

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

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

**[2025] NZEmpC 182
EMPC 349/2025**

IN THE MATTER OF	a without notice application for a freezing order
BETWEEN	OPEN COUNTRY DAIRY LIMITED Applicant
AND	SIMON STEWART Respondent

Hearing: 19 August 2025 (heard by telephone)

Appearances: M J Hammond and J Russ, counsel for applicant

Judgment: 19 August 2025

**JUDGMENT OF JUDGE M S KING
(Application for without notice freezing order)**

[1] The applicant, Open Country Dairy Limited (the Company) has applied without notice for a freezing order in relation to the property of the respondent, Mr Stewart.

[2] The Company is an independent dairy processor, processing milk and other dairy products. Mr Stewart commenced employment with the Company in 2013 as a market manager. During his employment he was promoted to senior market manager and in 2021 he was promoted to group market manager. In his role he was directly responsible for some of the Company's largest customer accounts.

[3] In October 2023 the Company became concerned that Mr Stewart may have divulged its confidential pricing information to two customers (Customer A and Customer B) in exchange for payment. The Company conducted a disciplinary

process which ended with it dismissing Mr Stewart for serious misconduct on 14 November 2023.

[4] On 28 November 2023 the Company filed a statement of problem in the Authority where it claimed Mr Stewart had breached the confidentiality provision of his employment agreement and the duties of confidentiality, fidelity and good faith which he owed to the Company. Mr Stewart also filed a statement of problem in the Authority claiming that he had been unjustifiably disadvantaged during his employment with the Company and that his dismissal was unjustified.

[5] On 12 June 2025 the Authority issued a determination dismissing Mr Stewart's claims and upholding the claims of the Company.¹ The Authority determined that the Company was entitled to an assessment of remedies for these breaches and indicated that these could include statutory penalties, compensatory and special damages. A further investigation meeting was to be scheduled to assist the Authority in the final disposition of the matter.

[6] On 8 August 2025, after the Company had filed its application for a freezing order, Mr Stewart's counsel advised the Authority and the Company that the Serious Fraud Office (SFO) had filed a single charge against Mr Stewart.

[7] The Company has assessed the damages it believes were incurred because of Mr Stewart's conduct and estimates its loss to be between USD\$1,904,620 and USD\$3,657,497. The Company intends to claim for the higher amount and has applied to the Court for a freezing order over Mr Stewart's assets up to the value of USD\$3,657,497.

Power to make freezing orders

[8] Section 190(3) of the Employment Relations Act 2000 (the Act) provides the Court with the same powers to make freezing orders as the High Court possesses. The High Court Rules 2016 are applied to applications for freezing orders, and ancillary orders, with modifications in this Court as appropriate.

¹ *Stewart v Open Country Dairy Limited* [2025] NZERA 330.

[9] Rule 32.2 empowers the Court to grant a freezing order. A freezing order may be made against a prospective judgment debtor.²

[10] The test to apply requires the Company to establish that:³

- (a) there is a good arguable case;
- (b) Mr Stewart 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 the interests of justice favour making the orders applied for.

Good arguable case

[11] This application was heard urgently and without notice to Mr Stewart. The comments which follow are therefore based on the Company's uncontested evidence.

[12] In the context of an application for a freezing order, a good arguable case is established if the allegations made are capable of tenable argument and are supported by sufficient evidence, bearing in mind the early stage in which an application is likely to be brought.⁴

[13] The Company has proven its claim in the Authority that Mr Stewart has breached his obligations to it and is liable for remedies. It is now a matter of obtaining a determination from the Authority on the quantum of remedies it is entitled to, if any.

[14] Mr Hammond submitted on behalf of the Company that there is a good arguable case that it will succeed in the Authority in establishing its claims for damages. In its evidence, the Company provides a report setting out its financial

² High Court Rules 2016, r 32.4.

³ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; and *Potgieter v Bliss Beauty NZ Ltd* [2022] NZEmpC 203 at [10].

⁴ *Mudajaya Corp Berhad v Chua* [2019] NZHC 1436 at [22], referring to *Hannay v Mount* [2011] NZCA 530 at [22].

analysis of the damages it claims to have suffered as result of Mr Stewart's breaches of his obligations to the Company.

[15] A summary of the Company's financial analysis for assessing its losses is set out below:

Weighted average assessment

- (a) The Company's evidence on how it calculated a weighted average, price to assess its losses against what the customers paid is set out below:

To calculate the weighted average price, Open Country multiplied the prices it sold product to all its other customers during the same GDT cycle it sold product to [Customer B] by the corresponding volume it sold to those customers.

Open Country then divided the sum of those values by the total volume sold during the same GDT cycle. This price was then used to compare with the prices sold to [Customer B].

Where there was no data to calculate a weighted average price, the applicant selected the relevant Contract Period (CP Price) from the Global Dairy Trade (GDT) auction results. As a business rule Open Country does not sell below the GDT price.

- (b) In the Company's assessment it estimated using the weighted average assessment that Customers A and B paid USD\$1,127,351 less than the weighted average selling price that all other Company customers paid during the same period.
- (c) In its evidence, the Company gave examples of why it was concerned about the rate of pricing the customers in question had received. In relation to the pricing rates paid for regular whole milk powder, it observed that Customer A paid the lowest price of all its customers in 9 out of 13 GDT pricing cycles. It also observed that Customer B had paid the lowest price of all its customers in 20 out of 47 GDT pricing cycles. The Company's evidence was that this was very unusual.

Highest price assessment

- (a) The Company performed a second assessment which involved it assessing the opportunity loss to the Company by comparing what Customer A and Customer B had paid for regular or instant whole milk powder during the relevant periods, against the rate for the highest price contracted by the Company during the same period. The Company estimated that the customers in question paid USD\$2,880,228 less than the highest price contracted by the Company.

[16] The Company's estimated damages claim is currently based on the highest price assessment. However, based on the limited evidence before the Court, I consider the Company's highest price assessment to be too speculative. At present there is insufficient evidence before the Court to satisfy me that Customers A and B would have agreed to the highest price contracted to the Company during each GDT event. To support the Company's claim for damages under its highest price assessment, evidence in the nature of detailed expert forensic accounting reports would be required to satisfy the Court that such damages claimed are not speculative or too remote.

Freight pricing - weighted average assessment

[17] The Company in its assessment has identified that the freight prices paid by Customer A and Customer B are approximately USD\$37,919 less than the weighted average price paid by all other company customers who sent freight to the same region during the same periods.

[18] The Company points out that it operates a market-based freight charging. It does not have customer-based freight prices, which makes the freight prices paid by Customer A and Customer B highly unusual.

Long Term Supply Agreement pricing assessment

[19] The Company contracted a consultancy firm that specialises in financial investigation and forensic accounting to conduct a forensic examination of Mr Stewart's company phone and laptop. The consultancy firm produced a report on

the forensic examination and found that Mr Stewart had used the Company's confidential information to discourage Customer A and Customer B from signing up to Long Term Supply Agreements (LTSA) with the Company. The Company conducted a weighted average assessment of what the clients in question paid under its spot pricing (ad hoc sales with prices that fluctuate) as opposed to the rates they would have paid under a weighted average margin set out in proposed LTSA.

[20] The Company's assessment estimates that these customers would have paid USD\$739,350 if they had been contracted and paid the LTSA rate as opposed to the spot pricing rate.

[21] The assessment of loss based on these comparators appears remote and speculative. While establishing loss of chance damages does not require proof of certainty,⁵ the Company's quantification of losses does not appear to factor in the probability of the clients in question signing up to the LTSA (particularly given their documented history of price-sensitivity).

[22] It appears that customers either signed up to a LTSA, or in the alternative they chose to pay the fluctuating spot pricing rate. The Company's claims for damages includes the difference these customers paid against both the proposed LTSA and spot pricing rates (based on the weighted average assessment above). This creates a risk that the Company, by claiming the opportunity losses for both options, is double-counting losses.

[23] Notwithstanding the concerns of double-counting, the Company has provided insufficient evidence to demonstrate that Customers A and B would have agreed to a LTSA, but for Mr Stewart's breach. Without evidence of the offers of the LTSA to Customer A and Customer B this loss is difficult to substantiate.

Assessment of losses

[24] On the untested evidence before me, I am satisfied at this interim stage, that there is sufficient evidence, rising to the level of a good arguable case for the Company

⁵ *Chaplin v Hicks* [1911] 2 KB 786 (CA); and *Strack v Grey* [2019] NZCA 432 at [47] and [51].

to have a claim for losses. Based on the Company's weighted average assessment for losses for whole and instant milk powder, and its claim for freight prices the value of the Company's arguable claim for losses is USD\$1,165,270.

[25] However, contingencies will still need to be considered. This may include the likelihood of Customer A and Customer B paying a lower price than the weighted average (even without access to privileged information) and the likelihood that their large accounts and valued positions with the Company may have given them an edge in price negotiations over other clients. There was also the possibility that these customers might have purchased lower volumes of product in the absence of confidential information, which in turn could affect the freight pricing.

[26] Accounting for these potential variables, as well as the serious, draconian impact of freezing orders on the rights of those impacted by them, I consider that a 10 percent reduction for contingencies can be applied to all of the Company's claims, which would reduce the loss to USD\$1,048,743. This figure is also reflective of the fact that the Company's loss analysis is based on an internal assessment and as such, has not been independently verified. The quantum of loss may be revised and amended at a later stage upon further evidence from an independent forensic accountant or suitably qualified expert.

Possible defences

[27] Rule 32.2(3)(a) requires the Company to identify any possible defences available to Mr Stewart. The Company has done so. Mr Stewart may deny that there is no imminent risk of dissipation of assets. He may also claim that there is no evidence to suggest that any assets are currently at risk of being dissipated so as to frustrate a future judgment.

[28] The Company considers that its impending damages claim in the Authority will heighten the risk of dissipation. Its claim for remedies is significant and it considers there is a real risk that Mr Stewart will take similar steps to dissipate his assets or conceal them from the Company. In support of its claim, the Company points to the consultancy firm's report which identifies emails and WhatsApp messages which

indicate that Mr Stewart acted dishonestly and sought to conceal the payments he received from customers. This included messages where he sought to organise for payments from customers below New Zealand's financial reporting thresholds and on other occasions arranging for the customers to pay him in large cash sums. The report indicates that his conduct was deliberate and occurred over a sustained period.

[29] The Court acknowledges that Mr Stewart claimed in the Authority that the money he received from the customers in question was in the order of USD\$100,000 and was payment to his consulting business, where he advised clients on market predictions for dairy commodities. However, the Authority did not accept this defence.⁶

[30] Those possible defences are acknowledged and have been taken into account.

Mr Stewart has assets within the jurisdiction

[31] The evidence provided demonstrates that Mr Stewart has real estate and bank accounts held within New Zealand.

There is a risk of dissipation

[32] As stated above, the consultancy firm report provided prima facie evidence that Mr Stewart had been dishonest and divulged confidential information in exchange for his own financial benefit. It also indicates that he deliberately sought to avoid financial disclosure thresholds when receiving payment.

[33] The Authority determination also made adverse findings in relation to Mr Stewart's character. The Chief Authority Member stated in his determination that he had "no trouble" finding Mr Stewart had breached his duties of confidentiality, fidelity and good faith.⁷ He described Mr Stewart's actions as "egregious",⁸ "overwhelmingly contrary to his express and implied obligations",⁹ and that he was the architect of his own misfortune.¹⁰

⁶ *Stewart*, above n 1, at [102].

⁷ At [98] and [104].

⁸ At [75].

⁹ At [80].

¹⁰ At [81].

[34] I consider that there is prima facie evidence of fraud committed by Mr Stewart which goes a considerable way to establishing that there is a risk of dissipation of his assets.¹¹

[35] While fraudulent conduct is not the end point,¹² evidence of fraud or dishonesty means:¹³

...the threshold for establishing the defendant's likely disposition for disposal of assets should not prove great, but the threshold will correspondingly be more difficult to cross if the claim does not relate to such conduct but merely to some lesser breach, such as breach of a commercial contract.

[36] Further, there may be a spectrum of dishonest activity which goes toward establishing the risk of dissipation so that the circumstances of the fraud or dishonesty may be relevant to the assessment. An employee who misappropriates an employer's assets by transferring funds directly into their own account may differ from an employee who uses sophisticated methods to evade detection by their employer, or by government authorities. In the present case, there is sufficient evidence to suggest that Mr Stewart's misappropriation involved active steps of concealment to evade anti-money laundering requirements as well as detection by the Company.

[37] Lastly, the Court sought clarification on the timing of the application for freezing orders. Notably, more than 50 days had elapsed after the Authority issued its liability determination, before any application for freezing orders was made. The Court questioned whether the delay was consistent with the Company's claim that Mr Stewart may dispose, deal with or otherwise diminish his assets to avoid the prospective remedies determination of the Authority.

[38] The Company submitted that it waited for the challenge period for the Authority determination to expire, before filing its application for a freezing order and concurrently pursuing its claims for remedies in the Authority. It says filing an application before the challenge period would have been premature. The Company maintains that it has real concerns that its liability determination in the Authority and

¹¹ *MNO v PQR* [2023] NZEmpC 109.

¹² See also *LAF v MEC* [2025] NZEmpC 23 where allegations of fraud were insufficient to establish a risk of dissipation.

¹³ *Covington Group Holdings Ltd v Zhong* (2004) 17 PRNZ 819 (HC) at [58(e)].

its claims for remedies before the Authority may be rendered nugatory in the absence of a freezing order. The Company also considers that the SFO prosecution reflects the seriousness of Mr Stewart's conduct and the quantum of funds it believes he may have obtained. It submits that the SFO prosecution increases the risk that Mr Stewart will now take steps to dissipate his assets. It submits that timing of the freezing order application was appropriate and did not cause any prejudice to Mr Stewart.

[39] In the circumstances, I am satisfied that there is a risk Mr Stewart's property will be dissipated.

Balance of Convenience

[40] I am satisfied that the balance of convenience and overall justice of the case, as demonstrated by the evidence before the Court, requires the freezing order to be granted up to the value of USD\$1,048,743.

[41] Making such an order will likely cause a degree of hardship and concern for Mr Stewart and his family, but as required by r 32.6(3),¹⁴ the draft order includes a provision that Mr Stewart is not prohibited from dealing with the assets covered by the order for the purposes of:

- (a) paying ordinary living expenses;
- (b) paying legal expenses related to the freezing order; and
- (c) paying legal expenses related to any charge laid by the SFO.

[42] Such orders are appropriate and for the benefit of all parties.

[43] The Company is required to take all reasonable steps to advance the Authority investigation into its entitlement to remedies in a timely manner. However, the Company will not be in breach of this requirement, if the Authority's investigation meeting is delayed at Mr Stewart's request pending the outcome of the SFO prosecution.

¹⁴ See High Court Rules 2016, r 32.6(3).

[44] The order is to have effect until 5 pm on Tuesday, 2 September 2025, unless prior to that time, they are continued or renewed. This case will be called again in Court at 9 am on Monday, 1 September 2025. The purpose of the hearing will be to review the order now made. Parties and their representatives may attend the hearing in person or by AVL. Any party may apply in the meantime to vary or discharge the terms of the orders on two working days' notice.

[45] A copy of the order, this judgment, all Court minutes issued in this proceeding and all documents filed by the Company are to be served on Mr Stewart as soon as possible. The Court is to be notified as soon as these documents have been served, and an affidavit of service must be filed.

Interim non-publication orders

[46] The Authority made interim non-publication orders by consent over any evidence which identifies any members of Mr Stewart's family, his health and named customers of the Company.¹⁵

[47] The Company has applied in this Court for interim non-publication orders which would continue the orders made in the Authority. It also seeks to extend the orders to include any other customers (and their representatives) named in the application and supporting documentation as well as the Company's confidential pricing information. The grounds for extending the non-publication orders are that disclosure would have adverse effects on the Company's commercial interests, third parties commercial interests and reputational interests, and that disclosure is not material to the matters at hand.

[48] I am satisfied that it is appropriate that an interim non-publication order is made preventing the publication of any information or identifying details in these proceedings which identifies Mr Stewart's family members, his health, and/or any information that identifies the Company's customers or its confidential pricing information. This non-publication order is made pursuant to cl 12 of sch 3 to the Act and will continue until further order of the Court.

¹⁵ *Stewart*, above n 1, at [1].

[49] The Court file is not to be inspected by any person without leave of a judge.

[50] I direct the Registrar of this Court to draw this judgment to the attention of the Authority.

[51] This judgment is not to be published until after 5 pm on Tuesday, 2 September 2025.

[52] Costs are reserved.

M S King
Judge

Judgment signed at 2.45 pm on 19 August 2025