IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 147
5448996

	BETWEEN	MOHAMMED IRFAN ALI Applicant
	A N D	ABHISEK QUALITY FOODS LIMITED trading as BOMBAY PALACE INDIAN RESTAURANT WANAKA First Respondent
		RAMESH ANAMD RAJAGOPAL Second Respondent
		MASANIAMMAN LIMITED Third Respondent

Member of Authority:	David Appleton
Representatives:	Robert M Thompson, Advocate for Applicant Paul McBride, Counsel for the Second and Third Respondents
Investigation Meeting:	Determined on the papers by consent
Submissions Received:	As set out in the determination.
Further information received:	As set out in the determination.
Date of Determination:	31 August 2016

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

A. I decline to join the second and third respondents.

B. I decline to issue a compliance order against the first respondent.

C. Costs are reserved.

Employment relationship problem

[1] Mr Ali seeks to join the second and third respondents to the proceedings and then seeks compliance orders against them pursuant to s.137 of the Employment Relations Act 2000 (the Act). Mr Ali also seeks a compliance order against the first respondent.

[2] The second and third respondents resist the joinder and object to the making of compliance orders against them on the basis that to do so would be an abuse of process.

[3] The first respondent has not taken any part in the current matter before the Authority, although the financial statements of the first respondent were produced by order of the Authority.

Procedural history of this matter

[4] This matter has been long running before the Authority. It is necessary to set out some of its history. I do so in summary form:

a. On 11 May 2015 the Authority issued a determination on a preliminary matter[1] declining to join Mr Rajagopal and the other director and shareholder of the first respondent to the proceedings.

b. On 15 June 2015 the Authority issued its substantive determination[2].

c. On 7 September 2015 the Authority[3] ordered that the first respondent pay to Mr Ali the GST inclusive sum of $2,717.71 in respect of disbursements incurred by Mr Ali.

d. On 27 November 2015 Mr Ali lodged an application seeking joinder of the second and third respondents which is the subject of this substantive determination.

e. On 10 December 2015, the second and third respondents lodged their statement in reply.

[1] [2015] NZERA Christchurch 61
[2] [2015] NZERA Christchurch 80
[3] [2015] NZERA Christchurch 127

f. On 22 January 2016, Mr McBride lodged an affirmation in affidavit form from Mr Siva Krishnadass, who had provided accounting services to the first respondent at the material time.

g. On 29 March 2016, in response to an Order of the Authority, Mr Krishnadass produced the financial statements of the first respondent for the year ended 31 March 2015.

h. On 4 July 2016 the Authority issued a determination on an interlocutory matter[4], setting out questions that Mr Krishnadass was to answer, after having had submissions from Mr Thompson and Mr McBride on that subject.

i. On 26 July 2016, Mr Krishnadass answered the questions by way of an affirmation in affidavit form.

j. On 3 August and 17 August 2016, Mr Thompson lodged his submissions and on 10 August 2016 Mr McBride lodged his submissions.

[5] Much of the information and the submissions received since January 2016 have been about the financial state of the first respondent, whether sufficient information has been made available and what the information means. I examine these submissions and information in more detail below.

Background

[6] The third respondent operates the Bombay Palace Indian restaurant in Wanaka. This restaurant was formerly operated by the first respondent. Mr Ali used to be employed by the first respondent as a tandoori chef working in the Bombay Palace.

[7] By way of its determination dated 15 June 2015, the Authority found that the first respondent had failed to comply with its obligations to Mr Ali under the Minimum Wage Act 1983 and ordered the first respondent to pay to Mr Ali the net sum of $21,305.29. The first respondent was also found to have failed to comply with its obligations to Mr Ali under the Holidays Act 2003 and was ordered to pay to Mr

[4] [2016] NZERA Christchurch 102

Ali a further net sum of $5,920.69. In addition, the first respondent was ordered to pay to Mr Ali a compensatory sum of $5,000 under s.123(1)(c)(i) of the Act. Finally, the first respondent was ordered to pay penalties to the Crown in the total sum of $10,000.

[8] Mr Ali asserts in his statement of problem in the current proceedings that demand for payment letters were sent to the first respondent on 10 July 2015 and 12 October 2015. As at 16 November 2015, Mr Ali had not received payment and there had been no communication from the first respondent. It is to be assumed that payment has still not been made as at the date of this determination as Mr Thompson has not advised the Authority that that is the case.

[9] I note from the Companies Office website that the company's summary for the first respondent states that it is overdue in its obligation to file an annual return and that the Registrar of Companies has initiated action to remove the first respondent from the Register and that public notice was given. Mr Thompson has confirmed that he has objected to the removal from the Register of the first respondent on behalf of Mr Ali.

[10] I also note from the Authority's files that, as at 22 October 2015, the penalty had also not been paid to the Crown and the matter was, at that stage at least, in the hands of the Legal Services – Litigation Section of the Ministry of Business, Innovation and Employment.

[11] It is on this basis that Mr Ali seeks joinder of the second and third respondents pursuant to s.221 of the Act so that compliance orders can be made against them to require the first respondent to comply with the Authority's orders.

[12] It remains to be added that Mr Ali made an application for joinder of the second respondent prior to the Authority's investigation into the substantive merits of Mr Ali's claim, and such application was the subject of the Authority's determination dated 11 May 2015[5]. In that determination, I declined to join Mr Rajagopal, and the other director and shareholder of the first respondent, Mr Anand, on the basis that neither Mr Rajagopal nor Mr Anand was ever Mr Ali's employers and that there appeared to be no valid basis upon which to lift the corporate veil of the first respondent.

[5] See note 1.

[13] Mr Ali's application at that stage, prior to the Authority's investigation into the substantive complaints by Mr Ali against the first respondent, had been prompted by Mr McBride writing to the Authority and to Mr Thompson on 8 April 2015 advising that the first respondent company had ceased trading with effect from 31 March 2015. Mr McBride had sought to withdraw as counsel and solicitor for the first respondent in the proceedings, and that leave was granted.

[14] The basis upon which Mr Ali now makes his application for joinder relates to actions taken by Mr Rajagopal both prior to and after the Authority's investigation into Mr Ali's substantive concerns. These actions may be summarised as follows:

(a) On 2 March 2015 the Authority directed the first respondent to produce all evidence that it relied on in support of its position (including in respect of its counterclaim against Mr Ali) by no later than 24 April 2015.

(b) On 5 March 2015 Mr Rajagopal incorporated the third respondent. The Companies Office Register shows that Mr Rajagopal is the sole director and 90% shareholder in the third respondent. He is a 75% shareholder and joint director of the first respondent.

(c) Around 15 March 2015 Mr Rajagopal applied to the Queenstown Lakes District Council's District Licensing Committee for a temporary authority to carry on the sale and supply of alcohol at the Bombay Palace Restaurant. The reason given was stated as "Planning to trade Bombay Palace Wanaka with a new company name as Masaniamman Limited with a new shareholder."

(d) On 1 April 2015 the third respondent entered into a deed of lease in respect of the landlord's business known as the Bombay Palace Restaurant carried on from the premises. The commencement date was stated to be 1 October 2009 [sic]. Mr Rajagopal was stated to be the guarantor for the lease.

(e) The first respondent had entered into a deed of lease with the same landlord in respect of the same premises on 1 October 2009 and Mr Rajagopal was, again, cited as the guarantor.

(f) Mr Ali submitted to the Authority copies of advertisements for the Bombay Palace from two editions of the *Upper Clutha Messenger*, one dated 21 January 2015, prior to the first respondent apparently ceasing trading, and 11 November 2015, after the third respondent started trading. These advertisements were identical.

[15] In his first set of submissions, Mr Thompson states that Mr Ali is seeking joinder of Mr Rajagopal so that a compliance order can be made against him "to enable or cause [the first respondent] to meet its legal obligations to [Mr Ali]". He states that Mr Ali is seeking joinder of the third respondent so that a compliance order can be made against it "to ensure [the first respondent] complies with the Authority's orders".

[16] Mr Thompson states that Mr Ali is not seeking to impose a personal liability on Mr Rajagopal to pay the first respondent's legal obligations directly to Mr Ali, nor is it seeking any orders to impose a liability on the third respondent to do so.

Legal principles

[17] Section 221 of the Act enables the Authority to, inter alia, join parties to proceedings. Section 221 states:

> **221 Joinder, waiver, and extension of time**
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
> (a) direct parties to be joined or struck out; and
> (b) amend or waive any error or defect in the proceedings; and
> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
> (d) generally give such directions as are necessary or expedient in the circumstances.

[18] Section 137 of the Act gives the Authority power to order compliance. This section provides:

> **137 Power of Authority to order compliance**
> (1) This section applies where any person has not observed or complied with—
> :
> :

> (b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.
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> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
>
> (3) The Authority must specify a time within which the order is to be obeyed.
>
> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
>
> (a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).

[19] It is now accepted law that the Authority may make a compliance order against persons who have been joined in proceedings and who are in a position to compel a party against whom or which orders have previously been made to meet its legal obligations. The leading case establishing this is *Northern Clerical IUOW v. Lawrence Publishing Co of NZ Ltd*[6].

[20] *Lawrence Publishing* pre-dates the Act, dealing with s.207(1)(b) of the Labour Relations Act 1987 which was expressed in similar but not identical terms to s.137 of the Act. However, the Employment Court has since approved the Authority's jurisdiction to make such orders against third parties under s.137 of the Act. I refer, for example, to *Health & Body Clinic Ltd & Ors v. Anita Zhao*[7] in which his Honour Judge Perkins acknowledged the Authority's jurisdiction to make such compliance orders if properly factually based[8].

[21] As it is simpler, I shall address first whether joinder and compliance orders should be made against the third respondent.

Should the third respondent be joined?

[22] Mr Thompson submits that the third respondent should be joined to the proceedings as it is a façade created by Mr Rajagopal as a *pre-emptive and strategic*

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[6] [1990] 1 NZILR 717 at 722
[7] [2011] NZEmpC 51
[8] Ibid para.[4]

ploy so that the first respondent could avoid the Authority's orders and its obligations to Mr Ali.

[23] Mr Thompson submits that this must be the case as there is, he says, no sound commercial basis for trading the same restaurant business with the same trading name in the same premises with the same deed of lease terms, using the same employees, and the same marketing material, but by having a new company name the business suddenly becomes financially viable.

[24] In support of these assertions, Mr Thompson relies on the facts concerning the incorporation of the third respondent described above. He also states in his submissions, although he has not provided evidence for all of these assertions, that Mr Rajagopal continues to use the same employees, telephone numbers, marketing materials, tradename and other goodwill benefits built up by the first respondent during its five years in existence.

[25] Mr Thompson submits that the facts relied on prove an obviously intimate relationship between the first and third respondents which gives rise to a suspicion that there is an element of façade involved.

[26] In *Lawrence Publishing*, the Court made an order directing a corporate entity to advance to the employer *whatever funds may be necessary (if any) in order to enable Ante Mate Katavich and* [the employer] *to comply with orders* [made against the employer and Mr Katavich]. The rationale for this order of the Court was that the corporate entity (John Tony Holdings Limited) owned *practically all the shares in* [the employer]. In other words, John Tony Holdings Limited was the holding company of the employer. One out of the 500 shares of the employer was held by Mr Katavich, who also held slightly more than half of the 70,000 shares in the holding company.

[27] It is on these facts that his Honour Judge Finnigan concluded that the two companies were "intimately inter-related". This fact did not enable the Judge to find, though, that John Tony Holdings Limited was "a mere façade concealing the true facts" which would have led him to conclude that it was appropriate to lift the corporate veil.

[28] The rationale of *Lawrence Publishing* in joining the corporate entity John Tony Holdings Limited appears to have been that the two companies were intimately

inter-related. This cannot be said of the first and third respondents, however. Whilst Mr Rajagopal owns substantial shareholdings in both, neither company holds any shareholding in the other. Nor can it be said that the two corporate entities operated as some sort of partnership.

[29] What is clear from the evidence, is that the third respondent took over the operation of the restaurant known as Bombay Palace and, whilst Mr Thompson says that no evidence has been adduced to prove that the first respondent ceased trading on 31 March 2015, it can be strongly inferred that that was the case.

[30] Unfortunately, there is a well-recognised phenomenon in New Zealand (as well as other jurisdictions, such as Australia) which has been referred to as "fraudulent phoenix activity"[9] whereby "a company [arises] from the ashes of its former self, not as a genuine business rescue but rather through the deliberate endeavours of its controllers to shed the debts of the old company and continue with business as usual through the new one."[10]

[31] Not all phoenix activity is fraudulent, however. It makes sense that the owners of a failed business would wish to deploy their experience and expertise in the same kind of business as they have previously operated. They may have significant goodwill which still exists and which they would wish to continue to exploit. The goodwill will probably be closely associated with the same trading name and business premises, where the equipment and other tangible assets necessary to operate are installed. The new business may well employ the same staff, thereby saving them from unemployment, and ensuring trained and experienced personnel are immediately available.

[32] For these reasons, the Authority must be cautious of inferring that the sole or principal reason for the third respondent being incorporated and taking over the running of the business of Bombay Palace was to prevent Mr Ali from enforcing the orders of the Authority. Whilst this has not been denied in the statement in reply, this appears to be because the statement in reply focuses on the jurisdictional difficulties that the second and third respondents argue exist with Mr Ali's application. However, as I say, the Authority must be cautious, without more, of imputing fraudulent or

[9] See, for example, the paper by Helen Anderson - *Fraudulent Transactions Affecting Employees – Some New Perspectives on the Liability of Advisers.* Melbourne University Law Review [Vol 39:1 2015]
[10] Ibid, page 5.

improper motives to Mr Rajagopal in incorporating the third respondent when there could have been many legitimate reasons for doing so.

[33] In addition, the incorporation of the third respondent took place prior to the Authority's investigation into the substantive complaints of Mr Ali and before any orders in respect of Mr Ali's substantive complaints had been made. It could be, of course, that Mr Rajagopal anticipated the findings of the Authority, but that would be speculation.

[34] In any event, Mr Ali does not seek to lift the corporate veil and, despite Mr Thompson calling the third respondent a mere façade, he does not explain how it is that making a compliance order against the third respondent would achieve the result that Mr Ali seeks; namely, payment of the sums due to him by the first respondent.

[35] Given that Mr Ali does not seek to lift the corporate veil, and further, given that the first and third respondents are unrelated separate entities, it is not at all clear on what legal basis the third respondent would be in any position to ensure that the first respondent complied with the orders of the Authority. The position would be different if the third respondent was the holding company of the first respondent, but it is not.

[36] For this reason, I decline to join the third respondent to these proceedings and I decline to make a compliance order against it.

Should the second respondent be joined?

[37] Mr Thompson submits that Mr Rajagopal should be joined as a party for the following reasons:

(a) He knowingly caused or enabled the first respondent to repeatedly not pay Mr Ali's contractual entitlements as he was the first respondent's managing director, at material times held himself out as the manager or owner of the first respondent, was the mind and conscience of the first respondent and was in complete control of its day-to-day operations and decision making. Mr Rajagopal knew at material times that Mr Ali was being underpaid, told Mr Ali that he knew this and that he would have him paid but that Ali had to wait, and that he refused to pay Mr Ali's final wages.

(b) To make a compliance order against Mr Rajagopal would not offend against the principles well established in New Zealand law against lifting the corporate veil[11].

[38] I accept the submissions of Mr Thompson that Mr Rajagopal was the effective owner and manager of the Bombay Palace restaurant and, as a Director of the first respondent, he was, and remains, in a position to ensure that the first respondent company complies with its obligations pursuant to the Authority's orders.

[39] However, I take note of the judgment of her Honour Judge Inglis in the Employment Court of *Brenda Christiansen v. Sevans Group (NZ) Ltd & Ors*[12]. In this case, at paragraph [17], her Honour acknowledged authority for the proposition that the Court could make a compliance order against persons who had been joined in proceedings and who are in a position to compel the first respondent to meet its legal obligations, but went on to say[13]:

> The likely difficulty with an application of this approach in the present case is the company's financial position. If the company has no financial resources available to it then there is no realistic way of the second respondent compelling it to meet its legal obligations.

[40] *Christiansen* was not a case such as *Health & Body Clinic Ltd*[14] referred to above, as in that case, Health & Body Clinic Limited had actually been struck off the register and so had no legal status. On that basis, his Honour Judge Perkins declined to issue compliance orders against the second and third respondents as "it would not be fair or reasonable in the circumstances, nor in the interests of justice, for Mr and Mrs Arnesen to be required to comply with an order they could not possibly achieve."

[41] Similarly, in *McLennan v. Internet Productions Ltd (in liquidation)*[15] the Employment Court declined to make an order for compliance against a third party when the employer company was in liquidation. In *Christiansen* the judgment records that the employer company "has been struggling financially for some time and that attempts to secure additional funding from overseas sources have been pursued during 2011 and 2012 but have proved to be unsuccessful." The judgment records that the

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[11] At first held in the UK case of *Salomon v. Salomon & Co Ltd* [1897] AC 22
[12] [2013] NZEmpC 11
[13] At [17]
[14] See note 7
[15] [2003] 1 ERNZ 282

company's bank statements showed a net overdraft position, that the director stated that he had no assets, and it was not trading.

[42] It is clear from this case law that I must have regard to the financial position of the first respondent.

The first respondent's financial position

[43] In the first affidavit of Mr Siva Krishnadass, he deposed that he provided accounting services to the first respondent until it ceased trading with effect from 31 March 2015. He stated that, at that stage, the financial position of the first respondent was that it was operating at a loss, had accrued losses, had extremely limited assets and that it now had no assets and could be best described as a shell with substantial debts.

[44] Mr Krishnadass had exhibited no evidence with his affidavit to substantiate these statements and, by an order made pursuant to s.160(1)(a) of the Act, I required Mr Krishnadass to produce a copy of all accounts and other financial records of the first respondent that he had in his possession and upon which he relied in making his statements about the state of the first respondent.

[45] The financial statements showed that the first respondent had current assets as at 31 March 2015 of $24,869, of which $22,225 were made up of Shareholders' Overdrawn Current Accounts. There had also been cash drawings of $35,556 in the relevant financial year and there were fixed assets of $14,359.

[46] In his second affirmation by affidavit Mr Krishnadass stated the following:

a. The first respondent has not called on the shareholders to pay the overdrawn current account, and that any such call for repayment is part of the liquidation process.

b. The fixed assets of the first respondent have not been sold to the third respondent, or any other entity.

c. Accounts payable of $36,017 as of 31 March 2015 have been fully paid.

d. The third respondent did not agree to make any payment to the first respondent in respect of the transfer of the business.

e. The first respondent did not owe any money to the Inland Revenue not shown in the statements.

f. The first respondent received $1.02 from the Inland Revenue, but this sum has not been banked.

[47] Mr Krishnadass also stated in his second affirmation that his authority to act on behalf of the first respondent has now been revoked, that *the answers and evidence required further in this matter will breach privacy and confidentiality agreements with* [his] *existing and former clients* and that he understands that he is *legally privileged to withhold information between* [his] *clients and* [him]*self to any third party*.

[48] The summary position of Mr Krishnadass' evidence is that nothing material has changed in respect of the financial position of the first respondent since the preparation of the financial statements for the period ended 31 March 2015.

The parties' submissions

[49] Mr Thomas's submissions in relation to the answers given by Mr Krishnadass may be summarised as expressing the view that they confirm that Mr Rajagopal shifted the first respondent's assets and income producing ability to the third respondent without compensation, *as part of the respondents' duck and dive tactic in order to avoid the Authority's determinations, while at the same time financially befitting the 2nd and 3rd respondents*.

[50] Mr Thompson also takes issue with the statement of Mr Krishnadass that the only time overdrawn current accounts are repaid is during a liquidation process. I am sympathetic with this scepticism. Mr Thompson goes on to say that *all it takes for the money to be returned to the first respondent is for the second respondent to tell himself to repay the money, plus interest, and then make that payment*.

[51] In his submissions in response, Mr McBride asserts that the overdrawn current account is the only asset referred to, and that there is no information as to either any ability to recover or still less as to the cost/benefit of any such recovery. Mr McBride

states that it has not been established that the first respondent is in a position to either realise or pay out the amount of that debt.

[52] Mr McBride also submits that it is outside the Authority's jurisdiction to direct that the second respondent (or any other party) pays sums to the first respondent in order to put it in a position to make payment.

[53] Mr McBride in his earlier submissions in opposition, drew my attention to the statement of the Court in *Apex v. Taranaki Community Press*[16]. In this judgment his Honour Chief Judge Goddard stated:

> I now pass to the application for a compliance order. The Court is not always willing to make a compliance order where it involves compliance by paying a sum of money. This is because the respondent may not have the money and may be unable to comply for that reason, and the consequences of a compliance order are so serious that the Court hesitates to order compliance where there is any possibility that it may be ordering someone to do something that may be impossible for that person to do even if others could it.

[54] I understand Mr McBride to be referring to the penal provisions set out at s.140(6) of the Act:

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

Discussion

[55] Mr Thompson submits that Mr Ali does not seek to make Mr Rajagopal pay what is owed to him out of his own pocket. However, what he wants is for Mr Rajagopal to be joined to the proceedings, so that he can then be ordered to ensure

[16] [1992] NZILR 71

that the first respondent complies with the Authority's orders against it. It appears that that may only be achieved by the first respondent being compelled to call in its debts, of which $22,225 is owed by the shareholders of the first respondent, Mr Rajagopal and Mr Elilarasi Ramesh Anand.

[56] However, assuming that were to occur, the following scenarios may then ensue:

a. The two shareholders may repay the loans;

b. One of the shareholders may do so, and the other may not. It is not known in what proportions the sum of $22,225 is owed as between them;

c. Neither shareholder may do so.

[57] If, as may well be likely, Mr Rajagopal did not agree to repay the loans, that creates the absurd situation where, in order to comply with the Authority's order, he has to cause the first respondent to sue himself. That would be a legal nonsense. Even if all of the $22,225 is owed by Mr Anand, the first respondent would have to incur costs in suing him. Mr Anand may well have no assets with which to repay the loan. Similarly, Mr Rajagopal may not, if he owes the first respondent any money.

[58] The Authority has not sought to examine whether the shareholders are in a position to repay the loan(s). Although it is arguable that it has the power to do so pursuant to s.160(1)(a), I am satisfied that it would be an abuse of that power to do so. The matter before the Authority is to ascertain whether the first respondent is in a financial position to comply with its orders. I am not convinced that that empowers the Authority to enquire into the personal financial assets and liabilities of the first respondent's shareholders, or other debtors. The matter may be different if the corporate veil had been lifted, but it has not.

[59] Taking the scenario further, if Mr Rajagopal were joined, and then failed to take steps to ensure the first respondent complied with the Authority's orders, by not ensuring that the shareholders' repaid the loan(s), he himself would face further compliance orders and possible penal sanctions. That would not be just in my view, where he may not be able to ensure compliance.

[60] I anticipate that Mr Ali would say that Mr Rajagopal could just avoid that risk by making sure that he and Mr Anand repaid the loans, plus interest, and then passed the repayments to Mr Ali in satisfaction (or part satisfaction) of the debt owed to him. However, that would presuppose that the shareholders were in a position to do so. A compliance order would also, arguably, amount to indirectly forcing Mr Rajagopal and/or Mr Anand to pay Mr Ali out of their own pockets, by forcing them to make payments to the first respondent.

[61] With respect to the third party not paying anything to the first respondent for the transfer to it of equipment, the Authority does not have the power to interfere in the transactions between the two companies, even if the first respondent entered into a bad bargain.

Conclusion

[62] The following conclusions emerge:

a. The Authority cannot issue a compliance order against the first respondent requiring it to make payments to Mr Ali, when it manifestly does not have the funds to do so;

b. The Authority cannot issue a compliance order against the first respondent requiring it to take steps (such as calling in debts, issuing legal proceedings, and so forth) which may or may not put it in a position to make the payments to Mr Ali;

c. By extension, the Authority cannot issue a compliance order against the second respondent requiring him to compel the first respondent to carry out the actions referred to in (a) and (b) above; and

d. The Authority cannot issue a compliance order against the second respondent directly or indirectly requiring him to make payments to the first respondent so it would then be in a position to make the payments to Mr Ali.

[63] With respect to Mr Thompson, he appears to fundamentally misapprehend the power of the Authority in these circumstances, where it has not lifted the corporate veil. It is limited to joining a third party who is in a position to compel a respondent

to comply with its orders. For example, the Authority may direct a respondent company to produce documents in evidence which it knows are in its possession or under its control. The director (being the controlling mind of the respondent company) may refuse to take the steps required for the respondent company to comply. The Authority may then join that director to the proceedings so as to require him or her to take those steps.

[64] Similarly, a director or shareholder may be joined to proceedings to require him or her to compel a respondent company to make payments it has been ordered to make, where the Authority knows that the company has the funds available to make those payments. That is not the situation here.

[65] The Authority cannot make a compliance order which it knows carries a substantial risk of not being fulfilled. This is both because it would both impugn the integrity of the Authority's process, and would place the subject of the compliance order at risk of unjustly facing further actions for non-compliance.

[66] Therefore, taking all of the above evidence, submissions and case law into account, I accept the submission of Mr McBride that this is a case where it would not be appropriate to join Mr Rajagopal to these proceedings and then issue a compliance order against him.

Should there be a compliance order against the first respondent?

[67] Finally, for completeness, I must consider Mr Ali's application to issue a compliance order against the first respondent. However, for the reasons already ventilated above, it is not appropriate to issue a compliance order against the first respondent as it is clearly in no position to make the payments to Mr Ali.

An abuse of process?

[68] Mr McBride has submitted that Mr Ali in bringing his application amounts to an abuse of process as he had brought a similar application previously, prior to the Authority's investigation into the substantive merits of Mr Ali's claim.

[69] However, I disagree. This is not a mere repetition of the application that the Authority declined on 11 May 2015. Whilst there was little merit in the application to join the third respondent, the application to join the second respondent was founded in

precedent. Unlike Mr Ali's previous application to join Mr Rajagopal, the current application was seeking to do so for the purposes of issuing a compliance order against him to ensure that the first respondent complied with the orders of the Authority.

[70] If it were not for the fact that the first respondent is clearly in no position to pay the sums ordered by the Authority, I would have joined Mr Rajagopal and issued the compliance order requested. It was only when Mr Krishnadass' answers to questions in his second affirmation were lodged that it became clear that the first respondent was not in a position to pay those sums.

Costs

[71] The parties are to seek to agree between them how costs should be dealt with. In the absence of such agreement within 14 days of the date of this determination, Mr McBride may lodge and serve a memorandum of counsel within a further 14 days which sets out what costs are being sought, the basis of the costs sought, and how any costs awarded should be divided between the second and third respondents. Mr Thompson may serve and lodge his written reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority