

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

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

**[2023] NZEmpC 108
EMPC 306/2022**

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

AND IN THE MATTER OF an application for security for costs

BETWEEN MGK HOMES LIMITED
 Plaintiff

AND BOMI YOON
 Defendant

Hearing: On the papers

Appearances: M Beech, counsel for plaintiff
 Seungmin Kang, counsel for defendant

Judgment: 19 July 2023

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK
(Application for security for costs)**

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority, which found that the plaintiff, MGK Homes Ltd (MGK), had unjustifiably dismissed the defendant, Ms Yoon.¹ She was awarded \$15,576.84 (gross) as lost wages, \$20,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and \$4,544.25 as special damages under s 123(1)(b) of the Act.² In a subsequent costs determination, the Authority also awarded Ms Yoon \$6,876.31 in costs.³

¹ *Yoon v MGK Homes Ltd* [2022] NZERA 377 (Member Blick).

² At [93].

³ *Yoon v MGK Homes Ltd* [2022] NZERA 515 at [25] (Member Blick).

[2] In an interlocutory judgment issued on 22 February 2023, Judge Holden granted MGK a stay of the Authority's awards pending the determination of its challenge in this Court.⁴

[3] The following orders were made:⁵

- (a) The Authority's substantive and costs determinations were stayed for an initial period of one month from the date of the judgment.
- (b) If MGK paid the sum of \$46,997.40 into court prior to the end of that month, the stay would continue pending further order of the Court.
- (c) MGK was to file and serve an amended statement of claim as a non-de novo challenge, satisfying s 179(4) of the Act. This was to be done within one month of the date of the judgment.
- (d) Ms Yoon was to then file and serve a statement of defence to that amended statement of claim within a further 14 days.
- (e) If Ms Yoon wished to pursue the penalty issue, she would be required to apply for leave to file her own non-de novo challenge, with any such application also to be filed before the end of that period.

[4] MGK paid the required sum into court, and the stay on the Authority proceedings continued.⁶

[5] Ms Yoon has now applied for security for costs of \$16,730 on the basis that MGK will be unable to pay her costs if it is unsuccessful in its challenge.

⁴ *MGK Homes Ltd v Yoon* [2023] NZEmpC 22.

⁵ At [28].

⁶ *MGK Homes Ltd v Yoon* EmpC Auckland 306/2022, 28 March 2023 at [2].

[6] In her application, Ms Yoon relied on an affidavit from an ex-employee of MGK. The ex-employee claimed that MGK recently dismissed two employees because of financial difficulties and that it has not yet paid their outstanding wages. Ms Yoon states that this affidavit provides a reason to believe that if she is successful in defending the challenge, MGK will not be able to pay costs.

[7] MGK opposes the application and states that it will be able to meet any costs award if it is unsuccessful. It relies on an affidavit from its director, who does not deny that two employees were dismissed as a result of cash-flow difficulties, but states that the exact amount owing to them is disputed. He acknowledges that the company had cash-flow difficulties earlier in the year but states that it will be able to meet any obligations arising from the challenge through its existing equity in two properties it owns.

[8] In response, Ms Yoon states that when the value of the properties is assessed using their rateable value, there is no net equity in either property.

The law

[9] As stated by this Court previously, there are no particular provisions relating to security for costs in the Employment Court.⁷ Accordingly, pursuant to reg 6(2)(a)(ii) of the Employment Court Regulations 2000, the Court looks to the provisions of the High Court Rules 2016 when dealing with applications for security for costs.

[10] Under r 5.45(1)(a)(i) and (b) of the High Court Rules, the Court has a discretion to order the giving of security for costs if a plaintiff is resident out of New Zealand or there is reason to believe that the plaintiff would be unable to pay the costs of the defendant if the plaintiff is unsuccessful in its proceeding.

⁷ *People Media Group Ltd v Galligan* [2023] NZEmpC 13 at [18].

[11] In exercising this discretion, the Court must consider all the circumstances and balance the interests of both the plaintiff and the defendant.⁸ An order may be made if it is just in all the circumstances.⁹

Analysis

Threshold – inability to pay adverse costs

[12] For the purposes of these proceedings, the Court can only consider exercising its discretion to order security for costs if it is satisfied there is reason to believe the plaintiff will be unable to meet an adverse costs award.

[13] The defendant submits the threshold is met because MGK has had cash-flow difficulties and because it does not have sufficient equity in its two properties to be able to meet any costs ordered.

[14] MGK does not deny that it has had cash-flow difficulties; nor does it deny that two employees were dismissed as a result of those difficulties. However, it states that the employees have not been paid because the sums claimed by them are disputed. That dispute will be the subject of mediation on 17 July 2023.

[15] In the circumstances, it is not possible for the Court to determine with any certainty whether any sums remain owing to the two employees as that issue is disputed. Therefore, it is also not possible to determine whether any sums have remained unpaid to any employee due to cash-flow difficulties on the part of MGK. On the other hand, I accept, based on the affidavits of both parties, that MGK has had cash-flow difficulties.

[16] However, even though MGK has had cash-flow difficulties, it submits that any sums ordered against it can be met from equity in its two properties. Therefore, it is necessary to consider whether MGK does in fact have sufficient equity in the properties to support its position.

⁸ *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [15]–[16].

⁹ High Court Rules 2016, r 5.45(2).

[17] MGK owns two properties. The first property has a rateable value of \$340,000, an “as is” market value of \$1,675,000, and an “as if complete” market value of \$2,450,000. This first property has mortgages totalling \$1,337,400 with likely higher priority sums attached. The second property has a rateable value of \$425,000, an “as is” market value of \$575,000, and an “as if complete” market value of \$2,500,000. This second property has mortgages totalling \$342,700 with higher priority sums attached.

[18] Mr Kang, counsel for Ms Yoon, submits that when assessing whether there is equity in the properties, the value of the properties should be assessed using the rateable value and the indebtedness should be assessed using the priority sums on the mortgages. If this approach is adopted, it is submitted that there will be no equity in the properties.

[19] In support of the submission that the value of the properties should be assessed using the rateable value, Mr Kang relied on *Snowdon v Radio New Zealand Ltd* where the Court preferred the rateable value over the purported market value of the property.¹⁰ In that decision, the Court provided three options to the party providing security as to how that could be achieved.¹¹ One of those options involved a second mortgage over property which was already heavily mortgaged. The parties disagreed about whether there was sufficient equity in the property to support an additional mortgage once the bank’s priority over certain sums was taken into account.¹²

[20] However, the situation in *Snowdon* is distinguishable for at least two reasons. First, in *Snowdon* the Court was not primarily assessing whether a party was impecunious; rather, it was assessing whether there was sufficient equity in a property to reliably support an additional mortgage.¹³ Second, the Court was deciding a situation where, despite the seller’s best efforts, the property had not yet been sold, and as a result, it was not clear that it could in fact sell at the market value.¹⁴

¹⁰ *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 84.

¹¹ At [39].

¹² At [24]–[33].

¹³ At [33].

¹⁴ At [31].

[21] In the present proceedings, there is no indication that the properties' rateable value is a more accurate assessment than their "as is" market value. In particular, in respect of the first property under scrutiny in the present proceedings, the rateable value of \$340,000 is clearly too low considering the improvement work carried out by MGK. Therefore, I prefer the "as is" market value of each property as set out in the valuation reports provided by MGK.

[22] In support of the submission that the level of indebtedness should be assessed using the priority sums on the mortgages, Mr Kang cited *A P Proude Contracting Ltd v Power Farming Manawatu Ltd*.¹⁵ In that decision, the High Court was considering whether security for costs could be provided by way of a third mortgage over property. The Court declined to permit such an arrangement as the margin between the value of the property and the priority sums was deemed to be unacceptably scant.¹⁶ In particular, the Court held:¹⁷

... the plaintiff's offer provides insufficient protection for the defendants and, absent a considerably improved margin of security for a mortgage to the defendants over the farm, they are entitled to continue to reject this offer. Neither the plaintiff's bare assertion that its current indebtedness is substantially less than the priority sums or the ... reduction in the priority sums secured are enough to remedy this.

[23] As with *Snowdon*, this case is distinguishable because once again the Court was assessing whether there was sufficient equity in a property to reliably support an additional mortgage rather than whether the party in question was impecunious.

[24] In any event, it cannot be the case that the Court must always prefer the priority sum over the actual loan amount because sometimes the priority sums on a mortgage will be far in excess of the sum owed under the mortgage. Where there is reason to believe that the actual indebtedness of a party may in fact exceed the sum loaned under the mortgage, it will often be appropriate to consider the extent of any relevant priority sums. However, each situation must be considered on its own facts.

¹⁵ *A P Proude Contracting Ltd v Power Farming Manawatu Ltd* HC Palmerston North CIV 2006-454-940, 4 March 2008.

¹⁶ At [37].

¹⁷ At [37].

[25] In the present proceedings, there is no evidence before the Court that the extent of MGK's debt exceeds the loaned sums. Therefore, I accept that the "as is" market value should be compared against the loan sums when assessing the existing equity in each property.

[26] When that calculation is carried out, the evidence available to the Court indicates that the net equity in the first property totals \$337,600 and that the net equity in the second property totals \$232,300.

[27] Finally, even if MGK does not have sufficient equity in the properties, I observe that its cash-flow difficulties have not prevented it from complying with previous orders of the Court. In particular, it has recently been able to pay \$46,997.40 into court as a condition of the stay of proceedings in relation to the Authority's determinations.

[28] Ms Yoon seeks \$16,730 as security for costs. Even though MGK appears to have cash-flow difficulties, it has sufficient equity in its properties to comply with a costs award of that degree and has demonstrated its ability to comply with any such award by complying with the financial condition placed on the stay of proceedings. Therefore, I am not satisfied that there is reason to believe that MGK will be unable to pay any costs awarded against it in the event that it is unsuccessful.

Outcome

[29] Ms Yoon's application for security for costs is declined.

[30] As the successful party, MGK is entitled to costs on this application. If they cannot be agreed, it may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The defendant is to respond by memorandum filed and served within 14 days thereafter, with any reply from MGK to be filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 2 pm on 19 July 2023