IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 252
EMPC 393/2024

IN THE MATTER OF	an application for a freezing order and ancillary orders
AND IN THE MATTER OF	an application to vary orders
BETWEEN	SOUNDHOMES NZ LIMITED Applicant
AND	PHILIP CARL DOUGHTY First Respondent
AND	PROCLADD EXTERIOR SOLUTIONS LIMITED Second Respondent
AND	BLACKDOG FINISHES LIMITED Third Respondent
AND	PREVENT SERVICES LIMITED Fourth Respondent

Hearing:	16 December 2024 (Heard at Wellington via Audio Visual Link)
Appearances:	J Leenoh and M Bouzaid, counsel for applicant MC Donovan and D Montepara, counsel for respondents
Judgment:	18 December 2024

JUDGMENT (NO 6) OF JUDGE B A CORKILL
(Application to vary orders)

Introduction

[1] This judgment resolves an opposed application to extend a freezing order. The history is relevant and is as follows.

[2] By minute dated 4 October 2024, I issued a freezing order and ancillary orders on a without notice basis, with reasons to follow.[1]

[3] That order was reviewed on notice on 23 October 2024, and on a number of subsequent occasions.[2] Extended freezing orders were made by consent so as to allow documents to be provided by the respondents to the applicant, and for a forensic accountant instructed for the applicant to analyse this material with a view to concluding whether they revealed fraudulent activities.

[4] By 23 October 2024, I was advised by Mr Donovan, counsel for the respondents, that an asset had been realised for $170,000. Initially, this sum was transferred to the trust account of the first respondent's solicitor, and subsequently was paid, as security for costs, to the Registrar of the Court who holds the funds in an interest-bearing account until further order of the Court.[3]

[5] Undertakings were also given on behalf of the respondents to the effect that they would not dissipate or diminish their assets to defeat their ability to meet a judgment in this proceeding or any other proceeding brought by the applicant.

[6] Parallel to these steps, the parties have attended mediation, a process which has not concluded.

[7] Because the freezing and ancillary orders will expire at 10 am on 18 December 2024, the applicant applied to the Court for a further extension of the orders. Its position, in summary, is that Mr Doughty has breached the freezing order and his

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1 *Soundhomes NZ Ltd v Doughty* [2024] NZEmpC 194 at [3].

2 *Soundhomes NZ Ltd v Doughty (No 2)* [2024] NZEmpC 201, *Soundhomes NZ Ltd v Doughty (No 3)* [2024] NZEmpC 203, *Soundhomes NZ Ltd v Doughty (No 4)* [2024] NZEmpC 217 and *Soundhomes NZ Ltd v Doughty (No 5)* [2024] NZEmpC 241.

3 *Soundhomes NZ Ltd v Doughty (No 3)*, above n 2, at [7].

undertaking by allowing an asset to be dealt with, and that further orders are also necessary because requests for information have not been fully complied with.

[8] The respondents strongly oppose the continuation of the freezing and ancillary orders. It is submitted that a responsible approach to the applicant's inquiries has been taken, that a substantial sum has been paid into Court, and that reliable undertakings have been given.

[9] The orders which have been made previously made it clear that ordinary living expenses, payment of legal expenses related to the freezing order, and the making of payments in the ordinary course of business, are not to be caught by a freezing order.[4]

[10] It was asserted for the respondent that logistical problems arose in obtaining such payments from the second respondent's bank account, being an operating account in respect of the company for which Mr Doughty works. These problems would likely be exacerbated during the upcoming Christmas period.

[11] Finally, by way of background, I record that a statement of problem has been filed in the Employment Relations Authority, together with an application for removal to the Court. A statement in reply has also been filed. Because mediation is still open as between the parties, the application for removal has yet to be progressed.

Legal framework

[12] Section 190(3) of the Employment Relations Act 2000 (the Act) grants the Court the same authority as the High Court to issue a freezing order, as outlined in the High Court Rules 2016.

[13] There are three threshold requirements:[5]

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4 High Court Rules 2016, r 32.6(3).

5 *Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31, [2016] ERNZ 309, citing *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980 1 All ER 213 (CA).

(a) that the applicant has a good arguable case;

(b) that the respondents have assets within the jurisdiction; and

(c) that there is a real risk that the property will be dissipated or, if relevant, will be moved out of the jurisdiction.

[14] Then the Court must assess balance of convenience factors.[6]

Good arguable case

[15] The respondents do not contest this requirement, although it is necessary to discuss it briefly.

[16] The applicant alleges that the first respondent has committed fraud and/or conversion during his employment with it, and that he misappropriated its confidential information, intellectual property and goodwill so as to springboard the second, third and fourth respondents into a better position, which caused loss of profits and damage to the applicant's business.

[17] For the purposes of their statement in reply, the respondents have admitted that the first respondent obtained or caused the second respondent to obtain a financial benefit during his employment with the applicant. Beyond this broad concession, no further particulars are given.

[18] At the beginning of November 2024, the forensic accountant prepared a report in which she expressed the view that there had been potential fraudulent transactions or payments of some $267,000. Subsequently, she has said that there may be yet further amounts involved.

[19] Mr Donovan submits that there are duplications in the above figure, and that once those are allowed for, and taking into account the above concession made for the respondents, quantum is more likely in the order of $152,000 to $155,000.

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6 *Murren v Schaeffer* [2018] NZCA 318, (2018) 24 PRNZ 285 at [17].

[20] It suffices to say for present purposes that the applicant has established a good arguable case against the respondents for a sum that is not insignificant.

Assets within the jurisdiction

[21] Again, there is no dispute as to this requirement. It was plainly satisfied at the outset of the litigation in this Court, and continues to be satisfied.[7]

Risk of dissipation

[22] This requirement is controversial.

[23] Mr Bouzaid, counsel for the applicant, submits that there is a substantial risk of dissipation of assets by the respondents, and that although the sum of $170,000 has been paid into Court and undertakings have been given, these steps are insufficient to ensure that there is an effective preservation of relevant assets against a judgment were it to be obtained subsequently.

[24] As already noted, the respondents say that responsible steps have been taken, and that a freezing order is no longer necessary.

[25] Before dealing with the particular points raised, I summarise the assets held by the respondents. Mr Doughty co-owns his home, together with his wife. It is valued at approximately $1,120,000 to $1,180,000. It is subject to a first mortgage to a bank, securing $966,000, and now a second mortgage for $200,000 which I will discuss more fully shortly.

[26] Mr Doughty and his wife are the owners of chattels which have an approximate value of $50,000. He has a motor vehicle which is apparently being worked on and is of modest value. He sold another vehicle in order to realise monies for the purposes of the payment into Court. He holds various bank accounts, holding modest sums.

[27] The corporate respondents have limited fixed assets, and some current assets, mainly in the form of bank accounts. One of these is the operating account of the

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7 *Soundhomes NZ Ltd v Doughty*, above n 1, at [44].

second respondent, mentioned previously. The company's financial records show various liabilities, so that there appears to be modest equity in each entity.

[28] For present purposes, then, apart from the monies paid into Court, the main assets of interest for the purposes of the freezing order have been the house property and the balances held in the various bank accounts. I note there is an apparent issue as to whether the full extent of these has been identified.

[29] The applicant relies on several steps which it says suggest there has been an obscuring of relationships as between the respondents and/or in a breach of the freezing order as made. As to the first of these points, Mr Donovan submitted that Mr Doughty was removed as a director and shareholder of the second respondent company on 1 and 2 October 2024, shortly before notice of the freezing order was given, on 7 October 2024. No explanation has been given as to why these steps were taken. The evidence does not clarify whether Mr Doughty was in fact aware of the proceeding instituted by the applicant prior to service of the orders. At this stage, therefore, I regard this factor as neutral.

[30] More significant is a step that was taken in early December 2024, when an encumbrance was registered by a third party over the house property owned by Mr Doughty and his wife.

[31] Mr Doughty said that when he and his wife purchased the home in 2017, a family trust agreed to assist the couple by lending $200,000 by way of a term loan agreement.

[32] Mr Doughty said that when filing previous affidavits in this matter, in which he described his assets and liabilities, he had overlooked this arrangement. He said that during mediation his wife reminded him of the loan advanced by the trust.

[33] On 5 December 2024, the solicitors for the trustees wrote to Mr Doughty and his wife, giving them notice that the sum was to be repaid, together with interest from that date, and enclosing for signature an Authority and Instruction (A and I) form to enable a fixed-sum mortgage to be registered against the property; a copy of the

mortgage which would be registered was also enclosed. It was noted that the recipients of the letter may wish to obtain legal advice before signing the documents. It was also stated that the mortgage would be a second registered mortgage.

[34] In his evidence, Mr Doughty said that as the trust had a right to request registration of a mortgage, he had no option but to allow it to be registered. This occurred.

[35] There is no evidence as to whether Mr Doughty obtained legal advice before signing the A and I form, a step which enabled registration to occur. Following registration, however, the applicant's lawyers were advised that this step had been taken by the respondents' lawyers.

[36] Mr Bouzaid submitted that allowing this step to be undertaken would likely have constituted a breach of both the freezing order and the undertaking signed by Mr Doughty. He argued that on the face of it, Mr Doughty had dealt with and/or diminished the value of the subject property, in contravention of these obligations. The equity in the property was thereby reduced to $63,000, based on the respondents' figures.

[37] Mr Donovan submitted that registration did nothing more than give effect to a right that predated the freezing order by over seven years, and that it did not reduce the value of the property because:

(a) it was already subject to rights under the loan agreement; the mortgage did not reflect new lending; the equity in the property was effectively the same, whether or not the mortgage was registered because the first respondent and his wife were obliged to repay the loan under the loan agreement in any case; and

(b) the mere registration of the mortgage did not reduce the market value of the asset.

[38] It was also acknowledged that the loan agreement should have been disclosed in Mr Doughty's initial affidavit of assets, as sworn on 16 October 2024.

[39] Mr Bouzaid submitted that by Mr Doughty signing the A and I form, he had taken a step that he was not authorised to take, given the freezing order. He argued that the proper course would have been for the trustees to register a caveat, which would not have required Mr Doughty's co-operation. The loan agreement contained an agreement to mortgage the property, and thus an equitable interest sufficient to sustain a caveat.[8]

[40] There are several points to be made about this transaction. Mr Doughty was presented with legal documentation by lawyers acting for the trust, which included the A and I form, and other documentation pertaining to the registration of the mortgage under a loan agreement which had existed some years previously.

[41] However, the position was not straightforward, given the existence of the freezing order and the undertaking which existed at the time. The proper course would have been to inform the applicant's solicitor and, if necessary, the Court. A caveat could have been registered by the trust in the meantime, given the existence of the equitable right under the loan agreement, which I agree would not have required Mr Doughty's co-operation.

[42] If a question had come before the Court as to whether the trust should be permitted to proceed with registration of the mortgage, it is more likely than not the Court would have approved this possibility, given the pre-existing liability and associated rights held by the trust. The applicant's rights under the freezing order prohibited Mr Doughty from dealing with the asset but did not amount to a security. Clearly, the trust rights were superior to those of the applicant.

[43] But that said, there were technical breaches of the freezing order and the undertaking.

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8 Elizabeth Toomey (ed), *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at 4.03(5)(a).

[44] I note that the complex legal points which were argued in support of the proposition that Mr Doughty had acted in breach were raised only at the hearing, and without Mr Doughty having an opportunity to respond to the issues by way of additional evidence as to why no steps were taken before the A and I form was signed.

[45] At this stage, I cannot conclude that Mr Doughty deliberately breached the freezing order and his undertaking with the intention of disadvantaging the applicant. It is conceivable that there is another explanation. In my view, the status quo should be maintained to allow Mr Doughty an opportunity to provide the necessary further evidence, after which the Court can review the circumstances more fully.

[46] In the meantime, I conclude that the original non-disclosure of the family trust loan and the circumstances relating to the registration of the second mortgage together suggest that a prudent, sensible person could properly infer a danger of default if assets are removed.[9] These circumstances have raised a possible doubt as to the reliability of Mr Doughty's undertaking.

[47] The next point of contention between the parties relates to an issue as to whether ancillary orders should be made, directing the respondents to file and serve further affidavits providing further information on five questions.

[48] Mr Bouzaid submitted that an ancillary order could be made for several purposes, one of which is to elicit information relating to assets relevant to the freezing order or prospective freezing order.[10]

[49] Mr Donovan submitted that the questions were in fact aimed at obtaining information which would permit the applicant to develop its allegations as to alleged fraudulent activities, and that these matters were not relevant to the maintenance of a freezing order. He relied on a recent statement made in the High Court that the purpose of such an order is to "ascertain the existence, value and whereabouts of the relevant assets and thereby ensuring that any freezing orders made can be properly policed and are effective."[11]

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9 *Oaks Hotels and Resorts NZ Ltd v Body Corporate 358857* [2013] NZHC 2695 at [18].
10 High Court Rules 2016, r 32.3(2)(a).
11 *Yangtze Industrial Cooperation Ltd (in liq) v Lee* [2024] NZHC 3552 at [13].

[50] However, as Mr Donovan properly accepted, three of the questions arguably fall within the description of ancillary orders outlined in High Court r 32.3(2)(a).[12] Moreover, they are appropriate given the difficulties which arose in obtaining disclosure of all assets.

[51] A fourth question seeks, in effect, information that falls outside the descriptor in the rule. Mr Bouzaid submitted that the information is required by the forensic accountant to "finish her analysis of the alleged fraud."[13]

[52] I do not consider this question relates to a freezing order. That said, it may be a proper question for the applicant to raise, and a failure by the respondent to answer it could be relevant to balance of convenience considerations. I note that the information was requested on 5 December 2024; the request was declined on 6 December 2024 on the basis it did not fall within the ambit of the then ancillary order. In an affidavit filed on the day of the hearing, the accountant said that some but not all of the requested information had been provided.

[53] Because the request has been made by the accountant on a without prejudice basis, the Court has no way of knowing precisely what information is still outstanding. I have concluded that the question is not properly one that should be described as ancillary to the freezing order, although it may be one that the Authority could investigate, or could be explored by way of a notice of disclosure under the Court's disclosure regime.

[54] The final question concerns a request for "full unredacted transaction details of all accounts from 6 May 2019 to the date disclosure is received, with running balances." This, too, relates to information the accountant has requested for her purposes. It is not appropriate for this to be the subject of an ancillary order, although it may be a relevant request for disclosure purposes, and a failure to provide it may be relevant to balance of convenience considerations.

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12 Paragraph 10(a)(i), (iii) and (iv) of the proposed ancillary orders.
13 Paragraph 10(b) of the proposed order.

Balance of convenience

[55] The Court was addressed on the question as to how payments might best be made from the operating account of the second respondent to the first respondent, on an ongoing basis. I have already referred to the respondents' right to receive certain classes of expenditure. Previously, the Court's order had authorised the release of approximately $17,600 per week to meet the necessary expenditure, to be paid from the second respondent's operating account. Then the bank involved advised counsel that their systems did not allow for any automated payments from a restrained account, and that such transfers would need to be administered manually each week. It was apparent that this would potentially cause difficulties for a range of reasons, including the unavailability of counsel during the Christmas period, the possible lack of continuity of relevant staff at the bank involved, and an issue as to whether the operating account would in fact have sufficient funds to meet the required expenditure. I also note there were difficulties in such payments being made for approximately two weeks after the freezing order was initially served. The making of these payments has not at times occurred as intended.

[56] Mr Bouzaid suggested that the Court order payment of a lump sum from the account to cover the several weeks of the Christmas period during which these problems might arise.

[57] For his part, Mr Donovan takes the position that, given the sum paid into Court and the existence of a reliable undertaking, no freezing order is necessary; alternatively, the freezing order should only be maintained over Mr Doughty's and his wife's property. There is some equity in that property, which would likely increase over the perhaps significant period it could take for the issues involved to be resolved. But, he said, in light of all the circumstances, a continued freezing of the operating account was not justified.

[58] As noted earlier, I have concluded that the relatively low threshold for concluding that there is a risk of dissipation is established, and that further orders are necessary.[14]

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[14] See above at [46].

[59] A third possibility arose at the hearing, supported by Mr Donovan but not by Mr Bouzaid. It is that the freezing order cease to have effect over the operating account of the second respondent; that full copies of bank statements in respect of that account be provided by Mr Doughty to the applicant company each fortnight so that any activities within the account are fully transparent;[15] and that leave be reserved to both parties to apply for any necessary directions on short notice. The freezing order would apply to all other assets.

[60] Mr Bouzaid submitted that, given the concerns held over the registration of the trust mortgage, the applicant company had insufficient confidence that these arrangements would be reliably implemented.

[61] It is premature to reach such a conclusion. Moreover, if there were to be a misuse of the second respondent's operating account in any way, there would be a potential issue of contempt for breach of an undertaking, and a likelihood of reinstatement of a freezing order over the account in question.

[62] Given these safeguards, I am satisfied that the appropriate step is to lift the freezing order on this particular account. In short, the balance of convenience favours a more limited form of freezing order until the next review in early February 2025.

Result

[63] I am satisfied that a freezing order should be made over all assets of the respondents, other than the operating account of the second respondent which will allow the necessary ongoing payments for living expenses to be paid to an account operated by Mr Doughty and his wife. All other assets, although individually having more modest value, should be the subject of the freezing order at least in the meantime.

[64] Mr Doughty is to provide copies of bank statements each fortnight to the applicant company. These are to include the running balance of the account as at the date of the statement.

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[15] Mr Donovan said he was instructed that statements for the operating account would in fact be supplied from 1 December 2024.

[65] I expect progress to be made in the near future, which may allow the question as to whether there is a continuing need for a freezing order, given the payment into Court and the respondents' undertakings. I have suggested to counsel that the further information the accountant requires, if properly disclosable, should be provided as soon as possible, with a view to mediation being resumed early in the new year. If resolution of the parties' differences is not possible at mediation, the application for removal and/or such other steps as are appropriate in the Authority can be advanced. I am concerned that matters have not progressed as rapidly as they could have.

[66] On this basis, I authorise the issuing of an amended form of the freezing order and ancillary orders. These are to have effect until 10 am on 11 February 2025. There will be a review hearing at 10 am on 7 February 2025. A telephone directions conference is to take place with the Judge assigned to the matter at 10 am on 3 February 2025, so that the Court may be updated as to progress, and as to what directions may need to be considered at the review hearing.

[67] In the meantime, I reserve leave to apply for any necessary directions on three days' notice, if necessary.

[68] This judgment and the orders authorised in it are to be served on the banks involved as soon as possible.

[69] Costs are reserved.

B A Corkill
Judge

Judgment signed at 10 am on 18 December 2024