

**ORDER PROHIBITING PUBLICATION OF NAME AND IDENTIFYING
DETAILS IN THE CONTEXT OF THIS JUDGMENT**

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 91
EMPC 401/2023**

IN THE MATTER OF	an application for without notice freezing and ancillary orders
AND IN THE MATTER OF	an application to discharge or vary orders
BETWEEN	STU Applicant
AND	FRD Respondent

Hearing: 13 May 2024
(via AVL)

Appearances: D Brabant and T Sung, counsel for applicant
E Anderson and S Poborowski, counsel for respondent

Judgment: 14 May 2024

Reasons: 28 May 2024

REASONS FOR JUDGMENT (NO 6) OF JUDGE M S KING

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[1] On 13 May 2024, I received detailed submissions from the respondent, FRD, in support of his application to discharge or vary the freezing and ancillary orders against the assets of the respondent.¹ The applicant, STU, opposed the application and sought for the orders to be extended. Voluminous affidavits and exhibits and submissions were filed by all parties.

[2] On 14 May 2024, I issued a short judgment indicating my conclusions.² The application to discharge had not been successful and the orders were to be extended by four months, until 16 September 2024, with a review hearing to be scheduled on or before 9 September 2024. Leave was reserved for the respondent to apply at short notice to vary or discharge the orders, and costs were reserved. The reasons for the judgment were to follow.

¹ On 6 November, the Court granted without notice freezing and ancillary orders against the assets of the respondent. The orders were varied on 5 December 2023 and have been reviewed and extended by the Court on three other occasions. The orders were due to expire at 5 pm on 14 May, unless they were extended by the Court.

² *STU v FRD* [2024] NZEmpC 77.

[3] Prior to issuing my reasoning for this judgment, a further affidavit was filed by STU's director identifying an error in his evidence filed on 31 October 2023, where he had incorrectly attributed a small number of the approximately 1,803 irregular transactions that occurred over a four-year period to the wrong client. Submissions made by STU's counsel at the review hearing referred to this evidence, which STU's director has confirmed is incorrect. The proceeding was put on hold while the parties were given an opportunity to be heard on this new development.

[4] In summary, Ms Anderson, counsel for FRD raised concerns with STU's evidence, pleadings, submissions and the weighting the Court has placed on them. Ms Anderson requested that the Court takes this into account when considering next steps. Mr Crossland, on behalf of STU, in summary submits that the error in evidence was genuine and that the other evidence before the Court is sufficient to establish the plaintiff's claim that the orders should be continued.

[5] After considering the views the parties, I issue my reasoning for the judgment as set out below on the evidence before the Court at the review hearing. The new evidence submitted by STU's director will be taken into account when the orders are reviewed within four months, at the next review hearing.

[6] The reasoning for this judgment is set out below.

Application for discharge, or variation of orders

[7] FRD has filed an application seeking to discharge the orders or, in the alternative, he seeks to vary the orders to reduce the impact on him and his family. STU has filed its opposition to the application.

[8] A summary of the key grounds relied upon by FRD in his application include:

- (a) STU does not have a good arguable case. The evidence it has provided is not sufficient to make out its allegations against FRD in its draft statement of problem.

- (b) STU has failed to demonstrate that there is a real risk that FRD will dissipate or move his assets out of the jurisdiction. While FRD has Chinese citizenship, his life is established and anchored in New Zealand. STU's evidence that FRD has acted dishonestly is circumstantial and weak. FRD has complied with the disclosure of information required under the orders and he has also voluntarily provided additional information not covered by the orders.
- (c) The balance of convenience and interests of justice favour the application being granted. Reliance is placed on the fact that the substantive proceedings in the Authority and the related proceedings in the High Court are likely to be on foot for a significant period. STU's case has significant evidential gaps. The orders are having a significant impact on FRD and his family. STU has rejected offers of security by way of mortgage over FRD's most substantial assets, being the residential properties, he owns with his wife.

[9] In the alternative, FRD proposes that the orders be varied to allow the security to be maintained over his most substantial assets, being three residential properties, which are covered by the orders. FRD claims that this provides STU with comfort that his most significant assets cannot be dealt with, diminished, or dissipated. He claims his other assets are modest. He says that such a variation is in the interests of justice, given the draconian nature of freezing orders, and would reduce the negative impact of the orders on him and his family, while retaining some security for STU.

[10] The application is opposed. A summary of the key grounds relied upon by STU in its notice of opposition include:

- (a) STU has a good arguable case that FRD has breached his duties to it by misappropriating its stocks and either gifting or selling them to third parties. FRD directed the profits from his misappropriation through companies in which he and/or his wife have business interests. FRD has failed to disclose all relevant information to enable the Court to

assess his contention that these companies have a legitimate business, and the freezing orders are not unduly onerous and should not be varied.

- (b) There is a continued risk that if the orders are not maintained, FRD will dissipate assets to avoid any subsequent judgment.
- (c) The orders allow FRD to pay personal and business expenses and are not unduly onerous. The overall justice requires the maintenance of the freezing order.

Substantive proceedings

[11] During the hearing, counsel advised that a statement of problem and statement in reply have been filed with the Employment Relations Authority. The parties have not attended mediation. Mediation was postponed until after this application was determined by the Court. The Authority has not convened a conference call to deal with any interlocutory matters, including any issues around discovery of relevant information, or the timetabling of this matter to an investigation meeting.

[12] Counsel have also advised that related proceedings have been filed in the High Court. There are six defendants:

- (a) The first defendant is FRD's wife.
- (b) The second defendant is a company in which FRD was previously a shareholder and director (Company A); his wife is currently the sole director and shareholder of Company A.
- (c) The third defendant is a company in which Company A holds 50 per cent of the company's shareholding (Company B). The other 50 per cent is held by Mr Y. Company B is a client of STU.
- (d) The fourth defendant is a company in which Mr Y owns 30 per cent of the shares in (Company C).

- (e) The fifth defendant is a Hamilton based butchery company (Butchery Company). STU has discontinued proceedings in the High Court against the Butchery Company.
- (f) The sixth defendant is a Hamilton based restaurant company (Restaurant Company). STU has discontinued proceedings in the High Court against the Restaurant Company.

[13] The High Court has granted a freezing order over the assets of the first and second defendants. The defendants in the High Court proceeding have applied to stay the proceedings while the Authority deals with the claims against FRD. The application is opposed by STU and is scheduled to be heard shortly after this hearing.

[14] No firm answer can be given at present to the question of when the proceedings in the Authority and the High Court will be completed. Neither proceeding appears to have progressed or been granted priority or urgency in either jurisdiction. Without urgency or priority being sought, it is likely that the Authority and High Court actions would not take place until the end of 2024 or early 2025 at the earliest.

Legal framework

[15] FRD has applied to discharge or vary the interim freezing and ancillary orders. It is common ground that STU bears the onus of satisfying this Court that the orders should be continued.

[16] A freezing order is an interim injunction that prevents a defendant from moving assets beyond the reach of judgment creditors. The jurisdiction is codified in pt 32 of the High Court Rules 2016.

[17] The basic test to satisfy in order to maintain the orders involves three elements:³

³ *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451 (HC).

- (a) whether the applicant has a good arguable case on the substantive claim;
- (b) whether there are assets to which the order can apply; and
- (c) whether there is a real risk that the respondents would dissipate or dispose of the assets, so as to render the respondent judgment proof.

[18] In *Shore v Narain*, the Court of Appeal also emphasised the importance of the overall justice of the case, balancing the need to protect the applicant against prejudice or hardship caused to a respondent or third parties.⁴

Whether STU has a good arguable case

[19] There is a dispute over whether STU has a good arguable case. A good and arguable case is made out if the allegations in the proposed claim are capable of tenable argument and are supported by sufficient evidence. This does not require a prima facie case to be established. The applicant does not, however, need to demonstrate that its case is strong enough to entitle it to summary judgment.⁵ The sufficiency of the evidence must be considered in light of the context that the assessment is being made at a very early stage of the proceedings.⁶ Its case must be better than one barely capable of serious argument, but need not have a greater than 50 per cent prospect of success.⁷

[20] STU's substantive claims against FRD are set out in the draft statement of problem filed in the Authority, which can be summarised as follows:

⁴ *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548.

⁵ *Wilson's (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd* [1985] 2 NZLR 11 (HC) at 21 – 22.

⁶ *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 110 IPR 442 at [18]; *Hannay v Mount* [2011] NZCA 530 at [20] – [22]; *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [37]-[42].

⁷ *Ninemia Maritime corp v Trave Schiffahrtsgesellschaft mbH "The Niedersachsen"* [1983] 1 WLR 1412 (CA) at 1417.

- (a) FRD has misappropriated STU's stock during his employment. FRD either sold or gifted stock to third parties, who are the defendants in the related High Court proceedings.
- (b) FRD's conduct alleged above is a breach of his employment agreement, including:
 - (i) a breach of cl 2 which required FRD not to make contractual commitments which would conflict with the performance of his employment obligations;
 - (ii) a breach of cl 6 which required FRD to, among other things, act honestly and diligently; in the interests of STU, its clients, other employees; and in accordance with STU's policies, as contained within any personnel manual, work rules or code of conduct, or any written or oral directions given by STU;
 - (iii) a breach of cl 18 which restricted secondary employment and imposed duties of confidentiality in favour of STU;
 - (iv) a breach of s 4 of the Employment Relations Act 2000;
 - (v) a breach of the implied duty of fidelity and fiduciary duty owed by FRD to STU; and
 - (vi) alternative causes of action for conversion and unjust enrichment.

Background

[21] STU's evidence is that FRD, as its Operation Manager, was responsible for the operational functions of its Hamilton branch. This included dispatch and logistics, purchasing and procurement, replenishment and inventory control. FRD arranged the drivers, rosters and organised their runs. In his position, FRD had full access to and training on STU's stock management system to allow him to undertake the above operational functions.

[22] In early 2023, STU's newly appointed national credit controller began to implement structured procedures for inventory management within STU. As part of this process, STU discovered multiple irregular transactions involving FRD's user identification in STU's electronic stock management system (user ID). STU's evidence included Excel spreadsheets which were created by extracting source data from STU's stock management software system. The spreadsheets identified seven categories of irregular transactions which can be sorted into two groups. The first group contains three categories of irregular transactions that relate to the transfer of stock between branches. The second group contains four categories of irregular transactions that relate to four specific companies. I intend to analyse the irregular transactions in these two groups, assessing the merits of each group of transactions from the evidence filed by the parties.

Irregular transactions involving the transfer of stock between branches

[23] The three categories of irregular transactions that STU identified in its stock system involved transactions where stock did not arrive at the destination recorded in STU's stock management system, or was zero rated after it arrived at the Hamilton branch. They are summarised below:

Category one - Inventory control transfer system

[24] STU identified approximately 609 entries where FRD's user ID had accessed its inventory control transfer (ICT) module in its stock management system to alter the inventory at STU's Hamilton and Auckland branches (in record only). The number of entries was more than would have been expected and there was no evidence that these entries were authorised.

Category two - Branch transfer system - zero

[25] STU identified approximately 363 entries where FRD's user ID had altered shipments of stock to give the appearance that they had been transferred from STU's Auckland branch to the Hamilton branch. FRD's user ID had then recorded the shipments to the Hamilton branch at zero quantity, thus creating a loss in the inventory in the Auckland branch and allowing surplus stock to stay in the Hamilton branch.

STU claims that there is no reason for these entries and that FRD was not authorised to make them. If stock had not arrived, FRD was required to notify the Auckland branch and request that it change the shipping quantity.

Category three - Branch transfer system – line entry

[26] STU identified approximately 38 entries where FRD's user ID had altered shipments of stock that had been transferred from the Auckland branch to the Hamilton branch by receipting the stock back to the Auckland branch (in record only). FRD's user ID achieved this by altering the line detail in STU's stock management system which specified where the product had gone. FRD did not have authorisation to alter the line details. If the product had not been received by the Hamilton branch, STU's processes required the Auckland branch to change the entire purchase order, not just the line code. These entries created a loss for the Auckland branch and a surplus in stock for the Hamilton branch.

Whether the irregular transactions were undertaken by STU

[27] FRD submits that the evidence provided by STU does not show that the irregular transactions involved any wrongdoing by him. FRD's evidence is that employees were given generic passwords that were easy to guess. Two other employees commonly used his user ID to access STU's system and that logging in with more than one user ID was common and necessary. On this basis STU cannot be sure that he is responsible for the irregular transactions.

[28] STU disagrees; its evidence is that:

- (a) FRD had changed his password from the generic one he was initially given by STU;
- (b) logging in with others users' IDs was not common or necessary;
- (c) the two employees who FRD accused of using his ID did not have the necessary knowledge or training in the system; and

- (d) there were examples of irregular transactions that match FRD's company car GPS records to show he was present when the transactions occurred.

[29] Weighing the evidence, I find that STU has a good arguable case that the irregular transactions recorded as being undertaken by FRD's user ID, were undertaken by FRD and not other employees of STU. While STU has not provided GPS tracking of FRD's vehicle or other evidence to establish he was on site when all of the 1,803 irregular transactions occurred over a four-year period, I do not consider this level of proof is required at this preliminary stage of the case, due to the conduct having occurred over a four-year period and appearing to be of a systematic and complex nature, and masked by legitimate entries into STU's stock management system.

Whether STU's stock management system is correct - no missing or misappropriated stock

[30] FRD submits that the irregular transactions identified by STU are correct. STU has no evidence that STU's stock management system is incorrect and that the stock it has identified as irregular transactions, is missing, or has been misappropriated. Similarly, FRD claims that there is no evidence that he has acted fraudulently, or has gained a pecuniary advantage from the alleged wrongdoing.

[31] FRD's evidence is that stock was often transferred from STU's Auckland branch to its Hamilton branch, as certain products were not stocked in Hamilton. The contents of deliveries were unreliable, including because some items did not fit in the truck, and invoices were rarely accurate and needed to be adjusted later. He said that many employees made these adjustments and that he did not believe authorisation was necessary to do so. He claims STU cannot say with certainty that the entries his user ID had altered were incorrect.

[32] STU denies that the deliveries from its Auckland branch to its Hamilton branch were unreliable. It supplied evidence that:

- (a) Hamilton branch customers are “hand to mouth” and STU could not afford to let them down by leaving stock behind;
- (b) there was a series of checks in place to ensure the deliveries between Auckland and Hamilton were correct; and
- (c) any adjustments had to be authorised.

[33] Weighing the evidence before me, including the evidence of deliveries being completed without invoices and the evidence from the Butchery and Restaurant Company considered below at [55]–[59], I find that STU has a good arguable case that the irregular transactions it has identified is a result of missing or misappropriated stock; and that FRD undertook these transactions in its stock management system without authorisation and for his own pecuniary gain.

Whether stock from the irregular transactions was misappropriated by FRD and sold by Company A

[34] FRD’s evidence is that Company A operates a legitimate online marketplace where clients (third parties) upload details of the stock they wish to sell, and registered customers can purchase the items listed for sale. Company A does not operate in competition with STU. He said his role at Company A was to visit customers and suppliers, encourage customers to list products for sale, register buyers to purchase goods, and ensure registered buyers were purchasing products. FRD provided a copy of an invoice Company A had created on 31 May 2023, which identified that one customer was being charged for sales commission. However, no evidence was provided by this customer to verify the invoices, the details of the customer’s relationship with Company A and its online marketplace business.

[35] The New Zealand Companies Office records confirm that FRD was previously a director and shareholder of Company A, and his wife is now sole shareholder and a director. Bank statements from joint accounts for FRD and his wife record that they received regular dividend payments from Company A that were significantly more than FRD’s salary with STU.

[36] Through the High Court proceeding, STU has obtained copies of Company A's bank accounts. The bank accounts show multiple payments for meat products. Company A's annual financial accounts also show that it had a gross profit of \$464,413 for the year ended March 2022, and \$764,354 for the year ended March 2023. STU also provided evidence from the directors of the Butchery Company and the Restaurant Company that they were customers of Company A and that they purchased stock directly from FRD through WeChat.

[37] Weighing the evidence before me, on a preliminary basis, I find that FRD's evidence regarding the nature of Company A's business, and that it was not in competition with STU, is untrue. STU has a strongly arguable case that some of the stock it has identified as irregular transactions was misappropriated from it by FRD and sold by Company A to the Butchery Company and the Restaurant Company, thus generating a loss for STU. FRD received a pecuniary gain from the conduct noted above in the form of regular dividend payments from Company A.

Volume of alleged missing stock too great to be overlooked

[38] STU has estimated that the loss from the above 1,803 transactions to be approximately \$2,856,538.42. This does not include the loss of profits associated with the misappropriated stock, which STU estimates to be approximately over \$4 million.

[39] FRD observes in his evidence that STU is claiming that he has stolen the equivalent of many 44 foot shipping containers, or 40 truckloads, of stock. He does not know how he could take this volume of stock unnoticed and then dispose of it. FRD's evidence is that stocktakes occur at the end of every month for the top 50 most expensive pieces of meat. These stocktakes would show if STU was losing millions of dollars of stock, as it was now saying. STU has failed to provide any stocktake data.

[40] STU's evidence is that it did not notice the misappropriated stock being moved, because it was being moved to customers through delivery with other ordered goods, or delivered by its drivers without the delivery being recorded in its stock management system (without invoices). STU considers that its stocktake information was

unreliable because FRD was responsible for overseeing the stock counting. These discrepancies were noticed in early 2023, when new procedures were put in place.

[41] FRD and the first four defendants named in the High Court proceedings do not appear to be cooperating with STU by providing information relevant to its claims. However, some of the information FRD has provided to STU about his interests and dealings with the defendants in the related High Court proceedings appears to be untruthful. Therefore, STU's investigation into the irregular transactions is ongoing and it has engaged Deloitte New Zealand (Deloitte) to undertake a specialist forensic analysis, which is due to be completed in about a month.

[42] Weighing all the evidence, the alleged conduct appears to be systematic and complex, and masked by legitimate entries into STU's stock management system and the delivery of misappropriated stock, with and without legitimate orders from STU customers. Given the nature of the allegations that are alleged to have occurred over a four year period, combined with the trusted position FRD held in STU's company, I do not consider that the volume of the stock that is allegedly missing undermines STU's claims against FRD at this preliminary stage.

Irregular transactions involving four specific companies

[43] The last four categories of irregular transactions identified by STU in its stock management system involve four specific companies. The transactions involve FRD's user ID altering shipping quantities of the stock ordered by these companies to zero, or a lesser figure than what was delivered, and for the stock to be delivered without invoices and free of charge, generating a loss for STU. Specifically, STU has identified:

- (a) 450 irregular transactions with Company B;
- (b) 280 irregular transactions with Company C;

- (c) 42 irregular transactions with a butchery client;⁸ and
- (d) 21 irregular transactions with the Restaurant Company.

Whether it was common practice for deliveries to be completed without invoices

[44] FRD's evidence is that it was common practice for truck drivers to deliver orders without providing invoices. STU disagrees; its evidence is that:

- (a) Stock was only very rarely delivered without invoices;
- (b) Three truck drivers confirmed that FRD directed them to complete deliveries without invoices, including to Company B, the Butchery Company and the Restaurant Company; and
- (c) There was video evidence showing FRD collecting STU stock without creating an invoice for the stock that was taken.

[45] Weighing the evidence before me, I find, on a preliminary basis, that it was not common practice for STU's drivers to deliver products without invoices. On at least one occasion FRD has taken stock without recording the stock in STU's stock management system and creating an invoice for the stock that was taken. STU has an good arguable case that FRD arranged for stock to be delivered without it being recorded in its stock management system (without invoices) to Company B, Company C, the Butchery Company and the Restaurant Company. These deliveries were free of charge, generating a loss for STU.

Irregular transactions with Company B

[46] Company B operated a small supermarket that sells products that are damaged or close to its expiry date (Clearance Store). STU sold damaged stock or stock near

⁸ STU's director's evidence of 31 October 2023 identified this butchery client as the Butchery Company; however, his subsequent evidence admits this is incorrect and the invoices are for a separate butchery client. STU's concern about the irregular transactions identified remains the same, regardless of the identity of the client.

its expiry date to the Clearance Store. It was not aware that FRD's wife had a business interest in Company B through her shareholding in Company A.

[47] STU discovered evidence of surplus meat stock in its Hamilton branch. The surplus stock was not recorded in its inventory and could not be sold before it expired. STU submits that the only reasonable explanation for the surplus stock, was that the Clearance Store was receiving some of this stock for free.

[48] FRD claims that surplus stock in the Hamilton branch was not abnormal, due to the occasional request by customers for more of a certain item. He also claims that he was authorised to adjust pricing manually for the Clearance Store and that there were regular audits at STU that would pick up any discrepancies in stock levels.

[49] STU disagrees; its evidence is that:

- (a) stock over the usual monthly sale volumes would be stored for a variety of reasons, such as a client having a promotion, but this would be recorded in inventory numbers;
- (b) the reason why stocktakes did not identify surplus stock was because FRD was overseeing stock counting and was able to exclude the extra stock; and
- (c) there was confirmation from truck drivers that deliveries were made to the Clearance Store without invoices; Hamilton warehouse workers were not allowed to complete orders for the Clearance Store until FRD arrived in the morning.

[50] FRD's evidence is that the Clearance Store was not very profitable and that he did not receive significant profits or benefit from it personally. However, he did not provide any financial documents to support his claims. STU provided evidence of significant turnover warranty from the Clearance Store and a large payment made by the Clearance Store to FRD and his wife.

[51] Weighing the evidence before me, I find, on a preliminary basis, that STU has a good arguable case that the Clearance Store benefited from receiving surplus stock from STU's Hamilton branch. The stock it received was either not recorded in STU's stock management system, or it received stock that was zero rated or purchased at a lesser value than what was delivered, generating a loss for STU.

Irregular transactions with Company C

[52] Mr Y, who owns 50 per cent of the Clearance Store (or Company B) with FRD's wife, holds 30 per cent of the shareholding in Company C. STU's evidence is that Company C operates a Thai restaurant and is a customer of STU. Between 5 July 2021 and 27 September 2023, STU identified approximately 280 entries in its stock management software where FRD's user ID was used to alter the shipping quantities of the stock ordered by Company C to zero or a lesser figure than that which was delivered.

[53] FRD has not directly responded to the evidence STU has provided in regard to Company C. The transactions regarding Company C appear to be covered by FRD's evidence at [30]–[31] above.

[54] For the same reasons given at [33] above, I find that STU has a good arguable case that the irregular transactions it has identified with regard to Company C, identify STU's missing, or misappropriated stock, including stock being charged at a less than value rate. STU has a good arguable case that that FRD undertook these transactions in its stock management system without authorisation.

Irregular transactions with the Butchery Company

[55] The evidence of the sole director of the Butchery Company is that, in about April 2020, FRD approached him and offered to supply him with beef and lamb products. FRD sent him product photos through WeChat.

[56] The director began to place three to four orders per week with FRD through WeChat. Initially FRD would accompany the delivery driver and provide a delivery note. However, after a few months, the director trusted FRD and invoices (which were

not in STU's name) were not provided on delivery but sent to the director directly via email. FRD would follow up if there were any unpaid invoices or any issues with the product delivered. The director confirms that he only dealt with FRD and that he never placed an order on any online transaction platform or WeChat programme. The Butchery Company initially received invoices from Company D (which the director believed FRD owned), before it changed to being from Company A. At a date coinciding with FRD's termination from STU, FRD advised the Butchery Company that he was unable to take further orders.

[57] For the same reasons set out at [37], I find that STU has a strongly arguable case that some, if not all, of the stock delivered and invoiced by Company A and Company D to the Butchery Company was stock FRD had misappropriated from STU through the use of irregular transactions in its stock management system. Without STU's knowledge, the misappropriated stock was delivered to the Butchery Company by STU's drivers free of charge, which caused it further loss. There appears to be no legitimate reason for its truck drivers to deliver its products without invoices three or four times per week. There is a strongly arguable case that FRD has received pecuniary gain from the conduct noted above.

Irregular transactions with the Restaurant Company

[58] The sole director of the Restaurant Company has provided evidence in support of STU. His evidence is that he was introduced to FRD who he understood had his own business as a supplier of meat products. On 27 June 2020, he began ordering beef, chicken and lamb products directly from FRD through WeChat. The director would contact FRD if there were any issues with the product delivered. He confirms that he never placed an order through any online transaction platform or WeChat programme. He confirms that the invoices were never delivered together with the product. FRD would send invoices directly to him via WeChat. As with the Butchery Company, the invoices were initially issued by Company D before changing to being issued by Company A, and FRD advised deliveries would have to cease after his termination from STU.

[59] For the same reasons as set out at [37] above, I find that STU has a strongly arguable case that a significant amount of the stock identified by it as irregular transactions was misappropriated from it by FRD and sold by Company A and Company D to the Restaurant Company. The misappropriated stock was delivered without STU's knowledge and authorisation, or otherwise with other legitimately ordered goods. There is a strongly arguable case that FRD has received pecuniary gain from the above conduct.

STU has a good arguable case

[60] After weighing all of the evidence above, I consider, at this preliminary stage, that STU has provided sufficient evidence to establish it has a good arguable case, or a sufficiently plausible foundation to establish that the following claims are pleaded in its statement of problem:

- (a) That FRD has misappropriated STU's stock during his employment as operations manager at its Hamilton's branch and has either sold or gifted stock to third parties, including the defendant companies in the related High Court proceedings.
- (b) That FRD's conduct above is a breach of the express terms of his employment agreement set out in full at [20](b), his implied duty of fidelity, and the statutory duty of good faith that FRD owed to STU during his employment.
- (c) That FRD's conduct above gives rise to claims of conversion and unjust enrichment.

Assets to which the order can apply

[61] It is not disputed that FRD has assets within the jurisdiction to which the orders can apply. I therefore do not need to consider that element of the three-step test set out at [17](b). It is satisfied.

Risk of dissipation

[62] In *Hortus Ltd v Ashlesha Holdings Ltd*, the High Court has recently recognised that a freezing order may be made pre-judgment if an applicant has a good arguable case, the respondents are in possession or control of assets to which the orders may apply, and there is a chance of dissipation or disposal of assets or their removal from New Zealand.⁹

[63] FRD submits that STU has failed to demonstrate that there is a real risk that he will dissipate or move his assets out of the jurisdiction. He says that while he is a Chinese citizen, he has been a permanent resident in New Zealand for over 20 years. His life with his family is established and anchored in New Zealand and he has no plans to return to China. He says he has complied with the disclosure of information required under the orders and that he has also voluntarily provided additional information not included in them. His counsel submits that the circumstantial evidence that he has acted dishonestly is weak.

[64] STU submits that FRD is an overseas citizen and has the ability to deal with assets outside of the jurisdiction. It says his alleged conduct is inherently dishonest. It submits that he has not fully disclosed his assets and/or the use of the funds of entities he controls. This includes his failure to disclose his relationship with Company D and his failure to disclose the sale of Company B. STU submits that FRD has a propensity to be economical with the truth, or to not fully disclose matters, such as his interest in Company A, Company B and the companies they supplied. It says this would give a prudent, commercial person pause to be concerned about dissipation.

[65] After weighing up the evidence before me, I accept that at this preliminary stage, FRD and his family have established lives in New Zealand and have no plans to leave. However, based on the untested evidence before the Court at this early stage of the proceeding, there is sufficient evidence to establish that FRD's failure to disclose his relationships and his wife's business interests in Companies A, B, C, D,

⁹ *Hortus Ltd v Ashlesha Holdings Ltd* [2023] NZHC 2851 at [12].

and his dealings with the Butchery Company and the Restaurant Company, indicate dishonesty or nefarious intent such that there is a real risk of dissipation of his assets.¹⁰

Full and frank disclosure of all material facts, including possible defences

[66] FRD submits that there are significant gaps in STU's case and that its substantive claims cannot meet the threshold for a good arguable case. In particular, he submits that STU cannot show, based on the evidence before the Court, that it has suffered a loss, or that FRD has either deliberately caused this loss for his own gain, or that the loss was likely to occur due to his oversight.

[67] FRD submits that if STU has any other relevant information about the above alleged wrongdoing, it has failed to comply with the requirements under r 32.2(3) of the High Court Rules to disclose all material facts. In the alternative, if it does not have any other relevant information, it has failed to disclose this significant evidence gap to the Court. Had it done so, the Court would not have found STU to have a good arguable case.

[68] For the reasons given above, I consider, at this preliminary stage, that STU has provided sufficient evidence to establish that its claim against FRD, as set out in its statement of problem in the Authority, has a plausible foundation. As the Court of Appeal has recognised in *Wing Hung Printing v Satio Offshore Pty*,¹¹ the good arguable case test does not require a plaintiff to establish a prima facie case, as disputed questions of fact cannot be readily resolved on affidavit evidence.

[69] I also consider that FRD should not benefit from any lack of cooperation in providing STU with information he may have about the irregular transactions it alleges he has undertaken, or his interest and dealings with the defendant companies in the related High Court proceedings. The lack of information provided by STU is due to it being required to obtain information about the irregular transactions from independent forensic accounting experts, Deloitte, which takes time and increases its costs. Within a few months, Deloitte's investigation report will be available, which

¹⁰ *Dotcom*, above n 5, at [18] and [31].

¹¹ *Wing Hung Printing Co Ltd*, above n 5, at [41].

will give the parties a further opportunity to review the strength of STU's case against FRD. If FRD and the other High Court defendants refuse to cooperate with the provision of information, STU may be required to undertake third party discovery applications which will take further time. It is unjust that FRD should rely upon his failure to cooperate in the provision of information, as a ground for discharging the orders.

Overall justice

[70] FRD submits that, in the circumstances, the overall justice of the case, combined with the balance of hardship foreseeably suffered by him and his family, favours the discharge of the orders.

[71] His evidence is that the orders are having a substantial impact on him and his family. They are a substantial blow to his reputation and ability to continue to revive Company A which has been damaged by them. FRD gave evidence that he had made a reasonable and pragmatic offer to STU to give security by way of a mortgage over the residential properties he owns with his wife in exchange for it agreeing to discharging the orders, which it rejected.

[72] STU submits that the overall justice supports the orders being continued until after the substantive proceedings have been determined. It acknowledges that the continuation of the orders will cause a degree of hardship and concern for FRD. The initial orders provided for the payment of FRD's and his family's ordinary living expenses and legal expenses related to the freezing order. The orders were varied on 8 December 2023 to allow FRD to operate one transactional bank account in order to receive income from his employment and pay his ordinary expenses.¹² The varied orders limit the impact on him and his family. STU submits that FRD's claims that the orders are affecting Company A's trading and causing him reputational damage is poor, with no corroborating evidence provided to establish a causal link between the orders and his claims. It also submits that the non-publication orders would preserve his reputation. Any damages caused to FRD by the orders would be minimal.

¹² *FRD v STU* [2023] NZEmpC 222.

[73] I accept that a key consideration is the potential longevity of the freezing and ancillary orders. The orders not only impact FRD, but also his wife and children. The orders, including the variation on 8 December 2023, have been in place for over six months. I accept that the continuation of the varied orders will continue to impose hardship on FRD, due to their draconian and highly restrictive nature. I acknowledge that, given the nature of the orders, they should not go on forever. However, due to the alleged conduct being systematic and complex, involving more than four years of irregular stock transactions that were masked by legitimate stock transactions, and any failure or refusal by FRD to cooperate with the provision of information so that proceedings could be progressed, it is likely that this matter will take some time before it will be determined by the Authority.

[74] I consider that any prejudice caused to FRD by a long-lasting freezing order can be repaired by utilising the undertaking as to damages filed by STU, and that this is appropriate in the circumstances where the overall grounds for a freezing order are strong. However, I indicate that the Court expects STU as the plaintiff, to promptly pursue the underlying substantive proceedings in the Authority with appropriate urgency.

[75] Standing back and having regard to all the material that has now been placed before the Court, I conclude that it is in the interests of justice for the orders to continue for a short period of four months. This will enable the parties to attend mediation, to consider the forensic accounting report, and to give them an opportunity to work collaboratively together and to collect further information enable them to fully assess the merits of STU's claims against FRD. Failing that, it will provide time for discovery applications to be made between the parties and any relevant non-parties. It will also give the parties time to file a request that the substantive proceeding be progressed with urgency or be given priority by the Authority.

[76] When the proceeding is recalled in four months' time for a review hearing, the Court expects to be updated by the parties on the steps they have taken to progress the hearing of the substantive matter in the Authority.

Alternative claim for variation of orders

[77] FRD has applied in the alternative for the orders to be varied to allow the security to be maintained over his most substantial assets, being three residential properties which are covered by the orders. He claims that this provides STU with comfort that his most significant assets cannot be dealt with, diminished or dissipated. He claims his other assets are modest. He says that such a variation is in the interests of justice, given the draconian nature of freezing orders, and that the variation would reduce the negative impact of them on him and his family, while retaining some security for STU.

[78] STU opposes any variation of the order. It submits that the security offered by FRD is a “poor cousin” when compared with the effect of the orders. It says the security does not prevent FRD or his wife from dealing with their residential properties, including selling them, borrowing against them or disposing of them to a friendly purchaser who is prepared to purchase them with the security in place. STU also submits that the last set of bank statements that FRD had disclosed to it identified one of FRD’s and his wife’s joint bank accounts with a bank balance of over \$39,000 and an available credit facility of \$50,000. FRD and his wife have also disclosed ownership of a motor vehicle with an approximate value of \$55,000. The orders currently attach to these assets. However, if FRD’s application was granted and the order was varied, STU would lose its security over these other assets. The combined value of FRD’s assets, including his bank accounts, vehicle and the estimated equity over his and his wife’s residential properties, is less than the amount of losses claimed by STU in the underlying Authority proceedings.

[79] Given my findings above in relation to STU’s strongly arguable case and the risk of dissipation, I consider that it is reasonable to decline FRD’s alternative claim to vary the orders. The orders will continue in its current form and any prejudice

caused to him by the continuation of the orders can be addressed in the future by FRD utilising the undertaking as to damages filed by STU.

M S King
Judge

Judgment signed at 4.45 pm on 28 May 2024