**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2011] NZERA Christchurch 184
5280737

| | | |
|---|---|---|
| | BETWEEN | PATRICK MILLS<br>Applicant |
| | AND | METRO FLOOR CANTERBURY (2002) LIMITED (IN LIQUIDATION)<br>Respondent |
| | AND | METROFLOOR CONTRACTING LIMITED<br>Party sought to be joined |
| Member of Authority: | Philip Cheyne | |
| Representatives: | Jonathon Smith, Counsel for Applicant<br>No appearance for Respondent<br>Julian Moran, Counsel Party sought to be joined | |
| Investigation Meeting: | 23 August 2011 at Christchurch | |
| Submissions Received: | 3 October 2011 from the Applicant<br>10 October 2011 from the Party sought to be joined | |
| Determination: | 23 November 2011 | |

---

## DETERMINATION OF THE AUTHORITY

---

### Employment Relationship Problem

[1] Metro Floor Canterbury (2002) Limited traded as *MetroFloor* and employed Mr Mills in that business. Mr Mills was dismissed in June 2009. He commenced proceedings in the Employment Relations Authority in November 2009. In April 2010 the Authority scheduled an investigation meeting for July 2010. There was no appearance by the employer at the investigation meetings. In a determination dated 20 August 2010 the Authority upheld Mr Mills' personal grievance claim and ordered Metro Floor Canterbury (2002) Limited (the old company) to pay him compensation and costs. Mr Mills' attempts to enforce this determination against the old company proved fruitless. Mr Mills then applied without notice to the District Court to change

the identity of the respondent company from Metro Floor Canterbury (2002) Limited to Metrofloor Contracting Limited (the new company), a newly registered company that appeared to have assumed control of the *MetroFloor* business. The District Court ordered that the application be returned to the Employment Relations Authority. The judgment referred to the principles expressed in *Square One Service Group Limited v Butler* (EMC Auckland, AEC 34/94; A 98/93, 17 June 1994), which if to be applied can only be done so by the Employment Relations Authority. The Authority served Mr Mills' District Court application on both companies. Arrangements were made for an investigation meeting to consider whether the matter should be reopened for the purposes of joining the new company to the proceedings in reliance on the principles expressed in *Butler*. This determination resolves that point.

[2] I have been provided with affidavits by Mr Mills and by Mr Mangos for the company sought to be joined. Both deponents were questioned on their affidavits and I have also received detailed submissions from counsel.

[3] To resolve this problem I will explain what led to Mr Mills' application before turning to consider the evidence and whether there are grounds to join the new company as a party.

**Mr Mills' concerns**

[4] The old company did not file its statement in reply to Mr Mill's personal grievance claim within time. It had also delayed participating in mediation before then. There was no appearance by the old company in July and August 2010 when the Authority scheduled investigation meetings into Mr Mill's personal grievance. With some justification Mr Mills considered that the old company delayed the Authority's investigation. Having received the Authority's determination Mr Mills attempted to enforce it but without success. Next, Mr Mills applied to the District Court for an order substituting the new company for the old company. In that application, after canvassing what he then knew of the situation, Mr Mills summed up the situation as:

> *This is the same party at the same address, doing the same trade, under the name Metrofloor with the same people and the same contact details (Phone numbers etc). The actions of the respondent are an attempt to avoid the enforcement of the Determination*

[5] More details have emerged as a result of the affidavits and questioning during the Authority's most recent investigation meeting.

**The evidence before the Authority**

[6] The shareholders in the old company are Mr Mangos (1 share), his wife Rachelle Aarsen (1 share) and Big Beaver Investments Limited (98 shares). Mr Mangos is the sole director of the old company. The old company was eventually placed in liquidation on 18 May 2011 on the IRD's application filed in December 2010 in relation to unpaid GST and unpaid PAYE including penalties and interest.

[7] The new company was incorporated on 22 January 2010 after Mr Mills had commenced the original proceedings. The shareholders of the new company are Mr Mangos (1 share) and Big Beaver Investments Limited (99 shares). Mr Mangos and Ms Aarsen were both directors initially but Mr Mangos resigned as a director on 14 September 2010. Mr Mangos' evidence is that he resigned because of advice that he might be bankrupted over personal tax owed by him.

[8] Mr Mangos is the sole director and shareholder in Big Beaver Investments Limited. That company apparently holds its shares as trustee of the Mangos Family Trust although I have not been given any documentation to corroborate that evidence.

[9] Mr Mangos' evidence is that by mid/late 2009 he had advice from his accountants that the old company was no longer solvent and must cease trading; and that if it did not do so, he as the company's director could be personally liable for company debts. There is a letter from Mr Mangos' and the old company's accountants to IRD referring to the old company's cashflow problems arising in the latter part of 2008 and a payment arrangement as of June 2009 towards PAYE arrears.

[10] Mr Mangos' advice was also that a new company could be formed to purchase the old company's assets which would have to be done at market value and with payment made in full. As noted the new company was incorporated on 22 January 2010. Interestingly, the accountants' letter to IRD seeking an instalment arrangement for tax arrears referred to above is dated 28 January 2010. It makes no mention of the

new company; rather it paints a picture of the old company continuing to trade in order to maintain employment for 12 staff and repay its tax arrears.

[11] A firm of auctioneers was engaged to value the old company's assets. Estimations of the value of the old company's vehicles were also obtained from reputable car firms. There is nothing to suggest that these valuations were not provided in good faith. Tax invoices dated 5 February 2010 from the old company showing a sale of those assets to the new company at these valuations were generated, the amount totalling $150,133.00 (including GST).

[12] The purchase price for the cars and other assets was apparently met by the Mangos Family Trust advancing $150,000.00 to the new company which immediately paid that sum to the old company which in turn deposited $150,000.00 into its bank account with the National Bank. The deposit into the old company's bank account had the effect of reducing the old company's overdraft facility by that same amount. Throughout, the National Bank held a floating debenture over the assets of the old company. The National Bank permitted the Mangos Family Trust to use the $150,000.00 in this way. Previously the Bank had required that money to be held on term deposit as part security for the old company's overdraft. I have been provided with bank statements that show these transactions on 5 March 2010. I am told that the old company's overdraft had been secured over a property owned by the Mangos Family Trust which the National Bank required to be sold during 2009 with the net proceeds of the sale ($150,000.00) placed on term deposit as security for the old company's overdraft. I am told that the property sale was to an unrelated party. The 28 January 2010 letter to IRD says that approximately $150,000.00 was introduced to the old company as extra working capital in July 2009. It is unclear whether this is a reference to the same funds used in March 2010 to allow the new company to purchase the assets of the old company.

[13] As mentioned I have been provided with some bank statements to demonstrate the transactions on 5 March 2010. The new company's bank account appears to have been opened on 10 February 2010. It also shows a deposit by direct credit as follows: *03 Mar MCNEE LIMITED T/A justbuild inv01 $18,907.82*. That appears to be payment for work performed by the new company, presumably prior to 3 March 2010. There are also several deposits in early April 2010 that appear to be for work

performed. The last deposit to mention reads: *01 Apr DC 0821-0043758400 TRANSFER $6,075.00*. That is a transfer of funds from the old company bank account to the new company bank account. I have not been given any explanation for this transfer on 1 April 2010. I have not been given the old company's bank statement for April 2010 but as at 5 March 2010 the old company's bank account showed an overdraft balance of $8,225.82. The source of funds enabling the 1 April 2010 transfer has not been explained.

[14] Mr Mangos' evidence is that he is employed as manager of the new company. It appears that all or most staff transferred from the old company to the new company. *MetroFloor* advertised in July 2010 for a new staff member. The advertisement did not indentify either company but it must have been on behalf of the new company. The new company continued to use the same premises, phone number and website previously used by the old company. Mr Mangos' evidence is that the new company did not pay anything to the old company for goodwill but did pay $20,000.00 to $30,000.00 to the old company in *Mid 2010* some months after *the purchase* to buy the old company's name *MetroFloor*. I have not been given any documentation to support this transaction.

[15] In addition Mr Mills points out that the old company (including Mr Mangos) never told the Authority or him about the transfer of the old company's business and assets to the new company even though that occurred during the Authority's investigation. Indeed all that was communicated to the Authority about this state of affairs was the mention in an email on 23 July 2010 that *MetroFloor* had ceased to trade, no accounts were being paid and there was no purpose in anyone attending the investigation meeting then scheduled for 27 July 2010.

[16] From all this Mr Mills believes that the old company continued trading while insolvent right up to the date that the business and other assets were transferred to the new company. He believes that the old company delayed dealing with the Authority while it transferred its assets to the new company in order to avoid his personal grievance claim and then to avoid paying him the compensation awarded.

**The law**

[17] The Authority is empowered, in any matter related to an employment agreement, to make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts: see s.162 of the Employment Relations Act 2000. There are District Court and High Court rules that deal with changes in parties both before and after judgment. As the District Court pointed out, those rules have no application in the present circumstances because the change occurred before the Authority's determination; and the rules covering that circumstance apply in the case of death, bankruptcy or devolution of an estate but not the transfer of assets to a third party, as here.

[18] More relevantly, s.157(3) of the Employment Relations Act 2000 provides that the Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with the Employment Relations Act 2000, any regulations made under that Act or the relevant employment agreement. There is exclusive jurisdiction under s.161 to make determinations about employment relationship problems generally, including any action (not within the Court's jurisdiction) arising from or related to the employment relationship; and to make determinations under such other powers and functions conferred on the Authority by any statute. Under s.221, in order to enable the Authority to more effectually dispose of any matter before it according to the substantial merits and equities of the case, the Authority may at any stage of proceedings direct parties to be joined or struck out. Clause 4 of Schedule 2 permits the Authority to reopen an investigation at any time.

[19] I am referred to *Square One Service Group Limited v Butler* [1994] 1 ERNZ 667. The Court said:

> *Mr Locke for the respondent submitted, correctly I conclude, that the Court (or Tribunal) may lift the corporate veil but still ensure the* Salomon *principles are not abused or employed, to prevent the veiled company or other entity to avoid its lawful or proper obligations. This may be done, in this Court or the Tribunal, in equity and good conscience and where there are sufficient elements of artificiality or a sham is apparent.*

[20] That case was considered by the Authority in *Hardy v Scoopy's Ice Cream Parlour (Whangarei) Limited* 12/10/2006, R Monaghan (Member), AA319/06. In *Hardy* the employee was dismissed by the respondent. About four months later the respondent sold its business to a new company. That arose from trading difficulties.

A shareholder and director of the old company became a shareholder and director of the new company along with another person. The other person had not been involved in the old company but had been involved in another associated company. The directors/shareholders of the old company continued to work at least for a time in part of the business bought by the new company. The Authority found that there was no evidence that the new company was incorporated to avoid the old company's obligations to the employee. The evidence established that there was a genuine reason for the sale of the old company assets to the new company.

**Applying the law**

[21] I think *Hardy* is reasonably analogous to the present situation. It is abundantly clear that Metro Floor Canterbury (2002) Limited ran into trading difficulties which resulted in a substantial debt to IRD prior to June 2009. Mr Mills was dismissed also in June 2009. Around the same time the Mangos Trust sold a property. At least some of the proceeds were applied to reducing the old company's indebtedness. Mr Mangos' bank statement also shows substantial transfers into the old company's bank account on 8 July 2009 and 10 July 2009. The only reasonable inference is that the company intended to keep trading at that time. The evidence is that the old company did indeed continue trading into early 2010. The tax debt (including penalties and interest) by then was over $350,000.00. That included Mr Mangos' personal tax debt but the majority was the old company's debt. I infer that the old company's debt, or most of it, was not forgiven by IRD because a statutory demand for more than $360,000.00 in GST and PAYE arrears including interest and penalties was served on the old company in October 2010. It is clear that the old company got into a situation where it simply could not meet its debt to IRD. That is what drove the scheme to sell the old company's assets to a new company, implementation of which commenced in late January 2010. That picture backs up Mr Mangos' evidence that the purpose of the scheme was not to defeat Mr Mills' claims.

[22] Counsel points out, correctly I find, that Mr Mills was unaffected by the sale of the assets to the new company. Mr Mills' claim always ranked behind secured creditors such as the National Bank which had the advantage of a floating debenture over the old company's assets. Once that and other prior claims had been met there would probably have been nothing left to meet the claims of creditors such as Mr

Mills. I also agree with Counsel that it would not be a proper use of the Authority's power to place Mr Mills in a better position vis a vis other creditors of the old company by now joining the new company as a party to the proceedings.

[23] On balance I find that the sale of assets to the new company was neither artificial nor a sham.

[24] I am mindful that there has been no accounting for the proceeds of the sale of the old company's name to the new company or the 1 April 2010 transfer of $6,075.00 from the old company to the new company. There might be issues over which company should have received payments such as the McNee Limited payment in early March 2010. There are submissions that Mr Mangos has fallen foul of the phoenix company provisions in the Companies Act 1993 and has not complied with his obligations under that Act as a director of the old company. Properly, those are matters for the liquidator to investigate if necessary. I note that Mr Mills is listed as a creditor in the liquidator's first report.

**Summary**

[25] For the reasons given I decline to join Metrofloor Contracting Limited as a party to proceedings 5280737 between Mr Mills and Metro Floor Canterbury (2002) Limited.

[26] Although Mr Mills have been unsuccessful, he might not be liable to meet any of Metrofloor Contracting Limited's costs since Mr Mangos contributed (at the very least) to the present problem by the way he failed to properly engage with the Authority over the original proceedings. However, I will reserve costs since the point was not canvassed during the investigation meeting. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority