

IN THE COURT OF APPEAL OF NEW ZEALAND

CA247/2012
[2013] NZCA 582

BETWEEN NEW ZEALAND CARDS LIMITED
Applicant

AND COLIN RAMSAY
Respondent

Court: Randerson, Wild and White JJ

Counsel: D G Beck for Applicant
S G Wilson for Respondent

Judgment 25 November 2013 at 2.30 pm
(On the papers):

JUDGMENT OF THE COURT

- A The application for a stay of execution is dismissed.**
- B The Employment Court is to pay out to the respondent the \$14,500 it holds plus any interest accrued on that sum. That payment will be in satisfaction of the \$13,880 judgment and on account of the costs of the Employment Court hearing, which that Court should now fix as promptly as it can.**
- C The applicant must pay the respondent's costs of the stay application on a Band A basis.**
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REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant (NZ Cards) seeks a stay of execution of an Employment Court decision issued against it on 27 March 2012.¹ In that decision Judge Couch upheld the Employment Relations Authority finding that the respondent had been unjustifiably dismissed² and ordered NZ Cards to pay the respondent Mr Ramsay \$13,880 in remedies plus costs.³ Both parties were content for the application to be dealt with on the papers.

Procedural history of the case

[2] NZ Cards has already applied to this Court for an extension of time to seek leave to appeal against the Employment Court decision and has filed an application for leave to appeal. This Court granted the extension of time subject to certain conditions and allowed the application for leave to appeal on a question of law.⁴ An earlier application for a stay of execution was adjourned to allow both parties the opportunity to file further submissions.

[3] NZ Cards filed submissions in support of the application for a stay of execution on 12 July 2012. The director of NZ Cards, Mr Beresford, also provided a sworn affidavit in support of the application. Mr Ramsay filed a memorandum in opposition to the application for a stay of execution on 26 July 2012. That same day, Mr Ramsay also filed his written submissions and an affidavit in opposition to the application.

[4] Unfortunately the application did not progress in any material way until May 2013. That delay is not attributable to either party. Given the passage of time since the earlier submissions and affidavits were filed, on 1 May 2013, Randerson J issued a Minute allowing both parties the opportunity to file updating affidavits.⁵ These were to be received by the Court by 15 May and 29 May respectively.

¹ *New Zealand Cards Ltd v Ramsay* [2012] NZEmpC 51.

² *Ramsay v New Zealand Cards Ltd* ERA Christchurch CA4/10, 15 January 2010.

³ The issue of the monetary amount of costs in the Employment Court remains outstanding.

⁴ *New Zealand Cards Ltd v Ramsay* [2012] NZCA 285. The substantive appeal has been set down to be heard by the Court of Appeal on 20 February 2014.

⁵ *New Zealand Cards Ltd v Ramsay* CA247/2012, 1 May 2013.

[5] On 16 May, NZ Cards advised the Court that there were no updating matters arising since his affidavit of 12 July 2012. Counsel indicated that submissions would be filed in response to any updating affidavits from Mr Ramsay. On 29 May Mr Ramsay filed a second affidavit in opposition. Mr Beresford then filed, on 30 May, a 25 page letter addressed to Randerson J, though this dealt almost exclusively with issues being raised as part of the substantive appeal.

[6] Wild J then issued a Minute on 8 August 2013 directing that any further submissions be filed by 23 August and 6 September respectively. No further material has been received. This Court is therefore determining the appeal on the papers on the basis of the material already before it.

The criteria for the grant of a stay of execution

[7] The criteria for the grant of a stay of execution are well known.⁶ In determining whether or not to grant a stay, the Court must weigh the factors in the balance between the successful litigant's rights to the fruits of a judgment and the need to preserve the position in case the appeal is successful.⁷ Relevant factors include whether the appeal would be rendered nugatory, if the stay were not granted, the bona fides of the applicant as to the prosecution of the appeal, the effect on any third parties, injury or detriment to the respondent if the stay is granted, the novelty and importance of the question involved, the public interest in the proceedings, the strength of the case on appeal and the overall balance of convenience.

The applicant's submissions

[8] Counsel for NZ Cards submits that Mr Ramsay would not be prejudiced by the granting of the stay while NZ Cards is likely to be prejudiced should the stay not be granted. NZ Cards is most concerned that if a stay of execution is not granted and the appeal is successful, there is no guarantee that these funds will be recovered from Mr Ramsay. This would render the appeal pointless.

⁶ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87; *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11]; and *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

⁷ *Duncan v Osborne Buildings Ltd*, above n 6, at 87.

[9] In his affidavit in support of the application for a stay, Mr Beresford confirms that NZ Cards has operating assets but no savings. The company is solvent and should have the means to pay any order for costs in the future based on its own estimate of revenue over the coming months. He suggests that any award of costs be payable in instalments.

[10] In support of its application, NZ Cards submits that any stay would be only for a short term until the appeal is determined; it is genuine about the appeal; interest is running on the judgment and any delay will be compensated by that; no other parties will be affected by the stay; and it is in the interests of justice that the stay be granted.

[11] It is also submitted that both parties' interests would be protected by an order that the \$14,500 that NZ Cards has paid to the Employment Court as security for costs continues to be held by that court pending the appeal.

The respondent's submissions

[12] Mr Ramsay submits there is no risk to NZ Cards that monies paid out could not be recovered if it successfully appealed the Employment Court judgment. He has the financial means to reimburse NZ Cards if the appeal is successful, albeit that he would have to release investment funds at a cost to him. Mr Ramsay submits that payments of amounts awarded by the Employment Court will not render pointless NZ Cards' case on appeal.

[13] Mr Ramsay further submits that his mother would also be affected by a stay. He provides full time care to his mother and has been relying on the proceeds of the judgment to pay for maintenance on her house. He receives a modest Work and Income supplement as a full-time caregiver of \$239.71 a week covering his day-to-day living costs. He has no other fixed or regular income. Mr Ramsay states that he has investments in the form of shares (\$100,000), a Kiwisaver account and endowment policies (\$40,000–\$50,000), and a freehold interest in a residential property (\$279,000). He states that he does not consider he ought to have to incur the cost of breaking or realising any of his investments pending the appeal. He

would be obliged to do this to undertake the basic maintenance work on his mother's house and to fund this litigation if the stay of execution is granted.

[14] Mr Ramsay also submits that NZ Cards' substantive appeal lacks any obvious merit and the overall justice of this case and balance of convenience favour him.

[15] Mr Ramsay states in his second affidavit that it has now been over two years since the determination of the Employment Relations Authority finding that he was unjustifiably dismissed. Notwithstanding that, he has received no payment. He also expressed concern at the way NZ Cards has approached matters in this Court, particularly the delays that it has caused. This has already cost Mr Ramsay considerable time and money.

Application of the law to this case

[16] We consider that the interests of justice in this case lie squarely with Mr Ramsay. He was awarded remedies and costs in the Employment Court nearly two years ago. He has been denied the fruits of the judgment in his favour for a sustained period of time. NZ Cards on the other hand has had the benefit of not having to pay Mr Ramsay's costs for the Employment Court hearing and having the money he paid into the Employment Court as security for costs being held by that court.

[17] Mr Ramsay has also shown that he has ample funds available to repay any amount paid to him, albeit that he may need to break or realise investments to achieve this. This means that refusing to grant a stay will not render NZ Cards' right of appeal pointless.

[18] We also note that there is evidence of an effect on a third party (Mr Ramsay's elderly mother) from the granting of a stay of execution. Mr Ramsay is currently caring for her and wishes to undertake maintenance work on her house with the money NZ Cards owes him, which he submits will improve her quality of life.

[19] Finally we note that both the application for a stay and the substantive appeal have suffered significant setbacks and delays, many of which are attributable to the

conduct of NZ Cards. This has added to the cost in terms of money and time for Mr Ramsay.

[20] It is difficult to assess the merits of the appeal at this juncture. We will therefore treat this as a neutral factor.

[21] For these reasons we conclude that the overall justice of the case and balance of convenience favours not granting a stay of execution.

Result

[22] The application for a stay of execution is dismissed.

[23] We order:

- (a) The Employment Court is to pay out to the respondent the \$14,500 it holds plus any interest accrued on that sum. That payment will be in satisfaction of the \$13,880 judgment and on account of the costs of the Employment Court hearing, which that Court should now fix as promptly as it can.
- (b) The applicant must pay the respondent's costs of the stay application on a Band A basis.

Solicitors:
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Duncan Cotterill, Christchurch for Respondent