

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2024] NZEmpC 139
EMPC 282/2024**

IN THE MATTER OF an application for a freezing order

BETWEEN YADVINDER SINGH
 First Applicant

AND DALVEER SINGH VARAICH
 Second Applicant

AND SATPREET SINGH
 Third Applicant

AND AMANDEEP KAUR
 Fourth Applicant

AND CHAMKAUR SINGH
 Respondent

Hearing: 30 July 2024
 (Heard at Christchurch by telephone)

Appearances: V Singh, advocate for applicants
 No appearance for respondent

Judgment: 1 August 2024

**JUDGMENT OF JUDGE K G SMITH
(Application for a freezing order)**

[1] The applicants have applied without notice for a freezing order to prevent the sale of a residential property owned by the respondent, who is the sole shareholder and director of their employer Miripiri Ltd.

[2] When the application was filed, difficulties with it were identified and raised with Vikram Singh, the applicants' advocate. They included concerns over the application not being signed by the applicants because Mr Singh was not able to certify it, the absence of a supporting memorandum, evidence being provided by unsworn affidavits and exhibits being attached to the application rather than produced by one of the applicants as an exhibit to a sworn affidavit. These difficulties were drawn to Mr Singh's attention at a telephone directions conference and certain remedial steps were taken that enabled the application to be considered.

[3] I was advised during the hearing that the applicants have extremely limited English language skills. That information presented a further difficulty because the affidavits were written in English. It became apparent on further inquiry that they were translated to the applicants before being sworn. The affidavits ought to have been in each applicants' preferred language with a certified translation into English.

[4] Despite some misgivings about what happened, I have decided to consider the affidavits as they stand. On the same point, despite some of the affidavits having exhibits attached to them in Hindi or Punjabi, which are yet to be translated, a general understanding of the employment relationship problem and the reasons for this application can be gleaned from the balance of available information.

[5] During the hearing it became apparent that the applicants' employment agreements had not been provided. They were supplied to the Court after the hearing along with the applicants' work visa approvals. Given the exigencies of the application both were considered.

[6] The following discussion is drawn from the applicants' very brief affidavits. As is common in applications without notice, the content of them is yet to be tested which means these remarks are, in a sense, provisional.

[7] All of the applicants are Indian nationals. They came to New Zealand on work visas requiring them to work for Miripiri, in Canterbury. Among the conditions attaching to those visas was a prohibition on being placed in a triangular employment arrangement with a controlling third party.

[8] The common theme in the evidence was that the applicants were employed by Miripiri only after paying a premium to secure the job, the amount of which was stipulated by Chamkaur Singh who also directed how it was to be paid. Three of the applicants say they paid \$52,000 each. The other deposed to paying \$46,000. The amounts were paid in India, apparently to Chamkaur Singh's father, and some payments were made here to either the respondent or as he directed. The applicants intend to make a claim in the Employment Relations Authority to seek recovery of the amounts they each paid.

[9] There is a second part to the applicants' intended claim in the Authority. They say they were not paid for the hours worked or paid properly in relation to public holidays. They also intend to seek penalties.

[10] On 18 July 2024 the applicant's advocate, Mr Singh, wrote to Miripiri and Chamkaur Singh raising a personal grievance, seeking to recover the premium payments, outstanding wages, compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and giving notice that penalties would be sought. The letter was also addressed to Chamkaur Singh because the applicants consider he is liable to them as a controlling third party under the Act. That explains why the letter referred to ss 103, 103B and 115A; the latter two sections enable an employee to pursue a personal grievance against both the employer and the controlling third party. The letter asserted a breach of the employment agreement and migrant exploitation.

[11] There was a reply from Miripiri's counsel. It did not engage directly in responding to the allegations but instead sought information to substantiate them. Additionally, Miripiri's counsel was instructed to advise the applicants that they each faced the possibility of disciplinary action for serious misconduct, because they had been working for another employer without Miripiri's informed consent. The applicants were informed that, if the allegation was proved, that would amount to dishonesty and a breach of the employment agreement and could lead to summary dismissal.

[12] To complete this picture, the applicants responded by stating they worked for the other company because Chamkaur Singh directed them to do so.

Power to make freezing orders

[13] Section 190(3) of the Act provides the Court with the same powers as the High Court to make a freezing order. In considering an application the Court uses the High Court Rules 2016 with appropriate modification.

[14] High Court Rule 32.2 provides for freezing orders. An order may be made against a prospective judgment debtor.¹ Mr Singh relied on the Court's Practice Directions, as allowing an order to be made in advance of a substantive proceeding being filed.²

[15] The test to apply requires the applicants to establish that:³

- (a) there is a good arguable case;
- (b) the respondent has assets within the jurisdiction;
- (c) there is a real risk the property will be disposed of, or diminished in value; and
- (d) the balance of convenience and overall interests of justice favour the applicant.

Good arguable case

[16] This application proceeded on an assumption that it is possible for the applicants to obtain relief by way of a freezing order against Chamkaur Singh because he is considered to be a controlling third party.

¹ High Court Rules 2016, r 32.5(4).

² "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 8.

³ *Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31, [2016] ERNZ 309 at [13]–[23].

[17] There is an insurmountable hurdle to this application. Leaving aside for a moment the way the application was expressed, as attempting to prevent the sale of Chamkaur Singh's property, no basis was put forward to adequately explain why it is possible to freeze the assets of a person the applicants acknowledge is not their employer.

[18] In his submissions, Mr Singh was alive to this issue about the difference in legal personality between Miripiri and Chamkaur Singh.⁴ He was also conscious that the employment agreements (in English) are between the applicants and Miripiri. That employment relationship would ordinarily mean any liabilities arising from it are between the applicants and the company.⁵

[19] Mr Singh recognised that this approach of attempting to attach potential liability to Chamkaur Singh as a controlling third party might stretch the concept but considered the interpretation argued for to be tenable. If that submission is accepted, it follows that relief might be obtained against Chamkaur Singh, opening the door to a freezing order, because he is a prospective judgment debtor.

[20] Section 5 of the Act defines a controlling third party in the following way:

controlling third party means a person—

- (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
- (b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee

[21] The evidential basis to support this claim was two-fold. The first part of it was the existence of the payments the applicants made. The second part was evidence that Chamkaur Singh instructed some or all of them to work for a company called Kosi Enterprises Ltd. The ability to give that instruction was said to bring Chamkaur Singh

⁴ Companies Act 1993, s 15.

⁵ There are some exceptions, for example, where there has been a breach of employment standards; Employment Relations Act 2000, s 142Y.

within the ambit of para (b), because that was the exercise of control or direction over the employees. The submission encompassed an argument that para (a) was engaged as well, because if a direction could be given to work for the other company it was at least arguably for Chamkaur Singh's benefit.

[22] Despite the valiant effort made in the submission, the two grounds relied on are insufficient to establish for the purposes of a freezing order that Chamkaur Singh is a controlling third party against whom the applicants have potential claims.

[23] Payments made by the applicants at Chamkaur Singh's direction may prove a breach of s 12A of the Wages Protection Act 1983 occurred, but the evidence points towards that direction being on Miripiri's behalf and therefore not within the scope of s 5 of the Act. Similarly, Chamkaur Singh's ability to direct the applicants as to where they work does not establish that he is a controlling third party. The evidence suggests no more than a conventional business structure where Miripiri employs staff and acts in its daily business through its director who, in that capacity, is able to instruct employees.

[24] Despite the visas preventing the applicants from entering into a triangular relationship, there is nothing in the employment agreements prohibiting Miripiri from having its employees perform work for another company. Further, Mr Singh did not explain how it might be possible to rely on the controlling third party provisions of the Act, which are directed towards remedies for personal grievances, when a significant part of the applicants' case is about recovering the premium payments. I am not satisfied that the applicants have shown that Chamkaur Singh was a controlling third party or that there is a sustainable argument that he is one.

[25] Although not raised by Mr Singh I have also considered whether the applicants might be able to rely on s 142Y of the Act. Under that section a Labour Inspector or an employee may recover from a person who is not the employer any wages or other money payable in certain circumstances. A prerequisite to such an action is that there has been a default in payment due to a breach of an employment standard. The definition of employment standard includes the provisions of the Wages Protection

Act. However, an impediment confronting that consideration is that s 142Y(2)(b) limits the ability to take action. Recovery is only available to the extent that the employee's employer is unable to pay the arrears of wages or other money and there was no evidence that Miripiri is unable to pay if liability is established.

[26] Recognising an obligation to advise the Court of any known defences, Mr Singh acknowledged that the respondent could rely on Miripiri being the employer and the legal separation between the company, and its shareholder and director. To overcome that possible defence he submitted it is possible to pierce the corporate veil and that Courts have not allowed the use of a separate legal personality to perpetuate fraud, relying on a case cited only as *Gilford Motor Co Ltd*.⁶ A further part of this submission was that Courts have also held that a statute can pierce the corporate veil, but the language used must be clear and unequivocal, referring to a case cited only as *Dimbleby*.⁷

[27] It is a very serious allegation to say that fraud may have been committed and, in this case, the argument was not developed beyond a reference to the requirement that the applicants each pay a premium. The reference was probably made by way of explaining the application of the principle. I do not take that point any further. Mr Singh's submission about piercing the corporate veil if a statute permits that course was linked to the ability to apportion compensation under s 123A of the Act. In other words, to the earlier submission about the respondent being a controlling third party for the purposes of apportioning liability for compensation under s 123 where a personal grievance succeeds.

[28] It is axiomatic that Miripiri is a separate and distinct legal personality from its director and sole shareholder.⁸ A leading decision on piercing the corporate veil is from the United Kingdom Supreme Court: *Prest v Petrodel Resources Ltd*, which has been applied in New Zealand.⁹ In that case, Lord Sumption analysed decisions in the United Kingdom on this subject before stating propositions with which the other

⁶ Presumably *Gilford Motor Co Ltd v Horne* [1933] CH935.

⁷ Presumably *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427 (HL).

⁸ Companies Act 1993, s 15.

⁹ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415; and *Bennett v Michaels* [2016] NZEmpC 137, [2016] ERNZ 247.

members of the Court agreed. For present purposes it is enough to refer briefly to them. There is a broad principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personalities. It may be an abuse of a separate legal personality if it is used to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by a company or rely on that liability belonging to the company.¹⁰

[29] *Prest* concluded that there is a limited principle¹¹ of English law that applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction, which is deliberately evaded or where enforcement is deliberately frustrated by interposing a company.¹² The Court held that, where such a situation occurs, the corporate veil may be pierced but only for the purpose of depriving the company, or the person controlling it, of the advantage that would otherwise be obtained by the company's separate legal personality. That approach has been applied by this Court to impose personal liability, although it was acknowledged that this will be done "rarely".¹³

[30] The available evidence is not enough to establish a good arguable case that Miripiri was created by the respondent for any of the reasons referred to in *Prest* that would allow the incorporation of the company to be put aside. The evidence points to payments which, if established, are unlawful. That does not go far enough to show that Miripiri was created or interposed between the applicants and Chamkaur Singh for the purposes of abusing that separate corporate existence or frustrating or avoiding some legal obligations.

[31] I do not accept Mr Singh's submission that Miripiri might have limited financial means so that any future judgment against it will be frustrated, because there was no evidence to support it. Even if that is the case, that situation is unlikely to

¹⁰ *Prest*, above n 9, at [34].

¹¹ In New Zealand, lifting the corporate veil is not regarded as a legal rule or principle, and is instead the description of the process or consequence of applying some other rule or principle: *Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management)* [1996] 1 NZLR 528 (CA) at 541. Sometimes it is referred to as the courts' jurisdiction to lift the corporate veil.

¹² *Prest*, above n 9, at [35].

¹³ *Bennett*, above n 9, at [24] and [36].

satisfy the test in *Prest*. The possible inability of the company to meet any future judgment is not an adequate reason to pierce the corporate veil.

[32] I am not persuaded that there is a good arguable case to make an order that would prevent the sale of the respondent's property.

Other matters

[33] There is a further problem. The applicants also needed to establish that there are assets within the jurisdiction and a risk of dissipation. Leaving aside that the application was not made against the applicants' employer, I accept there are assets in the jurisdiction (the business and property). However, the evidence of a risk of dissipation is slight at best. The applicants say that the property being sold by the respondent is one rented to, or at least occupied by, company employees. Some of the applicants (possibly all of them) at one time or another lived there. Two of the applicants referred to conversations they have had with other employees who live in the property. Through those conversations they discovered, they say, that the property is for sale. It seems those other tenants/employees were required to leave the property so that it might be inspected by possible private purchasers. The evidence, such as it is, was that the property is not listed for sale with a real estate agent but that it is being inspected by potential buyers. Apparently, they have also been instructed to live elsewhere from 11 August 2024.

[34] The application invited an inference to be drawn from this hearsay evidence that, in response to being placed on notice that litigation is to start, the respondent took steps to sell an asset. The inference was that steps are being taken to remove from the applicants the ability to access available equity in that property, which they trace back to the premium payments, as a way of defeating their claims.

[35] The hearsay nature of that evidence prevents a difficulty. Even if that evidential problem is cured, the inference invited goes further than is reasonable in the circumstances. Proof of a sale stops short of supporting the submission that the asset is being put beyond the reach of the applicants or dissipated in some way.

Outcome

[36] I have reached the conclusion that the applicants are unable to establish the basis for a freezing order attaching to Chamkaur Singh's personal property and that this application must be dismissed. The evidence presented by the applicants is, however, sufficient cause for concern that I am directing the Registrar to send a copy of this judgment to the Labour Inspectorate to consider if an investigation is warranted.

K G Smith
Judge

Judgment signed at 5.55 pm on 1 August 2024