

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHĪ**

**CIV-2017-009-3533
CIV-2017-009-3533
[2018] NZDC 26005**

IN THE MATTER OF	The receivership of CANSTRUCT INTERIORS LIMITED (IN RECEIVERSHIP)
AND IN THE MATTER OF	An application by the receivers to set aside notices of appearance in protest to jurisdiction dated 14 and 15 February 2018
BETWEEN	CANSTRUCT INTERIORS LIMITED (IN RECEIVERSHIP) Applicant
AND	PETR ZMESKAL Respondent
AND BETWEEN	CANSTRUCT INTERIORS LIMITED (IN RECEIVERSHIP) Applicant
AND	LUCAS LASEK Respondent

Hearing: 13 December 2018

Appearances: Ms S Chambers for the Applicant
Mr D J Ballantyne for the Respondents

Judgment: 14 December 2018

**RESERVED JUDGMENT OF JUDGE G S MACASKILL
ON APPLICATIONS TO SET ASIDE NOTICES OF APPEARANCE IN
PROTEST TO JURISDICTION**

Background

[1] The applicant (plaintiff) company is in receivership and I shall refer to it as the receivers. It is common ground that the company was put into receivership on 21 September 2017 and that Mr Zmeskal was the sole director and shareholder of the company.

[2] On 12 December 2017, the receivers filed proceedings against the respondents (as defendants) in separate proceedings. On 14 and 15 February 2018, the respondents filed appearances under protest as to jurisdiction. On 10 April 2018, the receivers filed interlocutory applications to set aside the appearances under protest as to jurisdiction. On 16 June 2018, Judge Neave consolidated the two proceedings.

The protests as to jurisdiction

[3] The respondents both protest the Court's jurisdiction on the ground that the Employments Relation Authority ("ERA") has exclusive jurisdiction to determine the issues between the parties. Mr Zmeskal says that he was employed as an Executive Director of the company under s 65 of the Employment Relations Act 2000. He alleges that the plaintiff's claim relates to the "interpretation, application or operation of my employment arrangement". Mr Lasek says that he "was an employee of the company and was on a salary, with all work expenses paid for, such as use of personal mobile, vehicle, and any other operational costs needed for administration and/or site works".

The claims against the respondents

[4] In the statement of claim against Mr Zmeskal, the receivers allege that he operated a director's or shareholder's current account and that the company made payments to him totalling \$18,845.97, for which the company received no consideration. It is further pleaded that no resolution was passed to authorise any payment or remuneration for the services provided by the defendant as a director. The receivers seek to recover the current account balance.

[5] In the statement of claim against Mr Lasek, the receivers allege that, between 28 December 2016 and 3 April 2017, he received payments from the company totalling

\$69,099.67, having provided no consideration for that sum. It is further pleaded that no resolution was passed to authorise any payment or remuneration for any services provided by Mr Lasek. The receivers seek judgment for that sum.

The respondents' defences

[6] In his affidavit of 16 July 2018, in support of his protest, Mr Zmeskal said this (and only this):

That I was the director of Canstruct and I had an agreement to be paid as an employee. Payment to me were irregular and for random amounts due to cash flow issues in the business. I do not have a copy of the agreement. I did not have an accountant for several months in which time many fillings were not completed. To the best of my knowledge, all company documents were seized by the inland revenue during their audit and I cannot produce any supporting documents.

[7] In his affidavit, Mr Lasek says this (and only this):

That I was an employee of Canstruct. I had an agreement with the company where I was on salary, and had all work related expenses paid for. To the best of my knowledge, I do not have in my possession my employment agreement with Canstruct. I believe that all documents were uplifted by the inland revenue. I was employed to do administration work, help manage projects, staff and site needs. The company often paid me less and in different amounts due to cash flows issues.

[8] Mr Zmeskal filed an affidavit in support of Mr Lasek in which he says:

Lukas Lasek was an employee of Canstruct. To the best of my knowledge he was employed by Canstruct from December 2016 to the date of receivership (September 2017). His role was to help with administration and management of projects and staff. He reported to me. We had an agreement and to the best of my knowledge this was seized by the inland revenue during their audit. Lukas was on salary including reimbursement of all work related expenses. He was often paid random amounts due to cash flow issues. As I did not have account for several months, within this time chaos occurred with the paper work and fillings of taxes. Before this could be remedied by an accountant, all documentation was seized by the inland revenue during an audit.

The evidence at this stage

[9] The immediate problem for the receivers and the respondents is that neither side can offer any documentary evidence as to whether or not the respondents had a relationship of employment with the company. It is common ground that the company's documents were seized by the Inland Revenue Department ("the IRD"),

but it is not apparent whether any of the records held by the IRD assist. The receivers report that the IRD has advised that it has received no PAYE returns from the company and that no PAYE deductions have been accounted for by the company. There is no sign of any employment agreement for either party or any other record that might assist in resolving the dispute, with one exception. That exception is that the receivers have access to the company's bank records which record the payments made to the respondents.

[10] The receivers have constructed a current account for Mr Zmeskal, which produces the balance claimed. The receivers acknowledge that the records of the transactions related to the payments to Mr Lasek include references to payment of salary, expenses and bills. Those references provide some evidence that at least some of the transactions purportedly relate to payment of items relating to employment, although the salary payments are inconsistent and irregular.

[11] The receivers and Mr Zmeskal will no doubt be entitled to access to all company records held by the IRD.

[12] It is not necessary that I review the balance of the evidence. Suffice it to say that it is no more enlightening as to the issue of employment than the evidence mentioned above. That is not to say that, having regard to the burden and standard of proof, it will prove impossible for a judicial officer to reach any conclusion as to whether the respondents were employees or not, or whether the monies paid by the company to them were legitimately paid pursuant to employment contracts or otherwise.

Is there a jurisdictional issue to be determined?

[13] Pursuant to s 161 of the Employment Relations Act 2000, the ERA has exclusive jurisdiction to make determinations about employment relationship problems generally, including matters about whether a person is an employee. Counsel's reviews of the cases show that there are a number of situations which the Courts have concluded that claims may be brought by an employer against employees, or former employees, that do not arise out of the employment relationship. I am satisfied that this case does not fall within any of those situations and that the receivers'

claims require determinations as to whether the respondents received the monies claimed as employees or otherwise.

[14] The Court has not been asked to yield jurisdiction to the ERA simply upon the basis of mere assertions by the respondents that they were employees, against the weight of convincing or compelling evidence to the contrary. It may be, for example, that Mr Zmeskal will have difficulty in persuading the ERA that he was an employee of his one-man company. But it cannot be said that the respondents are plainly seeking to avoid or delay the receivers' claims by unmeritoriously seeking to invoke the jurisdiction of the ERA. I shall not seek to define the threshold of evidence required but I am satisfied that it has been crossed.

[15] The only question for determination at this stage of the proceeding is whether this Court or the ERA is the proper forum for determination of the issue of the respondents' status as employees of the company or otherwise. Whatever the outcome before the ERA, there may be claims that can be heard and determined by this Court.

Conclusion

[16] I conclude that the ERA and not the Court, has jurisdiction to determine the issue whether the respondents or either of them were employees and, if so, whether the monies claimed were paid to them in that capacity and, if so, whether they were properly so paid.

Outcome

[17] The outcome is that the proceedings against both respondents (defendants) are stayed under further order of the Court, pending determination of the issues by the ERA. As the ERA may hold for the receivers and against the respondents as to jurisdiction with respect to the whole or part of the claims, I decline to dismiss the receivers' claims at this stage of the proceedings.

Costs reserved

[18] Ordinarily, costs would follow the event but I reserve all questions of costs until final disposition of this proceeding, not only because the determination by the

ERA may be relevant, but the relevant considerations may include such matters as any failure by Mr Zmeskal to keep proper company records

G S MacAskill
District Court Judge