IN THE COURT OF APPEAL OF NEW ZEALAND

CA23/2017
[2017] NZCA 153

BETWEEN	TERRY HAY Applicant
AND	LSG SKY CHEFS NEW ZEALAND LIMITED First Respondent
	SHABEENA SHAREEN NISHA Second Respondent
	PRI FLIGHT CATERING LIMITED Third Respondent

Hearing:	10 April 2017
Court:	Harrison, French and Brown JJ
Counsel:	J E Hodder QC and N J Scampion for Applicant C M Meechan QC and J M Douglas for First Respondent K L Wendt for Second Respondent
Judgment:	2 May 2017 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the first respondent costs for a standard application for leave to appeal on a band A basis increased by 50 per cent and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] In Ms Nisha's substantive personal grievance claim against LSG Sky Chefs New Zealand Ltd (LSG), Judge Corkill ruled she was entitled to a payment of compensation of $1,500 for humiliation, loss of dignity and injury to feelings after allowance for her contributory behaviour.[1] All her other causes of action were dismissed.[2] Costs were reserved and a timetable was set for the filing of memoranda.[3]

[2] Each party sought orders for costs. On LSG's application to join non-parties for costs purposes, an order was made joining PRI Flight Catering Ltd (PRI) and Mr Hay as parties to the proceeding.[4] The rationale for Mr Hay's joinder was that he appeared to be a person who funded the litigation brought by Ms Nisha and who controlled the claims brought against LSG.[5]

[3] Mr Hay applies for leave to appeal against the order for joinder under s 214(1) of the Employment Relations Act 2000 (ERA). Leave may be granted if, in the opinion of this Court, the question of law involved in the proposed appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[6]

Background

[4] PRI and LSG were both participants in the Auckland flight-catering market providing in-flight meals to airlines operating out of Auckland International Airport. Ms Nisha worked as a catering assistant for PRI from 2005 until 23 February 2011. Mr Hay was a director of PRI between December 1995 and April 2008.

[5] Subpart 1 to pt 6A of the ERA has the object of providing protection to specified categories of employees if, as a result of a proposed restructuring, their

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1 *Nisha v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171, (2015) 13 NZELR 185 at [250].
2 At [251].
3 At [252].
4 *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 166 at [144].
5 At [108].
6 Employment Relations Act 2000, s 214(3).

work is to be performed by another person.[7] Catering services for the aviation sector is one of the specified industries.[8]

[6] In late 2010 LSG won a tender for the Singapore Airlines contract from PRI, the latter being the incumbent provider of the relevant services. Ms Nisha was eligible to transfer her employment to LSG and elected to do so. When LSG declined to recognise a promotion and pay increase which Ms Nisha had received while at PRI, she brought a personal grievance claim. As the Service and Food Workers Union declined to assist her in that claim, PRI agreed to fund her proceeding.

[7] Perceiving that Ms Nisha would not have the resources to meet a substantial award of costs, LSG wished to seek costs against PRI as the funder of her claim. However, because the Employment Court does not have a direct jurisdiction to award costs against a non-party,[9] in order to pursue costs against a person it is necessary to join that person as a party under s 221 of the ERA. LSG applied to join not only PRI but also Mr Hay on the ground that he was a de facto director of PRI, appeared to be a person who funded the litigation and drove the claims made against LSG.

The Employment Court judgment

[8] While it was common ground that PRI was a funder of Ms Nisha, there was also evidence that PRI's parent company, Pacific Rim Investments Ltd (Pacific Rim), had assisted with funding. Noting a submission made by Mr Hay's counsel on the issue, Judge Corkill made a finding that the source of funding for Ms Nisha's proceeding was derived from both companies.[10]

[9] In the course of reciting the applicable legal principles, which were said not to be the subject of controversy,[11] Judge Corkill noted this Court's confirmation in *Kidd v Equity Realty (1995) Ltd* (*Kidd*) that, given the broad and untechnical

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7 Section 69A(1). The relevant subpart was inserted in 2004 and amended in 2006 and 2015 but its basic object has remained constant.
8 Clause (e) of sch 1A.
9 Clause 19 of sch 3. See also Employment Court Regulations 2000, regs 68–69.
10 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 4, at [89]–[90].
11 At [72].

language of s 221, the Employment Court has jurisdiction in an appropriate case to join a non-party for the purpose of making an award of costs.[12] Section 221 provides as follows:

> **221 Joinder, waiver, and extension of time**
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> 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,—
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> (a) direct parties to be joined or struck out; and
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> (b) amend or waive any error or defect in the proceedings; and
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> (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.

[10] In ruling that the joinder of both PRI and Mr Hay was appropriate, Judge Corkill found:

(a) For the purpose of the application Ms Nisha was "at all material times, in effect, insolvent".[13]

(b) Her claim could only be described as speculative.[14]

(c) There was relevant impropriety on behalf of PRI, driven by Mr Hay as the person who was controlling the proceeding as a de facto director.[15]

(d) If PRI had been a party to the proceeding from the outset it would have been necessary to consider whether PRI was insolvent as a prerequisite to joinder of Mr Hay, but those were not the circumstances.[16]

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12 At [75] citing *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452 at [12].
13 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 4, at [119].
14 At [123].
15 At [128].
16 At [131].

(e) Despite seeking voluntary deregistration, there was no evidence of the insolvency of PRI and the Court could not rule out the possibility that it could access some funding if needed.[17]

[11] The Judge concluded by noting that it was premature at that point to rule out the possibility of either PRI or Mr Hay being liable for some or all of any order for costs, if made.[18]

Proposed questions of law

[12] Mr Hay's application for leave identified nine questions of law said to meet the statutory criteria. However, in response to this Court's minute of 6 April 2017,[19] an amended application was filed revising the proposed issues to three questions of law:

> a. Is "insolvency in effect" sufficient to satisfy the first part of the *Kidd* test for joinder of non-parties for the purpose of a costs award, and did the Employment Court misdirect itself in law or misunderstand or misapply the *Kidd* test in coming to its conclusions?
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> b. Did the Employment Court misdirect itself in law or misunderstand or misapply the law by ignoring the question of the solvency of the acknowledged funder, PRI, before lifting the corporate veil in relation to PRI and Pacific Rim?
>
> c. Did the Employment Court misdirect itself in law or misunderstand or misapply the law when determining whether Ms Nisha's claims were speculative?

[13] Mr Hay's case, as originally formulated in argument by Mr Hodder QC, was in fact a synthesis of (a) and (b) as reflected in the following propositions:

- *Kidd* is authority that the actual insolvency of a party liable to pay costs is a jurisdictional prerequisite for the exercise of the joinder power in s 221.

- The determination of actual insolvency can only be made by the High Court pursuant to s 411 of the Insolvency Act 2006.

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17 At [133].
18 At [135].
19 *Nisha v LSG Sky Chefs New Zealand Ltd* CA23/2017, 6 April 2017.

- Where litigation is funded by others it must also be established that those funders are actually insolvent before joining a non-funding party (that is, Mr Hay) for costs purposes.

[14] Mr Hodder further developed and refined the essential question for determination as being whether the Employment Court erred in exercising its statutory discretion to order joinder without being satisfied that the principal party and those who were found to be litigation funders were unable to pay costs. He properly retreated from his original proposition that LSG was bound to prove the principal party's legal insolvency.

Analysis

[15] The setting for the present application for leave to appeal to this Court is a judgment which is demonstrably interlocutory in nature, being delivered in the context of the consideration of costs and the joinder of parties for that purpose. Indeed it is approximately the twenty-second interlocutory judgment given in the course of the litigation in the Employment Court. This is the third occasion on which this Court has been asked to grant leave to appeal from a decision of the Employment Court in the proceeding. The history of the litigation there raises real concerns about abuse of its processes and resources.

[16] We are not satisfied that Mr Hay has identified an arguable question of law. Mr Hodder's argument was based squarely upon this Court's decision in *Kidd*. He elevated its ratio to the level of laying down a series of principles which govern the Employment Court's exercise of its s 221 joinder discretion.

[17] *Kidd* was decided on unusual facts following protracted litigation and a series of delays by the Employment Court in delivering substantive judgments. It is sufficient for our purposes to note that the unsuccessful party, a company, went into liquidation before the Court had determined an application for costs. The Court ordered Mr Kidd's joinder and ordered him to pay costs essentially on the grounds that he was the guiding force behind and made relevant decisions for the company.

The company was unable to pay its debts and the successful party would not receive recompense unless Mr Kidd assumed liability.[20]

[18] This Court set aside the order joining Mr Kidd. It found that the Employment Court had failed to apply settled principles relating to the award of costs against non-parties.[21] It acknowledged, however, that the ordinary joinder jurisdiction lies where a party pursues or defends a claim for his own benefit or at his own expense.[22] In such cases, justice may well demand that the third party who seeks for his own benefit to control or fund litigation be held liable in costs "on a fact-sensitive and objective assessment of the circumstances".[23] But "something more" was required than evidence of the company financial insolvency and the director's guiding role in the company's conduct of the litigation.[24]

[19] We agree with Ms Meechan QC that *Kidd* was a fact-specific decision which does not stand as authority for the point of law advanced by Mr Hodder. *Kidd* is an affirmation of the principles governing third-party liability for costs and does not purport to limit the Employment Court's statutory discretion. In particular, *Kidd* does not require proof of the principal party's legal insolvency before another party may be joined for costs purposes.

[20] Moreover, these circumstances are far removed from *Kidd*. The Employment Court has made an interlocutory order joining Mr Hay as a party for costs purposes in circumstances where arguably (a) Ms Nisha appears financially incapable of satisfying a substantial costs order; (b) Mr Hay funded and directed Ms Nisha's claim and (c) Mr Hay acted in his own interests rather than hers. We cannot see any basis upon which the Judge arguably erred in law in exercising his discretion. He has not made a final decision on whether a costs order should be made against Mr Hay.

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20 *Kidd v Equity Realty (1995) Ltd*, above n 12, at [21(b)].
21 *Nisha v LSG Sky Chefs New Zealand Ltd*, above n 4, at [14]–[20].
22 At [19].
23 At [19] quoting *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414; [2006] 1 WLR 2723 at [59] per Rix LJ.
24 *Kidd v Equity Realty (1995) Ltd*, above n 12, at [16].

[21] Ms Wendt filed a written synopsis of submissions in support of Mr Hay's appeal and also advanced argument before us to the same effect. Ms Wendt's position seemed to be contrary to Ms Nisha's interests, both in exposing her to an award of costs on this application and also in increasing Ms Nisha's contingent exposure on LSG's substantive application for costs. With the benefit of reflection, Ms Wendt did not press her arguments and elected to abide the Court's decision.

[22] We are not satisfied that any of the questions of law which might be extracted from Mr Hay's broad contention satisfy the extra jurisdiction requirement that the question ought to be submitted to the Court of Appeal for decision by reason of its general or public importance or for any other reason. Even if we considered that such questions did fulfil the leave criteria under s 214, in our discretion we would decline to grant leave to appeal in this interlocutory context involving only issues of costs.

Result

[23] The application for leave to appeal under s 214 is declined. LSG is entitled to costs on this application. Ms Meechan submitted that having regard to the volume of material filed in support of the application, together with Mr Hay's revision of position in light of this Court's minute, an uplift in costs was justified. Both parties filed unnecessarily extensive bundles of authorities. Such was the factual framework that at the hearing Mr Hay tendered a coloured diagram illustrating the key relationships between the various participants. The primary parties were represented by senior counsel.

[24] In those circumstances, and having regard to r 53A(b) of the Court of Appeal (Civil) Rules 2005, we agree that an award of costs higher than the standard rate is appropriate. Mr Hay must pay LSG costs for a standard application for leave to appeal on a band A basis increased by 50 per cent and usual disbursements.

Solicitors:
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Douglas Erickson, Auckland for First Respondent
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