

# The Jurisdictional Divide –

## Cross-Jurisdiction Enforcement of Monetary Claims

### Introduction

Following on from the paper on *JP Morgan Chase Bank NA v Lewis*,<sup>1</sup> this paper deals with further matters arising from the jurisdictional divide, focusing on methods of enforcement of monetary claims and awards and other remedies in employment law. In the majority of cases these methods of enforcement will be used by employees against employers. However, in appropriate cases, the enforcement methods discussed will be just as available to an employer who has a monetary award against an employee.

Difficult issues arise from the jurisdictional conflict between courts of civil jurisdiction and the jurisdiction of the Employment Relations Authority (Authority) and the Employment Court in the area of recovery of ship master and crew wages. Decisions of the High Court have dealt with this conflict in proceedings involving forfeiture of vessels under fisheries legislation. The problems arise from the clear conflict of statutory provisions between the Admiralty Act 1973 and the Employment Relations Act 2000 and its predecessor legislation, the Employment Contracts Act 1991. In the context of enforcement, however, these jurisdictional issues have been resolved in the decisions to be discussed in this paper to the advantage of the employees involved.

This paper, in addition to briefly considering these jurisdictional divide problems, will also consider more general practical matters and methods in the cross-jurisdiction enforcement of monetary awards and other remedies in employment law. The determination of liability is only the first step in litigation arising from employment relationship problems. Where monetary awards are made, the primary objective must be to properly and promptly, take steps to collect the award for the client. Payment is not always made voluntarily. Experience in the Authority and the Employment Court is showing that many practitioners, through lack of experience or acumen, are failing to act in the best interests of their clients and opportunities to

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<sup>1</sup> *JP Morgan Chase Bank NA v Lewis* [2015] 3 NZLR 618, [2015] ERNZ 37.

enforce awards are being lost through delay or choice of inappropriate procedures. Unnecessary costs are being incurred and there is, in some cases, a failure to properly assess and advise the client when it is time to quit - particularly when costs will exceed the likely benefit of commencing litigation in the first place or in taking enforcement action after liability has been determined.

### **Claims by ship masters and crew for wages**

Perhaps the starkest divide between the courts of civil jurisdiction and the Authority and the Employment Court arises from the direct conflict between s 4(1)(o) of the Admiralty Act 1973 and ss 161(1) and (3) and 187(1) and (3) of the Employment Relations Act 2000. Section 4(1)(o) of the Admiralty Act 1973 reads as follows:

**4      Extent of admiralty jurisdiction**

(1)      The Court shall have jurisdiction in respect of the following questions or claims:

- ...  
 (o)      any claim by a master or member of the crew of a ship for wages, and any claim by or in respect of a master or member of the crew of a ship for any money or property which, under any of the provisions of the Maritime Transport Act 1994, is recoverable as wages or in the court and in the manner in which wages may be recovered:

Section 161(1) of the Employment Relations Act 2000 provides:

The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally...

Section 187(1) provides:

The Court has exclusive jurisdiction—  
 ...

The position is reinforced by s 161(3) which provides:

Except as provided in this Act, no Court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the Authority.

and Section 187(3) which provides:

Except as provided in this Act, no other Court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the Court.<sup>2</sup>

It is not the purpose of this paper to provide an exposition on admiralty law. However, the following background will assist in understanding this issue.

The Admiralty Act sets out the extent of the admiralty jurisdiction in the High Court and District Courts. The jurisdiction may be exercised by the High Court both in respect of *in rem* (against a ship) and *in personam* claims, whereas the District Courts only have jurisdiction *in personam* within the monetary limit of \$200,000.

The Admiralty Act sets out the extent of the admiralty jurisdiction by listing a series of maritime claims, including the maritime liens, statutory claims, statutory rights *in rem*, other maritime claims *in personam*, claims relating to possession or ownership of a ship, and mortgages. The claim for wages by a master or crew of a vessel is a claim for a maritime lien of high priority.<sup>3</sup> Of those claims listed in the Act, there are certain limitations provided as to whether they constitute actions *in rem* and therefore justifying the arrest of the vessel, or may simply only be dealt with as *in personam* claims. Certain jurisdictional limits are also specified in respect of some of the claims. For instance, consideration of the restrictions contained in ss 4 and 5 of the Act in relation to sister ship claims were dealt with in the decision of *Reef Shipping Company Limited v The Ship "Fua Kavenga"*.<sup>4</sup>

The High Court Rules 2008 provide a procedural scheme for the commencement and prosecution of actions in admiralty. The scheme also deals with arrest of the

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<sup>2</sup> The exclusive jurisdiction provisions in the Employment Relations Act 2000 are effectively a repetition of section 3 of the Employment Contracts Act 1991 which gave the Tribunal and the Court exclusive jurisdiction to hear and determine any proceedings founded on an employment contract.

<sup>3</sup> This paper does not deal with the determination of priority of admiralty claims. Master and crew wages have high priority over other rights against the vessel or fund. For a discussion on these issues, see DR Thomas, *Maritime Liens* (British Shipping Law, Vol 14, Stevens, London, 1980); ME Perkins "The ranking and priority of *in rem* claims in New Zealand" (1986) 16(2) VUWLR 105, updated in Andrew Scott-Howman "An Update On The Ranking and Priority of *in rem* Claims in New Zealand" (paper presented to the MLAANZ New Zealand Branch Conference, Napier, 11 March 2000).

<sup>4</sup> *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550.

vessel or vessels the subject of the claim, pleadings and preliminary acts (collision), defence of claims, appraisal and sale of vessels following proof by trial or admission, and determination as to priority of claims. The High Court has sole jurisdiction to deal with disputes if they arise as to tonnage limitation of claims.

The District Courts have admiralty jurisdiction limited to *in personam* claims. The District Courts Rules 2014 also provide procedures for admiralty claims, including preliminary acts (in collision cases) and stay pending resolution of any dispute as to tonnage limitation being resolved by the High Court under Part 7 of the Maritime Transport Act 1994.

The employment law jurisdictional problem arises in a situation where the ship's crew or master may wish to avail themselves of the right to enforce their maritime lien for wages under the Admiralty Act and High Court Rules by commencing proceedings in admiralty and to have the vessel or vessels arrested. The right to procure security and payment for any such wages claim by arrest in this way is a valuable and powerful remedy. From an enforcement point of view, employees who are claiming wages as master or crew of a vessel obtain a considerable advantage from the *in rem* procedures. Even the ability to use *in personam* procedures in the High Court in admiralty against an employer avails the use of High Court enforcement rules for any judgment.

The tension between the coinciding jurisdictions in the High Court and District Courts in admiralty and the employment institutions came to be considered in the decision of *Udovenko v Karelrybflot*.<sup>5</sup> This claim arose in the context of a forfeiture of a fishing vessel for breach of fisheries legislation where members of the crew sought to enforce their maritime lien to wages by seeking relief against forfeiture, along with recognition of their lien and assessment of the value of their claims. In that decision at first instance, William Young J stated in respect of s 4(1)(o) of the Admiralty Act 1973:<sup>6</sup>

It is not disputed that this provision (which took its present form by reason of an amendment in 1994), preserves a jurisdiction to this court which can be exercised notwithstanding the general provisions of the Employment Contracts

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<sup>5</sup> *Udovenko v Karelrybflot* HC Christchurch AD 90/98, 27 April 1999 at 12.

<sup>6</sup> At 12.

Act. These provisions would otherwise preserve exclusive jurisdiction to the institutions established under that Act in respect of the present proceedings because they are connected with contracts of employment.

The amendment in 1994, merely refers to the fact that the reference to the Shipping and Seaman Act 1952 in the section was replaced by reference to the Maritime Transport Act 1994 which repealed it. William Young J did state in his first interim judgment that his views on these legal issues should be treated as provisional only as they were not argued in front of him. However, in his second judgment, having heard further argument, he confirmed his earlier views on jurisdiction.<sup>7</sup>

The *Udovenko* case went on appeal as *Karelrybflot v Udovenko*.<sup>8</sup> The Court of Appeal made an important statement:

[44] The appellant argued, as it had in the High Court, that the Judge was not entitled to make an assessment of wages on the basis that the minimum amount which the seamen must receive was governed by the Minimum Wage Act. In this Court there was raised for the first time a preliminary point that the High Court had no jurisdiction under that Act because s 10(2) provides:

“(2) All proceedings under this Act shall be commenced in the Employment Tribunal.”

[45] We reject this argument. It seems to us that s 10(2) appears in the Minimum Wage Act for consistency with the Employment Contracts Act 1991 which generally excludes the jurisdiction of courts and tribunals other than the Employment Court and the Employment Tribunal where an employee is pursuing a claim for wages. However, the Admiralty Act, also a specialised statute, has long given the High Court a jurisdiction in relation to wages claims by seamen and that jurisdiction was unaffected by the Employment Contracts Act or earlier legislation dealing with questions of employment. A second consideration is that it is the obvious policy of the Minimum Wage Act that all wage claimants whose contracts are governed by that Act are to be entitled to pursue claims for the applicable prescribed minimum wage. It cannot have been intended that in order to be able to claim a minimum wage a seaman must forgo the benefit of an *in rem* proceeding, one of ancient origin and serving a protective function, in order to bring a proceeding in the Employment Tribunal. Nor can it have been intended that, despite the policy underlying the Minimum Wage Act, the High Court in its admiralty jurisdiction is to have no power to order payment of the prescribed minimum. Agreeing with Young J, we go further and say that not only does the High Court have such power but that,

<sup>7</sup> *Udovenko v Karelrybflot* HC Christchurch AD 90/98, 24 May 1999.

<sup>8</sup> *Karelrybflot v Udovekno* [2000] 2 NZLR 24 (CA).

upon becoming aware that the Minimum Wage Act applies to a particular employment contract of a seaman, the Court is obliged to give effect to the Act. This being the case, the criticisms of the position taken by Young J and of the lack of a pleading directed towards the Minimum Wage Act fall away.

Similar issues involving claims for relief by crew members claiming wages against vessel forfeiture in respect of fisheries prosecutions came to be considered more recently in *Sajo Oyang Corporation of Korea, South Storm Fishing (2007) Ltd v Ministry for Primary Industries*.<sup>9</sup> Both at first instance in the District Court and on appeal to the High Court, maritime liens in admiralty for wages were recognised and relief against forfeiture granted against the fund which became available from sale by redemption back to its owners of the vessel which had been seized. These decisions were of course decided after the enactment of the Employment Relations Act 2000 but the exclusive jurisdiction clauses between that Act and the Employment Contracts Act are not different.

However, the principles are not just confined to situations involving claims for relief against forfeiture in which the position of reimbursing the master and crew has to be urgently considered. There is a substantial advantage, and public and equitable interest, in masters and crew being able to undertake *in rem* proceedings in admiralty in the High Court to enforce wages claims where security for the claim can be procured pending the outcome on liability and quantum. There may be instances where *in personam* proceedings in admiralty for wages are issued and the High Court (or the District Court) may prefer to stay such proceedings while contemporaneous proceedings in the Authority and subsequently on appeal to the Employment Court – to determine liability and quantum on wages and other claims – are dealt with. For instance where, in addition to the claim for wages, a personal grievance for unjustifiable dismissal or other unjustifiable action by the ship owner employer is being pursued, any claim for compensation orders or loss of future wages may not form part of the maritime lien or statutory right *in rem*. Such claims would be required to be heard under the Employment Relations Act.

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<sup>9</sup> *Sajo Oyang Corporation of Korea, South Storm Fishing (2007) Ltd v Ministry for Primary Industries* [2015] NZDC 6726 and on appeal *Hartono v Ministry for Primary Industries* [2015] NZHC 3307.

If the choice is made at the outset to simply commence a claim for master or crew wages in the Authority, the question arises as to whether subsequent proceedings in admiralty can then be commenced in an effort to secure or enforce the determination, or a judgment of the Employment Court if an appeal by challenge is made. Such a question might arise, for example, where after the Authority's determination or an Employment Court judgment is procured, a vessel belonging to the employer sails back into a New Zealand port. Claims in admiralty are issued either in the High Court or District Court as discrete proceedings. The right to arrest a vessel on an *in rem* claim in the High Court can only arise following the commencement of the proceedings themselves. If the issues of liability and quantum for the master or crew claims have already been determined in the Authority or Employment Court, commencement of new proceedings in admiralty would be precluded by *res judicata* or the doctrine of merger. All is not lost, however, because the Employment Court has the same powers as the High Court to make a freezing order commonly referred to as a *Mareva* injunction.<sup>10</sup> So long as the employer is the owner of the vessel concerned, such an order would restrain the vessel leaving until the judgment is satisfied or security provided. The power to issue a freezing order is discussed elsewhere in this paper.

Finally on this subject a word of warning is issued. Counsel embarking on admiralty proceedings should be aware of the prospect of damages being awarded for wrongful arrest. An indemnity for damages is required from the litigant seeking the arrest. In addition, a thorough knowledge of the limitations in the jurisdiction such as were discussed in the "*Fua Kavenga*" case is recommended. With claims for a freezing order against a vessel an indemnity against damages will also be required. As the freezing order can only be against the property of the employer, the subject of the claims or judgments, care needs to be taken to investigate what can often be complicated chartering arrangements for operation of the ship. A charterer may be an employer of the crew but not the owner. Before commencing any such proceeding in admiralty, or for a freezing order against a ship, a thorough assessment of the claim should be made by experienced counsel. It needs to be kept in mind that once a vessel is seized the Sheriff, who is responsible for the costs

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<sup>10</sup> Employment Relations Act 2000, s 190(3); *Mareva Compania Naviera SA v International Bulkcarriers SA* ("*The Mareva*") [1980] 1 All ER 213.

of maintaining the vessel under arrest or seizure, will seek indemnity from the plaintiff or judgment creditor. The primary aim would be, therefore, not to maintain the arrest or seizure for any length of time but simply to obtain a fund or security for the claims which will then lead to the vessel being released. In situations where an insolvent owner is involved and holding the vessel needs to be for a longer period, there will likely be a raft of claims in addition to the wages claims and the costs of maintaining the vessel under arrest will be shared or perhaps be met by insurance underwriters.

Nevertheless, the admiralty jurisdiction of the High Court and the District Courts provides a more direct route to speedy enforcement methods and reimbursement for claims to wages by master and crew members than proceeding with wage claims under the Employment Relations Act and then endeavouring to enforce successful monetary awards by way of the remedies provided under that Act. The right to arrest the vessel right at the commencement of proceedings will lead to security being obtained at an early stage for the claims pending the determination of liability and quantum.

### **Enforcement of monetary awards under the Employment Relations Act 2000**

The primary remedy for enforcement of momentary awards in the Employment Relations Authority and Employment Court is a compliance order under ss 137-140A of the Act. The problem with an application for a compliance order is the time involved in pursuing it. This can be further extended if there is a challenge to a determination of the Authority's compliance order.

Applications for compliance orders primarily originate in the Authority. The Court has originating powers to order compliance with the provisions of the Act relating to strikes and lockouts, and to enforce its own orders, determinations, directions or requirements. It also has powers to order compliance to require orderly conduct during the course of proceedings.

Failure to abide by compliance orders of the Authority or Court may lead to proceedings before the Court culminating in punishment of a procedural kind such as a stay, strike out or dismissal. Other more draconian penalties of imprisonment, fine or sequestration of property are also available. The insertion of s 140AA into the Act now allows a Labour Inspector to apply for such sanctions for breaches of Authority or Court orders without there being a preceding compliance order.

The Court will generally be reluctant to adopt the more draconian remedies without extending further time to the defaulting party to comply. If imprisonment is to be imposed, the Court has no power to issue a warrant of arrest. However, this problem may be resolved using other procedural provisions in the Employment Relations Act and the Employment Court Regulations 2000.<sup>11</sup>

Generally the power to order compliance is more suitable for enforcement of non-monetary remedies. Although ultimately, if time is not an issue, the powers of fine, imprisonment and sequestration of property are powerful remedies in the enforcement of monetary awards.

### **Remedies for enforcement in the High Court and District Courts**

Remedies in the District Courts become available by virtue of s 141 of the Employment Relations Act 2000 which reads:

- (1) Any order made or judgment given under any of the Acts referred to in section 223(1) by the Authority or the Court (including an order imposing a fine) 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.
- (2) To avoid doubt, an order imposing a fine is enforceable under Part 3 of the Summary Proceedings Act 1957.

The Acts referred to in s 223(1) are the Employment Relations Act 2000 and those employment related statutes under which monetary awards, penalties or fines are likely to be awarded for breach of an employment agreement or minimum standards of employment. It is a simple process to register a determination of the Authority or a

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<sup>11</sup> See *Lever v Dick and Alexander* [2015] NZEmpC 115 for a discussion on how the Court will consider such matters.

judgment of the Employment Court with the District Court. Once that is done, and the determination or judgment becomes a judgment of the District Court, it then opens the way for use of all of the enforcement remedies available under the District Courts Act 1947 and the District Courts Rules 2014. These methods of enforcement may be quickly commenced after the determination or judgment is registered in the District Court.<sup>12</sup>

It is not possible to consider at length all of these remedies in a paper such as this, although several do deserve some discussion. Remedies available include charging orders, procedures to obtain orders of sale from the High Court to enforce charging orders, warrants to seize property, warrants to recover chattels, orders requiring the judgment debtor to attend Court for examination, warrants of committal for failure to comply with the judgment or subsequent orders (but not for monetary awards) writs of arrest if the debtor is about to abscond, and garnishee proceedings.

Charging orders involve a charge on property such as land, rights in partnership assets, shares and rights to property by virtue of any express or implied trust. The effect of the order is not only to have the charge registered against the title to the property concerned, but to restrain future dealings with that property. Once the charging order is made, it may be removed from the District Court to the High Court for enforcement by way of orders for sale.

Proceedings requiring a judgment debtor to come to Court for examination, or proceedings for a writ of arrest, are extremely likely to result in payment if the debtor is solvent and has the ability to pay the judgment debt but is obstinately refusing to do so. Where the debt can be secured against chattels or land then satisfaction of the judgment debt is reasonably certain unless the judgment debt exceeds the value of the property concerned.

Garnishee proceedings deserve special mention in the context of enforcement of determinations of the Authority or judgments of the Employment Court. Garnishee proceedings are a process whereby debts due to be paid to a judgment debtor by a third party (a sub-debtor) may be ordered by the District Court to be paid directly to

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<sup>12</sup> See District Courts Act 1947, pt 6 and District Courts Rules 2014, pt 19, covering jurisdiction and procedures for enforcement by use of these remedies.

the judgment creditor. It is a form of attachment against funds owing to the judgment debtor. In this day and age, with automatic banking of wages, an employee will invariably know details of the employer's bank account numbers and in small concerns will be likely to have knowledge of the extent of funds likely to be held in such bank accounts. Where a bank holds funds to the credit of an employing entity whether an individual or corporation, the bank is a sub-debtor. Rules 19.70 to 19.88 of the District Courts Rules 2014 set out the procedures for garnishee proceedings. The advantage of garnishee proceedings is that once the garnishee summons is served on the sub-debtor, the funds cannot be disbursed pending Court hearing or otherwise resolution of the claims. A sub-debtor may also pay into Court sufficient funds to satisfy the amount of the claim and costs; and upon receipt of the funds, the Registrar of the Court may pay the funds to the judgment creditor if the judgment debtor consents. Otherwise the funds are held by the Court as security for the claim.

Garnishee proceedings are a draconian measure. Such proceedings can be commenced quickly and are likely to procure prompt payment. Garnishee proceedings against bank accounts are particularly effective but the proceedings can be used against any sub-debtor of the judgment debtor where funds are available to meet the sub-debt.

By virtue of s 66 of the District Courts Act 1947, a judgment of the District Court may be transferred into the High Court. Therefore the process available under s 141 of the Employment Relations Act 2000 enables an order or judgment of the Authority or the Employment Court to be eventually transferred into the High Court with all the benefits of enforcement available in that Court. Obviously, consideration as to costs will be a factor in following this process but if the amount of the judgment debt warrants it, this will be an enforcement process of considerable advantage.

The methods of enforcement for a High Court judgment debt are contained in Part 17 of the High Court Rules. The remedies available include attachment orders on wages or salary (unlikely to be of use against an employer), charging orders on land and other property and interests, the power to order sale of such charged property, possession orders, arrest orders for wilful disregard of court orders, and sequestration orders. Arrest orders can only be issued for breach of orders other

than for payment of a sum of money so will be of little use as a collection device. Sequestration involves seizing the judgment debtor's property and depriving them of its use pending further court order. Sequestration is also of course available as a remedy for enforcing compliance orders under s 140(6)(e) of the Employment Relations Act 2000.

### **Insolvency – companies winding up and bankruptcy proceedings**

These methods of enforcement of a monetary award are often adopted by litigants. Only the High Court has jurisdiction to deal with such proceedings. A determination obtained from the Authority or a judgment from the Employment Court ordering payment of money will provide the basis for the issuing of a bankruptcy notice pursuant to s 17 of the Insolvency Act 2006 against an individual or a statutory demand pursuant to s 289 of the Companies Act 1993 against a company. Failure to comply with the bankruptcy notice will be an act of bankruptcy by the individual served with it. A bankruptcy petition can then be filed. In the case of the demand on a company, failure to pay will entitle the judgment creditor to file a winding up petition. This paper is not the place to deal with the intricate procedures involved in such proceedings. However, where the judgment debtor is solvent and will wish to avoid bankruptcy or liquidation, these types of proceedings are once again powerful remedies of enforcement. Care needs to be taken. If the individual or the company is indeed insolvent then substantial, irrecoverable costs may be incurred in pursuing the matter. If bankruptcy or liquidation does occur then the only remaining remedy available may be to file a proof of debt with the Official Assignee or the company liquidator. If some funds are available then unsecured creditors may obtain a dividend payment. Wages claims have a measure of priority in both bankruptcy and company liquidation.

### **Freezing orders**

The jurisdiction of the Employment Court to make freezing orders (formerly referred to as *Mareva* injunctions) is confirmed in s 190(3) of the Employment Relations Act 2000. As the Employment Court has the same powers as the High Court to make such orders, the Employment Court follows the High Court Rules and High Court

authorities as to the procedure and principles to be applied. A copy of the Employment Court's practice direction on search and freezing orders is attached to this paper.<sup>13</sup> The Employment Court has recently dealt with applications for such orders in *Harlow v Western Property Management Ltd* and *Eden Group Ltd v Jackson*.<sup>14</sup>

The purpose of a freezing order is to restrain a respondent from removing assets located in or outside New Zealand or from disposing of, dealing with, or diminishing the value of those assets.<sup>15</sup>

Obviously a primary purpose is to provide security for the claim being made pending determination of liability and quantum. However, an application for such an order can be made both prior to judgment or against a judgment debtor. A freezing order can also be made against a respondent who is not a party to the proceedings. An undertaking as to damages is required to be filed with the application.

While freezing orders originated from a maritime case ("*The Mareva*"), the jurisdiction is not confined to vessels. Ancillary orders will generally be made along with the freezing order to ensure it is effective.<sup>16</sup>

The principles which will be adopted by the Employment Court in considering an application for a freezing order are:

- (a) That the applicant shows a good arguable case.
- (b) That there are in fact assets (which need not be specifically identified) which may be made the subject of the order(s).
- (c) That there is a risk of removal or dissipation or diminution in value.
- (d) That overall justice requires the granting of the orders.
- (e) A meaningful undertaking as to damages must be given by the applicant.

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<sup>13</sup> Appendix.

<sup>14</sup> *Harlow v Western Property Management Ltd* [2016] NZEmpC 59 and *Eden Group Ltd v Jackson* [2016] NZEmpC 60.

<sup>15</sup> High Court Rules, r 32.2(2).

<sup>16</sup> High Court Rules, r 32.3.

- (f) The applicant must make full disclosure to the Court of all material facts and act with good faith if the application is made without notice.
- (g) If the freezing order is sought against the assets of a business which is continuing to trade then the Court will be careful not to prohibit transactions made in the ordinary course of business. Usually after the order is made, an attempt will be made to set it aside in whole or in part. During the process of dealing with such an application, and depending upon the circumstances in each case, orders may be modified to allow the respondent to continue with normal business dealings.

Some warnings have already been expressed earlier in this paper where the freezing order is being used to restrain a vessel from sailing from the jurisdiction in the face of wages claims by the crew. Commonsense needs to prevail before a decision is made to seek a freezing order on any assets. Timing and urgency is particularly important. Substantial costs will be incurred in seeking and obtaining such an order. If the assets subject to the order are already gone, then obviously seeking a freezing order will be a fruitless task.

## **Miscellaneous matters relating to enforcement**

### *Remedies against directors and officers of companies*

A problem which is often occurring in proceedings before the Authority or Employment Court relates to actions by directors or officers of employer companies to defeat an employee's claim. This usually occurs where a reasonably high monetary award is sought or made against the employer company in the Authority. A challenge will then be filed with the Employment Court and, in the relatively lengthy period then elapsing before the challenge can be heard, steps are taken to remove assets and have the company wound up. Often a new company will arise from the ashes (a phoenix company) and the employer will go on trading. If an employee gets wind of such actions then this would be an appropriate case to seek a freezing order.

However, if the employer company goes into liquidation, complicated issues arise with the liquidator as to whether the proceedings can be continued.

There are some remedies available under the Employment Relations Act 2000 to pursue third parties. For instance, the now repealed s 234 of that Act provided for action against officers, directors or agents of a company liable for minimum wages and holiday pay. However, an action under that section was only available at the suit of a Labour Inspector. There may be some residual cases where an action under that section may still be pursued.<sup>17</sup>

The repeal of s 234 of the Act has seen the introduction of the new Part 9A. Part 9A of the Act has now strengthened the remedies available to employees caught in such situations. The object of Part 9A is to provide additional enforcement measures to promote the more effective enforcement of employment standards. Such remedies include recovery of wages and compensation, pecuniary penalty orders and banning orders. The District Court has jurisdiction to enforce pecuniary penalty orders and, along with the High Court, can impose penalties for breach of banning orders. Such penalties may also involve conviction, fines or imprisonment. The new enforcement proceedings have not been fully tested at this stage. These provisions are outside the scope of this paper dealing primarily with enforcement by collection of monetary awards. However, the ability to take such enforcement action under Part 9A will hopefully ameliorate some of the problems earlier described.

It should not be overlooked that the High Court also has supervisory powers under the Companies Act 1993 to deal with this type of problem, which includes phoenix companies. If resort to those powers is financially viable, remedies are available to an employee.

### *Contempt of the Court or Authority – s 196 of the Employment Relations Act 2000*

Section 196 provides as follows:

- (1) This section applies where any person—

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<sup>17</sup> See *Labour Inspector (Melissa Ann Macrury) v Cypress Villas Ltd* [2015] NZEmpC 157. Full Court decision presently subject to appeal.

- (a) assaults, threatens, intimidates, or wilfully insults any person, being a member of the Authority, a Judge, an officer of the Authority, a Registrar of the Court, any other officer of the Court, or any witness, during that person's sitting or attendance in the Authority or the Court, or in going to or returning from the Authority or the Court; or
  - (b) wilfully interrupts or obstructs the proceedings of the Authority or the Court or otherwise misbehaves in the Authority or the Court; or
  - (c) wilfully and without lawful excuse disobeys any order or direction of the Authority or the Court in the course of the hearing of any proceedings.
- (2) Where this section applies,—
- (a) any constable, with or without the assistance of any other person, may, by order of the Authority or the Court, take the offender into custody, and detain the offender until the rising of the Authority or the Court:
  - (b) a Judge, if the Judge thinks fit, may sentence the offender to imprisonment for any period not exceeding 3 months, or sentence the offender to pay a fine not exceeding \$5,000 for every such offence; and, in default of payment of any such fine, may direct that the offender be imprisoned for any period not exceeding 3 months, unless the fine is sooner paid.

I mention this section because there is evidence of misunderstanding of its scope and effect. An application was made in proceedings currently before the Court by an employee to have officers of the employer company fined or imprisoned under this section for alleged perjury in a hearing before the Court which had occurred several years previously. Section 196 applies to contempt in the face of the Court of the kind specified in the section. The powers to call for assistance of a constable and impose a sentence are only available at the hearing itself. They cannot be exercised retrospectively for behaviour which may have occurred at an earlier sitting.

#### *Arbitration - enforcement of awards*

Section 155 of the Employment Relations Act, which occurs in that part of the Act dealing with mediation services, provides entitlement to submit an employment relationship problem to arbitration. The Arbitration Act 1996 does not apply in respect of the submission as it is specifically excluded.<sup>18</sup> The section is worded in

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<sup>18</sup> Employment Relations Act 2000, s 155(2)(a).

such a way that supervision by the Authority and Employment Court over any such arbitration is maintained rather than such supervision being exercised by the High Court as would be the case if the Arbitration Act applied. The fact that the Arbitration Act does not apply unfortunately precludes the ability to take enforcement action of an award by registering the award in the High Court. While the retention of supervision by the Authority or Employment Court is understandable, it is unfortunate that the right to use enforcement procedures in the High Court is precluded.

It is noted that in s 155(2)(b) of the Employment Relations Act 2000 the parties must determine the procedure for the arbitration. Presumably the parties may include in their agreement or submission to arbitration methods of enforcement of any award which is not complied with. Some commentators have suggested agreement to incorporate the terms of the award into a mediated settlement under s 149 of the Act or a determination of the Authority under its jurisdictional powers under s 161 of the Act. The remedies discussed earlier in this paper would then become available.

#### *Collection by a Labour Inspector*

The powers of Labour Inspectors under the statutes referred to in s 223 of the Employment Relations Act should not be overlooked as a method of collecting a debt in appropriate cases. A full consideration of these powers, which includes the new extended powers under Part 9A of the Act is similarly beyond the scope of this paper. The Inspectors now have wide powers the exercise of which may be unwelcome to a solvent employer if money is owed.

#### **Conclusions**

The primary purpose of this paper has been to deal with the jurisdictional conflict existing between the Admiralty Act 1973 and the Employment Relations Act 2000 in the context of this session of the conference which deals with the jurisdictional divide. However, in view of concerns as outlined in the introductory comments of this paper, it was considered that it might be of assistance to practitioners to continue the

discussion by outlining, albeit in summary form, methods of enforcement of monetary awards of the Authority and the Employment Court extending beyond the Employment Relations Act 2000 into other jurisdictions of the civil courts. It is suggested that the first step, before any proceedings on an employment relationship problem are commenced, is to assess the likely outcome against the goal of procuring monetary awards. This may involve attempts at an early stage to obtain security for the claims prior to or while proceeding through the Authority or the Court for the purposes of determining liability and quantum. Some methods of achieving this have been discussed in this paper. That includes, in the case of master or crew wages not proceeding under the Employment Relations Act 2000 at all, but rather pursuing remedies which may be more effective under the Admiralty Act 1973.

If procuring security is not feasible then acting quickly to take enforcement steps on the Authority's determination where a challenge has been filed may also be effective. A challenge to the Court does not act as a stay against enforcement of the Authority's determination of monetary awards. The parties subject to such monetary awards, usually the employer, will in all likelihood be required to pay the full amount or a substantial portion of the amount of the awards into Court pending the hearing of the challenge if a stay is sought.

Proper assessment has to be made at the commencement and during all stages of the proceedings. This is to ensure that once an award is made enforcement will be effective. If that is not possible costs should not be incurred in pursuing a case which, despite having merit, will not achieve the eventual goal for the client of being paid.

## Appendix

### **9. Search and freezing orders**

- (a) The Employment Court is empowered to make search and freezing (and ancillary) orders pursuant to s 190(3) of the Employment Relations Act 2000 and Parts 32 and 33 of the High Court Rules. The Employment Relations Authority (the Authority) does not, however, have the power to make search or freezing orders.
- (b) There must be a proceeding within the jurisdiction of the Court or the Authority to which the application for search or freezing orders relates or, if substantive proceedings have not been able to be issued because of urgency, to which the order can relate.
- (c) Those justiciable substantive proceedings will have to be brought in the Employment Relations Authority (more usually) or in the Employment Court.
- (d) Where such substantive claim must be brought in the Authority at first instance, an application to the Court for a search or freezing order will have to be accompanied by either a draft statement of problem, an actual statement of problem filed in the Authority or, in appropriate circumstances of urgency, the Court may make the grant of a search or freezing order conditional upon the immediate filing of substantive proceedings in the Authority. Where the substantive claim must be brought in the Employment Court at first instance, a draft or actual statement of claim will be required. The foregoing requirements may be modified or waived by a Judge in exceptional circumstances of extreme urgency.
- (e) An applicant for a search or freezing order must give a written and signed undertaking as to damages and must give evidence of the applicant's financial ability to meet an order for damages pursuant to the undertaking.
- (f) An applicant for a search or freezing order must file a form of draft order that includes reference to the undertaking as to damages.
- (g) In all other respects the Court will expect applicants to comply with Parts 32 and 33 of the High Court Rules.