

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 211
CRC 40/13**

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

AND IN THE MATTER of an application for security of costs

BETWEEN PYNE GOULD CORPORATION
 LIMITED
 Plaintiff

AND JAMES WEST
 Defendant

Hearing: (on the papers - 24 October and 7 November 2014)

Counsel: M Crotty and G Service, counsel for the plaintiff
 L Ryder, counsel for the defendant

Judgment: 14 November 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

The application

[1] This judgment deals with an application for security for costs in the sum of \$50,000, brought by Mr James West against Pyne Gould Corporation Limited (PGC).

[2] In my interlocutory judgment of 8 July 2014, I described the background to this matter as follows:¹

[2] The defendant, Mr James West, was appointed by the plaintiff, Pyne Gould Corporation Limited (PGC), as Financial Controller in June 2011, having worked for PGC since 2009. His employment ended on 16 April 2012, following which he raised two personal grievances; that he had been unjustifiably dismissed and that he had been unjustifiably

¹ *Pyne Gould Corp Ltd v West* [2014] NZEmpC 118 (footnotes omitted).

disadvantaged in relation to the alleged failure to properly consult over the disestablishment of his position. Mr West also sought payment of a bonus to which he claimed to be entitled.

[3] The Authority upheld the dismissal grievance and awarded Mr West remedies totalling over \$150,000. The claim for the bonus was dismissed. ...

[3] There is a challenge and a cross-challenge so that all matters are now at large before the Court. A five-day fixture for the substantive hearing is scheduled to commence on 8 December 2014.

[4] The grounds on which the application is made are as follows:

- a) PGC is incorporated outside New Zealand.
- b) There is reason to believe the company will be unable to pay Mr West costs if PGC is unsuccessful in the proceeding.
- c) It is just in all the circumstances to order security for costs.

[5] In his supporting affidavit of 9 October 2014 Mr West deposes:

- 10.1 PGC has sold all its NZ based assets and therefore will have no cash in New Zealand.
- 10.2 PGC's remaining material assets comprise ownership and shares in offshore entities Torchlight and EPIC.
- 10.3 There are now a significant number of regulatory and legal issues facing Torchlight and EPIC and PGC Group. The regulatory investigations have now been expanded to regulators in both New Zealand and Australia.
- 10.4 There is a significant dispute with a high net worth individual John Grill for a reported AUD \$20m and significant bonus claim from ex PGC Managing Director John Duncan ref 2013 NZERA Auckland 535 which has been disputed and is to [be] heard in the Auckland Employment Court commencing 20 October 2014.
- 10.5 PGC has failed to lodge 30 June 2014 financial statements with the NZ Stock Exchange by 30 September 2014 deadline which may indicate that it has insufficient funds to meet its commitments and does not wish to disclose this situation.
- 10.6 PGC [continues] to frustrate and delay the Employment Court discovery process including withholding key information in relation to the bonus payments that are under dispute. This may be further evidence of PGC's lack of funds and an inability to meet my costs.

[6] PGC opposes the application on the following grounds:

- a) It is a publicly listed company with significant assets.
- b) PGC has paid \$143,404.50, being the sums awarded by the Employment Relations Authority (the Authority) plus interest, into its lawyer's trust account pending the Court's judgment in this proceeding.
- c) PGC has complied with the Court's orders as to disclosure, having completed this on 14 October 2014. Further, briefs of evidence for the witnesses giving evidence at the substantive hearing on behalf of PGC have been filed and served.
- d) The proceedings involved a challenge by PGC to the Authority's findings regarding Mr West's personal grievance claim; but Mr West has cross-challenged the Authority's determination regarding his claim for a bonus. As a result both parties are in effect plaintiffs for part of the claim.
- e) There is no evidence from Mr West that he would be able to meet an order for costs awarded in PGC's favour against him.
- f) PGC's challenge to the Authority's approach to remedies and costs has (at least) a genuine prospect of success.
- g) Much of the evidence relied on by Mr West in his affidavit is sourced from the media; limited weight ought to be placed on such statements.
- h) Accordingly, security for costs should not be awarded.

[7] Both parties have filed submissions amplifying their respective positions. In the plaintiff's submissions it was submitted that the company's financial statements were filed with the New Zealand Stock Exchange (NZX) on 3 November 2014; a copy of those for the year ending 30 June 2014 and the allied announcement to NZX were attached to those submissions. Although no affidavit has been filed for PGC, these documents have been placed before the Court by counsel without objection. They have been considered accordingly.

Legal principles

[8] The defendant submits that reg 6(2)(a)(ii) of the Employment Court Regulations 2000 (the Regulations) permits the Court to refer to the rule in the High Court Rules which governs applications for orders for security of costs, r 5.45. That rule provides:

5.45 Order for security of costs

- (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
 - (a) that a plaintiff—
 - (i) is resident out of New Zealand; or
 - (ii) is a corporation incorporated outside New Zealand; or
 - (iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
 - (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
- (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
- (3) An order under subclause (2)—
 - (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
 - (i) by paying that sum into court; or
 - ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
 - (b) may stay the proceeding until the sum is paid or the security given.
- (4) A Judge may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.
- (5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.
- (6) References in this rule to a plaintiff and defendant are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[9] I accept that the Court has jurisdiction to make orders for security for costs, and that the High Court Rules provide useful guidance.

[10] The general principles applicable to such applications were conveniently summarised by Judge Inglis in *Liu v South Pacific Timber (1990) Ltd*.²

[10] In exercising its broad discretion the Court must have regard to the overall justice of the case, and the respective interests of both parties are to be carefully weighed. The balancing exercise was summarised by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* as follows:

The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.

Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[11] The merits of the plaintiff's case are to be considered in the context of an application for security for costs. Other matters which may be assessed in undertaking the balancing exercise include whether a plaintiff's impecuniosity was caused by the defendant's actions, any delay in bringing an application, and whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

[12] Concerns relating to access to justice apply across all courts. As the Chief Judge observed in *Mackenzie v Bayleys Real Estate Ltd*: "ultimately the particular decision must be on its own merits and the justice of the case."

[11] The Court has a broad discretion which it must exercise having regard to the respective interests of both parties to the case, and its merits.

[12] The general approach is summarised in *Busch v Zion Wildlife Gardens Ltd (in rec and in liq)* where it was held that an application for security for costs under r 5.45 generally follows these steps:³

- (1) Has the applicant satisfied the court of the threshold under r 5.45(1)?
- (2) How should the court exercise its discretion under r 5.45(2)?
- (3) What amount should security for costs be fixed at?
- (4) Should a stay be ordered?

² *Liu v South Pacific Timber (1990) Ltd* [2012] NZEmpC 129.

³ *Busch v Zion Wildlife Gardens Ltd (in rec and in liq)* [2012] NZHC 17 at [2].

Discussion

[13] In respect of the threshold question there can be no controversy. PGC is now incorporated in Guernsey, so that it meets the criteria specified in r 5.45(1)(a)(ii).

[14] The next question is whether, in all the circumstances, the Court should exercise its discretion to order security. The primary ground relied on by Mr West is an assertion that there is reason to believe PGC would be unable to pay costs if unsuccessful in the proceeding. There are a number of submissions which require consideration.

[15] The first is the location of PGC's business activities. It is apparent that PGC continues to have significant connections with New Zealand. Although now incorporated in Guernsey, the Court is advised that PGC is registered as an Overseas Non-ASIC Company⁴ with the New Zealand Companies Office. The consequence of that registration is that as an overseas company its incorporation is still held overseas, but its New Zealand operations are governed by New Zealand law. This includes the significant obligations which arise under pt 18 of the Companies Act 1993, particularly in relation to finance reporting requirements if it is deemed to be a large overseas company carrying on business in New Zealand.

[16] It is also significant that, currently, PGC is listed with the NZX. That means it is subject to all the regulatory requirements that apply to listed entities, including the NZX Listing Rules promulgated under the Securities Markets Act 1988. In short, PGC's listing activities are at present public and subject to significant oversight.

[17] Against that, however, is the evidence of the Managing Director's Report which accompanied the financial statements for the year to 30 June 2014 that its focus in that year "was to further simplify the group by selling non-core assets and reinvesting in the core business in Australia and the United Kingdom". Further the "migration from New Zealand to Guernsey" is said to be by way of preparation for a listing on the London Stock Exchange intended for the first quarter of 2015. These developments would potentially create difficulties for a New Zealand creditor.

⁴ That is, that it is not incorporated in Australia and subject to the oversight of the Australian Securities and Investments Commission.

However I consider the holding of assets in both Australia and the United Kingdom could potentially give rise to respectable enforcement options, if needed.

[18] The next submission made for Mr West is that PGC's financial position is precarious. It was his evidence that PGC's remaining material assets comprise ownership in offshore entities, Torchlight Fund LP (Torchlight) and EPIC, and that they currently face significant regulatory and legal issues according to media reports.

[19] PGC's annual financial report has become available since the filing of Mr West's affidavit, together with the Chairman's commentary. Those documents record that PGC has a net profit after tax of 26.6 million dollars in the subject year; although the company's auditors have advised that they will issue a qualified audit opinion, since two allied audits (of Torchlight Fund LP and Residential Communities Limited) have yet to be completed.

[20] In the course of the Managing Director's statement it was said:

Over the course of the financial year, Torchlight Fund LP acquired ownership of almost 100% of the assets of residential land investor and developer Residential Communities Limited (RCL). Melbourne-based RCL holds a land bank of about 6,000 sites on a consolidated basis spread across 17 projects, and develops and sells approximately 10% of these in any single year.

Torchlight Fund LP is also the cornerstone shareholder of ASX-listed Lantern Hotel Group. Lantern is a major Sydney-based freehold hotel group with NTA of more than AUD100m. Torchlight supports Lantern's strategy of creating long-term value by acquiring and operating freehold pubs.

Torchlight Fund LP's other assets include an 11% stake in United Kingdom newspaper group Local World. This was acquired in late 2012 for AUD12m (or GBP7.5m) and since then the UK economy, the newspaper sector and pound sterling have recovered strongly, leading to a positive outlook for the investment. Local World is creating value through both cost cutting and growth in digital advertising.

PGC, at balance date, held approximately 27% of EPIC. EPIC owns around 17% of Moto, the largest motorway service area owner and operator in the UK. PGC announced on October 22, 2014 it had sold its entire 41.89 million shares in EPIC for GBP0.30 per share or GBP12.6m. This is approximately equivalent to 60 cents a share or NZD25.4m. The price of 60 cents is ahead of PGC's carrying value and the gain on sale of \$9.4m is reflected in the results to June 20, 2014. Following the recent takeover of EPIC by United Kingdom interests, PGC no longer has the opportunity to control EPIC and, therefore, made a pragmatic decision to sell its stake to EPIC Investor LLP.

PGC also agreed a settlement deed with EPIC to create a clean break between the companies. The key terms of the Deed are that PGC has been repaid the GBP525,000 advance previously made to EPIC, and EPIC has waived its claim for NZD2.6m. In addition, PGC has paid NZD380,000 to EPIC, which is the amount PGC had previously accrued for legal costs in litigation.

[21] The Managing Director's statement and the financial statements are public documents emanating from PGC itself, and are to be preferred to the incomplete media reports which have been placed before the Court. The media reports refer to claims and possible liabilities.⁵ They do not provide any detailed or reliable analysis. Whilst it would have been of assistance to the Court to have received direct evidence regarding the various claims to which Mr West made reference to in his affidavit, I am satisfied that the information provided to NZX for its purposes, and copied to the Court, must be preferred.

[22] I do not consider that Mr West has established his assertion that "the financial position of the plaintiff is precarious at best". The Court simply has no reliable evidence with regard to alleged outstanding disputes which would impact on the financial position of the company.

[23] It is asserted that disclosure of documents had not been given by PGC, notwithstanding the Court's directions. The Court is now advised that this has occurred, albeit late.

[24] It is submitted for PGC that since the company has paid \$143,404.50 into its lawyers' trust account pending the Court's judgment, there is an appropriate alternative to an order for security for costs. Whilst PGC is entitled to credit for having made the payment in accordance with the Court's direction, it was a payment made for another purpose; it is security in respect of the remedies which Mr West was successful in obtaining from the Authority. If the challenge fails, those sums will become payable to Mr West. In that circumstance, any entitlement to costs on his behalf would be a separate issue. Consequently I do not regard this payment as constituting security for costs. It is a factor which takes the matter no further.

⁵ One of the claims referred to has been resolved by a consent judgment: *Duncan v Pyne Gould Corp Ltd* [2014] NZEmpC 192. Judgment was entered against PGC for \$475,000. I have no evidence as to whether this liability has been met.

[25] It is submitted for PGC that Mr West has known for some time that PGC was moving its centre of operations offshore, and that there has been considerable delay in the bringing of the application, which weighs in favour of a conclusion that it should be declined. I do not regard this factor as being determinative. The application was triggered by comparatively recent media reports of advice from NZX that if the company's annual report for the year to June 2014 was not filed by 8 October 2014, its shares would be suspended from trading. It was in that context that Mr West understandably brought the present application.

[26] The final factor requiring consideration is that each party is challenging aspects of the Authority's determination. The length of the hearing, and the costs thereby incurred will relate to both PGC's challenge and Mr West's cross-challenge. I am satisfied that the allegations made by each party are genuine and will require careful consideration. This is not a case where the evidence establishes that a defendant faces a misconceived claim brought by an impecunious plaintiff. That there are arguable claims by both parties is a further factor that militates against the making of an order for security in favour of one party only.

[27] For the foregoing reasons the application for security for costs is dismissed. Costs in relation to this application are reserved.

B A Corkill
Judge

Judgment signed at 10.45 am on 14 November 2014