December 2008, the challenge would be struck out and the stay of the defendant's enforcement of the Authority's orders would be discharged.

[7] On the assumption that the condition would be met, I issued directions timetabling the case to a fixture for 3 days commencing at 9.30am on Monday 30 March 2009.

[8] On 18 December 2008, the plaintiff applied for an order extending the timeframe for the plaintiff to pay the money into Court from 19 December 2008 until 23 January 2009. The application was supported by an affidavit of Trevor David Steele, a chartered accountant in Taupo. Mr Steele deposed that his firm acted for the plaintiff and Mr Cribb, that the plaintiff had progressed significantly in organising a loan from the United States from which Mr Steele expected funds to be transferred, either on 19 December 2008 or 22 December 2008. If the funds were not available at that point, Mr Steele deposed that they were unlikely to be available until the middle of January 2009. Mr Steele expected the funds to be available by 23 January 2009 at the latest.

[9] Mr Jacobson, counsel for Mr Smith, opposed the extension of time sought and implored the Court, if it granted an extension, that might be a final extension and to order that if the payment was not made by any extended date, then the consequences I had previously indicated should apply.

[10] In a minute of 19 December 2008, I stated I was satisfied that adequate grounds had been made out for the extension and granted it. I was also not persuaded to make this a final extension, in case adequate grounds for a further extension to be granted could be established later. I made a similar direction requiring any application for leave to extend the time to be made before 23 January 2009, and that if no such application was made, and if the monies were not duly paid into Court, then unless the Court otherwise ordered, the challenge would be struck out and the stay of the defendant's enforcement would be discharged.

[11] On 22 January the plaintiff moved the Court for an order that the timeframe for the plaintiff to pay the sum into Court be extended from 23 January 2009, until 24 February 2009. A further affidavit of Mr Steele was filed in support, annexing a letter from a financial services company in the United States confirming that there would be a transfer of funds from which the monies payable into Court would be

drawn. Mr Steele deposed that because of the world economic crisis an extension of time for paying the money until 24 February 2009, was sought. Because the defendant's representative could not be reached in time, on 23 January 2009 I made an order granting the application until 24 February 2009, subject to any application to reduce the time on the grounds of prejudice that might be filed by the defendant in this extended period.

[12] The following day, counsel for the defendant filed a memorandum in opposition to the extension of time and again seeking an order dismissing the plaintiff's challenge. His memorandum also complained that the plaintiff had breached the Court's timetabling directions in relation to filing a list of documents. In the event that the Court granted a further extension, Mr Jacobson sought finality as to when payment would be made and sought direction that the defendant not be required to take any further steps on the challenge until the plaintiff's obligations were met, and that the hearing date be vacated.

[13] On 24 February 2009, the plaintiff made yet a further application for orders extending the timeframe from 24 February 2009 until 17 March 2009. A further affidavit of Mr Steele was filed in support claiming that the world's economic crisis was continuing to cause delays in the draw down of the plaintiff's loan, but advising that all documentation had been concluded and the plaintiff was simply waiting for draw down of the funds from which payment into Court would be made.

[14] The defendant has again opposed the application and also sought orders dismissing the plaintiff's challenge and discharging the stay on enforcement. Mr Smith has filed an affidavit in support in which he refers to his earlier affidavit, filed on 25 September 2008, in which he had expressed concerns as to the delays in complying with the Authority's orders and that the delays might allow Mr Cribb to cause the plaintiff's affairs to be arranged so as to render it judgment proof. Mr Steele's affidavit traces the history of the various responses from the plaintiff asserting that new funding lines had been established and stating that the draw down of funds was only a matter of weeks away, which I have summarised above. Mr Smith claims to have been put to considerable costs as a result of the plaintiff's continued breaches and failures and claims that his position is now severely

prejudiced should the Court grant a further extension of time. On that basis he requests the Court to dismiss the challenge and allow him to commence enforcement action.

[15] He has also expressed the view that he is extremely concerned that he is required to continue to incur the cost of preparation for a hearing while the plaintiff simply breaches orders and avoids its obligation.

[16] Against this material I also have to take into account the plaintiff's former solicitor's advice that the plaintiff has not paid the legal fees of its solicitors and that counsel wrote to the plaintiff on 25 February and 3 March advising that the plaintiff's solicitors required payment of fees before continuing to act for the plaintiff.

[17] The current situation is completely unsatisfactory to the defendant. As a first step, I order that the fixture set down to commence on Monday 30 March 2009 is vacated.

[18] The issue now becomes whether a further extension should be granted and, if not, whether the stay of enforcement should be released or whether the challenge itself should be struck out.

[19] The affidavits of Mr Steele and Mr Cribb's submissions today satisfy me that efforts have been made to make the payment into Court and for this reason alone I do not consider that the challenge ought to be struck out at this point.

[20] However, the challenge is stayed from any further progress until the plaintiff pays \$250,000 into Court. This sum includes the original amount, interest to date, and the balance is security for the defendant's costs should the challenge proceed. This stay will be reviewed three months from now and if the monies have not, by then, been paid into Court, the challenge will be dismissed.

[21] In the meantime, the plaintiff's and Mr Cribb's stay of enforcement of the Authority's orders is lifted and the defendant is now free to take any steps he wishes to recover the amounts of the awards made by the Authority.

[22] The defendant is entitled to costs for today's hearing for the work that has gone before it and these I fix at \$2,500. These costs are to be paid in any event. I will, on the application of the defendant and with the opportunity of the plaintiff to comment, direct at what time those costs ought to be paid. The challenge is now stayed in the way I have said, until further order of the Court.

B S Travis
Judge

Judgment signed at 5.15pm on 5 March 2009