

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 118
EMPC 377/2015
EMPC 277/2016**

IN THE MATTER OF an application for stay of proceedings

BETWEEN PETER D'ARCY LORIGAN
 Plaintiff

AND INFINITY AUTOMOTIVE LIMITED
 Defendant

Hearing: On the papers

Appearances: P Lorigan, in person
 R Towner, counsel for the defendant

Judgment: 5 September 2019

**INTERLOCUTORY JUDGMENT (NO 7) OF JUDGE B A CORKILL
(Application for stay of proceedings)**

Introduction

[1] Infinity Automotive Limited (Infinity) seeks a sanction against Mr Lorigan based on his failure to pay previous costs orders.

[2] Mr Lorigan was ordered to pay costs to Infinity on a Category 2, Band B basis in an interlocutory judgment issued on 1 August 2018¹ and in a further interlocutory judgment issued on 8 August 2018.² The amounts were fixed in a costs judgment dated 11 September 2018³ in the total sum of \$14,495.

¹ *Lorigan v Infinity Automotive Ltd (No 3)* [2018] NZEmpC 88.

² *Lorigan v Infinity Automotive Ltd (No 4)* [2018] NZEmpC 89.

³ *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 104.

[3] On 13 September 2018, the Registrar issued the appropriate certificate of judgment, which was personally served on Mr Lorigan on 21 September 2018.

[4] On 24 September 2018, Infinity's lawyers sent an email to Mr Lorigan, requesting him to comply with the Court's costs judgment and pay the sum of \$14,495 for costs without delay. Advice as to when payment could be expected was also requested. Evidence before the Court suggests there was no response.

[5] On 12 November 2018, I issued a compliance order, because, at that time, there had been a default in payment.

[6] I ordered Mr Lorigan to comply by 23 November 2018 with the Court's judgment dated 11 September 2018 that the sum of \$14,495 for costs be paid by him to Infinity. I also ordered that he pay \$500 costs to Infinity in respect of its application for a compliance order.⁴

[7] In the same judgment, I drew Mr Lorigan's attention to the potential consequences of breaching a compliance order, making reference to the sanctions contained in s 140(6) of the Employment Relations Act 2000 (the Act). I also recorded that a judgment creditor has the ability to enforce an order for payment of money in the courts of general jurisdiction, whether by filing the relevant order in the District Court under s 141 of the Act or taking steps under the Insolvency Act 2000.

[8] Mr Lorigan was strongly urged to obtain legal advice, as he had been on a number of previous occasions in this proceeding.

[9] On 28 June 2019, Infinity's lawyers wrote again to Mr Lorigan requesting payment of the outstanding sums.

[10] Mr Lorigan replied on 3 July 2019, stating, in summary, that he would not meet the costs orders.

⁴ *Infinity Automotive Ltd v Lorigan* [2018] NZEmpC 133.

[11] Infinity's lawyers responded on the same day, confirming that, unless the total sum of \$14,995 was paid without delay, Infinity would apply to the Court for further orders.

[12] Infinity has now done so. It requests the Court to order that:

- a) The compliance order for \$14,495 be enforced by:
 - i. staying Mr Lorigan's proceedings until he complies with the compliance order; and/or
 - ii. fining Mr Lorigan the sum of \$10,000 or such other sum as the Court thinks just.
- b) A compliance order be made requiring Mr Lorigan to pay the costs order of \$500 contained in the judgment of 12 November 2018.
- c) Costs be fixed in respect of the present application.

[13] On 2 August 2019, I issued a minute to the parties, directing:

- a) That Mr Lorigan was to file and serve any notice of opposition and submissions regarding the costs-related matters by 12 August 2019.
- b) That Infinity then file and serve submissions in reply by 26 August 2019.

[14] I said I would resolve the application on the papers.

[15] On 9 August 2019, Mr Lorigan filed a document entitled "CHALLENGES TO DETERMINATIONS, ORDERS AND LEGAL VALIDITY OF ENTIRE PROCEEDINGS, PLUS A UNILATERAL WAIVER OF PRIVILEGE".

[16] The document stated that, having regard to Mr Lorigan's views about alleged illegal conduct by Infinity, the costs orders were made in error having regard to the evidence he says he holds, which he set out in detail.

[17] Mr Lorigan said his views as to illegality were supported by a range of domestic and international statutes. He concluded his statement by stating he believed there should be a judicial review or that the case be taken to the International Court of Justice.

[18] On 12 August 2019, Mr Lorigan filed a notice of opposition to Infinity's application, stating that he was never in a legal relationship with Infinity and repeating a number of assertions made in his earlier document. He also appeared to suggest he is entitled to remedies, under a Malaysian statute, on the basis that Infinity is related to a Malaysian entity.

[19] In his submissions, Mr Towner, counsel for Infinity, referred to the background factors confirming a default in payment and submitted that sanctions should be imposed under s 140(6)(a) and/or s 140(6)(d) of the Act. The sub-section states:

140 Further provisions relating to compliance order by court

...

- (6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:
- (a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:
 - (b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:
 - (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
 - (d) order that the person in default be fined a sum not exceeding \$40,000:
 - (e) order that the property of the person in default be sequestered.

[20] Mr Towner submitted that one or other or both sanctions would be appropriate because:

- a) Mr Lorigan's default had been deliberate and wilful.

- b) It had been repeated, as he had failed to pay two amounts of costs ordered against him.
- c) He had not provided any reason for his non-compliance; the notice of opposition did not provide any excuse or explanation, but instead continued unfounded and scurrilous attacks on Infinity.
- d) Mr Lorigan had not taken any steps to remedy his breach, and there was a history in the proceedings of Mr Lorigan flagrantly disregarding the Court's orders and directions.
- e) The amount sought by Infinity by way of fine was proportional to the amount of the outstanding costs and Mr Lorigan's high degree of culpability.
- f) Infinity had made reasonable and repeated requests that he pay the outstanding costs.
- g) There is a reasonable inference from an email sent by Mr Lorigan of 26 June 2019, which is before the Court, that Mr Lorigan, having sold his family home, would be in a financial position to pay a fine.

[21] It was noted that Infinity was not seeking the more draconian options available under the sub-section of either outright dismissal of the proceedings, or that Mr Lorigan be imprisoned, or that his property be sequestered.

[22] Apart from the assertions summarised above, Mr Lorigan made no legal submissions with regard to s 140 of the Act.

[23] A final introductory matter relates to the order of stay of proceedings pending appeal, which was ordered in the Court's judgment of 6 December 2018.⁵ The order was made because Infinity had applied to the Court of Appeal for leave to appeal a

⁵ *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 146.

material judgment. That application was declined on 15 May 2019.⁶ Having regard to that ruling, the order of stay could not continue. Accordingly, I revoked it in my minute of 2 August 2019.

Legal principles

[24] I have not been referred to any authorities where an order has been made under s 140(6)(a) of the Act, either staying or dismissing a proceeding.

[25] The Court's jurisdiction to impose a fine under s 140(6)(d) was comprehensively reviewed by the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer*.⁷ In that judgment, the Court of Appeal considered previous cases involving not only the imposition of fines, but also ordering imprisonment or sequestration.

[26] Then the Court stated:⁸

... we see the primary purpose of s 140(6) as being to secure compliance. That is apparent from the wording of the section. Secondly, it must be intended to enable the Court to impose some form of sanction for non-compliance with the compliance order.

[27] Given those two purposes, the Court of Appeal went on to state that a range of factors would be relevant in a particular case where a fine was under consideration. The court noted that these factors would include the nature of the default – deliberate or wilful – whether it is repeated, without excuse or explanation, and whether it is ongoing or otherwise. Any steps taken to remedy the breach would be relevant, together with the parties' track record. Proportionality is another factor and would require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and of the employee, including their financial circumstances, would be relevant.

[28] Some of these factors are, in my view, also relevant to a consideration as to whether a stay of proceedings is necessary in the interests of justice.

⁶ *Infinity Automotive Ltd v Lorigan* [2019] NZCA 161.

⁷ *Peter Reynolds Mechanical Ltd v Denyer* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828.

⁸ At [75] (footnotes omitted).

[29] I proceed accordingly.

Analysis

[30] There are several incontrovertible facts.

[31] Mr Lorigan has failed to pay the costs orders made against him and has failed to comply with the compliance order.

[32] He has not taken any legal step to challenge or appeal the making of the various orders of the Court.

[33] He has been requested on several occasions to make the necessary payments. It is plain from his correspondence that he has no intention of doing so. Rather, he raises matters that are irrelevant from a legal perspective. His assertions of criminal conduct, having regard to the information he has presented, are properly described as scurrilous and unjustified.

[34] He has been warned as to the consequences of not making the payments he has been directed to pay to Infinity, that is, that sanctions under s 140 of the Act, or otherwise under the District Court Act 1947 or the Insolvency Act 1967 would follow.

[35] He has been strongly urged to obtain legal advice; there is no evidence that he has done so.

[36] On the evidence before the Court, there is no reason to think Mr Lorigan could not pay the costs awarded. He has never said he could not do so; only that he would not do so.

[37] A contextual matter relates to the applications that came before the Court, and in which the Court was persuaded that orders should be made by way of contribution to the costs Infinity had incurred in resisting those applications.

[38] The first costs order arose from the Court's judgment of 1 August 2018,⁹ which related to an application for joinder made by Mr Lorigan. He argued that four companies related to Infinity should be joined because one or more of them may in fact have been his employer, although he had pleaded that Infinity was in fact his employer. Ultimately, I concluded that joinder was not justified, and that the application was wholly misconceived.¹⁰

[39] The second costs order arose from the Court's judgment of 8 August 2018, which related to an urgent application by Mr Lorigan that the proceedings he had instituted be stayed, or that alternatively there be a variation of the Court's timetabling directions; this is because he said he needed more time to prepare.¹¹

[40] An extension of time was allowed, as an indulgence, but on an unless basis. I directed that unless Mr Lorigan met his obligations for the upcoming hearing, the two challenges raising procedural issues which were before the Court would be struck out. In all the circumstances, I also ordered that Mr Lorigan should contribute to Infinity's costs.¹²

[41] In summary, the applications giving rise to the costs orders involved misconceived applications and a failure to comply with directions of the Court. Regrettably, these themes are evident in other applications filed by Mr Lorigan and in the documents filed for the purposes of the present application.

[42] The result of Mr Lorigan's seriously flawed approach to this proceeding has been to create unnecessary cost. That has continued to the present point, where, once again, Infinity has incurred costs in filing the present application.

[43] I am satisfied that the interests of justice require the imposition of a sanction. In my view, the correct sanction is an order of stay of two of Mr Lorigan's proceedings: those of which a preliminary issue is to be resolved, if they proceed. The effect of such an order would be that, for so long as the costs orders are not paid, those

⁹ *Lorigan v Infinity Automotive Ltd (No 3)*, above n 1.

¹⁰ At [90].

¹¹ *Lorigan v Infinity Automotive Ltd (No 4)*, above n 2.

¹² At [62].

challenges will not proceed. The solution lies in Mr Lorigan's hands. At this stage, the proceedings will not be dismissed. They will be continued just as soon as the outstanding monies are paid.

[44] In my view, this is the least restrictive sanction which could be applied. It would not be in the interests of justice to impose a fine in addition.

[45] I agree that it is appropriate to make a compliance order in respect of the costs order of \$500 made on 12 November 2018.

[46] It is also appropriate that a costs order be made in Infinity's favour with regard to the present application.

Disposition

[47] I make the following orders:

- a) *A sanctions order under s 140(6) of the Act:* Mr Lorigan's proceedings, EMPC 377/2015 and EMPC 277/2016 are stayed until he pays \$14,495 to Infinity.
- b) *A compliance order under s 139(2) of the Act:* Mr Lorigan is to comply by 18 September 2019 with the Court's judgment dated 12 November 2018 that the sum of \$500 costs be paid by him to Infinity.
- c) *A costs order under cl 19 of sch 3 of the Act:* Mr Lorigan is ordered to pay \$500 costs to Infinity in respect of this application.

[48] There are two other proceedings before the Court (EMPC 215/2017 and EMPC 297/2017). Both are currently stayed pending the disposition of EMPC 377/2015 and EMPC 277/2016. I will review the position with regard to those proceedings at a telephone directions conference to be held in the week of 10 February 2020.

[49] If EMPC 377/2015 and EMPC 277/2016 remain stayed because the costs orders have not been paid, I will at the telephone directions conference consider any application which may have been filed by then with regard to those proceedings, on that occasion.

B A Corkill

Judge

Judgment signed at 9.00 am on 5 September 2019