

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 81/07
5070144**

BETWEEN INFINITY INVESTMENT
GROUP LIMITED

Applicant

AND MURRAY PETER WALKER,
ALAN JAMES McKENZIE and
STEPHEN JOHN GRANT as
Trustees of the PINOT TRUST

First Respondent

AND MURRAY PETER WALKER

Second Respondent

Member of Authority: Phillip Cheyne

Representatives: Dale Lester and Karen Castiglione, Counsel for
Applicant
Diccon Sim, Counsel for Respondent

Investigation Meeting: 2 and 3 April 2007 at Wanaka

Determination: 19 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Infinity Investment Group Holdings Limited employed Murray Walker (the second respondent). The first respondents, who include Mr Walker, are the trustees of Mr Walker's family trust. The trustees own land transferred to them by Infinity. They granted Infinity a mortgage over that land to secure a loan to them from Infinity representing the purchase price of the land. Mr Walker is the covenantor under the

loan agreement. He says that the transactions were with his family trust at his request and were part of his employment agreement with the applicant.

[2] Mr Walker's written employment agreement dated 21 December 2000 included provisions for him to receive a *free house section ... up to a ceiling of \$200,000* subject to a pro rata claw back provision operative for eight years. The loan agreement does not include the same provision. Rather, it provides for repayment of the principal sum on the earliest of the following three events: 10 years from the date of the advance; or the cessation of the borrower's/covenantor's employment; or sale of the land.

[3] The employment ended by redundancy in September 2005. In October 2005, Infinity commenced proceedings in the District Court against the respondents to recover the principal and interest under the loan agreement. The respondents then sought a stay or an order dismissing the proceedings on the basis that the matter is an employment relationship problem within the exclusive jurisdiction of the Employment Relations Authority. Mr Walker says that no money is owed by him or the other trustees because of the terms of his employment. He also says that he is entitled to a discharge of the mortgage, there being no debt to secure.

[4] To resolve the problem I need to assess conflicting evidence about whether there was any agreed variation to the terms of employment contained in the written employment agreement dated 21 December 2000. First though, it would be helpful briefly to say something about the people involved, the nature of Infinity's business and Mr Walker's involvement in that enterprise.

The people involved

[5] Bob Robertson is Infinity's Chief Executive Officer and a principal of the company. Infinity operates a property development business around Wanaka and elsewhere in New Zealand. Mr Robertson employed Mr Walker as *Business Development Manager*. John Hogg is Infinity's Chief Financial Officer and has been with Infinity since May 2000. Colin Moorfoot is Infinity's Construction Manager and began working for Infinity in April 2000. Mr Hogg, Mr Moorfoot, and Greg Hunt were (or are) senior employees of Infinity who were offered a remuneration package that included a *free house section* provision similar to Mr Walker's.

[6] Mr Walker is a qualified accountant with a work history including financial and general management roles. His work with Infinity was not an accounting or financial management role. Mr Walker was appointed to work closely with Mr Robertson as an Executive Assistant taking responsibility for many of the CEO's tasks and delegated projects.

Employment Agreement

[7] The signed employment agreement was preceded by discussions and correspondence over some months, but it is not necessary at present to refer to that evidence.

[8] The relevant provisions of the employment agreement are as follows:

Remuneration:

It is intended Murray should have a remuneration package of \$150,000pa. The package is to be made up as follows:-

Basic salary: \$100,000 p.a. paid monthly or as agreed

Bonus: \$35,000 p.a. (a mix of fixed & profit based)

House section: \$15,000, see separate section

Total: \$150,000

...

Annual leave:

Statutory holidays plus four weeks p.a. able to be taken after the first 6 months.

Profit share:

As per remuneration package offered above, it is expected that a profit share of 1% of net profit after tax will be paid to Murray. This profit share is to be paid out after consolidated corporate accounts completed once a year. We envisage a fixed portion of bonus being equivalent to 1 month's pay.

Other:

(1) ...

(2) *A free house section in one of our developments is offered, up to a ceiling of \$200,000, as marked at our selling price. The site to be agreed between the parties. There would be a "claw back" if Murray left the company amortised pro-rata over 8*

years, ie if Murray left after 4 years he would have to pay back proportionally for 4 years being \$100,000.

(3) ...

(4) ...

...

Future:

This position is intended to be a long-term association. Your remuneration package plus profit share can be expected to be adjusted as time goes forward to recognise your special contribution to the company.

...

Murray, we believe this offer recognizes what you bring to the table at this stage and believe that as time progresses, our joint association will be mutually beneficial both financially and personally.

If you agree with the Terms above and are happy to join the team, please accept this employment offer by signing below.

Best regards,

Position and terms accepted

Signed

Signed

Bob Robertson

Murray Walker

Chief Executive Officer

Infinity Investment Group

Date: 21/12/2000

Date: 21/12/2000

[9] As mentioned above, the *free house section* was part of employment arrangements with other senior staff. Mr Robertson's evidence is that he was not at the time of these offers aware of the fringe benefit tax issues they created. He did not expect any tax consequences that would fall on the employer. Mr Hogg's evidence is that he knew there would be tax issues arising for the company but it is not suggested that he knew at that time of Mr Robertson's mistaken belief that there would be no tax consequences for Infinity. Mr Walker's evidence is that he mentioned the tax liability to Mr Robertson during the course of their negotiations. However, I prefer Mr Robertson's evidence that he was unaware at the time of the tax consequences.

[10] Sometime in 2001, Mr Hogg was asked to consider implementing the *free house section* as the relevant subdivision was nearing completion. That caused him to

consider the fringe benefit tax liability that would arise for Infinity on transfer of the sections. There was a discussion about this between Mr Hogg and Mr Robertson. Mr Robertson and Mr Hogg both say that Mr Robertson asked Mr Hogg and Mr Walker to sort out the *free house section* issue so as to avoid the tax consequences on Infinity. In his evidence, Mr Walker did not quite accept that responsibility for resolving the issue had been delegated to them both, but in an email dated 19 July 2001 Mr Walker did describe the delegation in a manner consistent with Infinity's evidence. I find that the email accurately describes Mr Walker's delegated responsibility (with Mr Hogg) for resolving the *free house section* issue.

[11] Mr Walker acknowledges his involvement over the course of some months during 2001 in proposing or considering various alternatives to provide the *free house section* as per the employment agreements without incurring a tax liability for Infinity. It is not necessary to canvass the details at this point. The position arrived at (as Mr Walker puts it) was that *there was no easy way to remove the company's ultimate liability for taxation*. That somewhat understates the matter. Short of legislative change, the tax consequences Infinity sought to avoid were inevitable if the *free house section* was provided as originally promised.

[12] Mr Hogg's evidence is that he eventually put together a proposal that Infinity provide the affected staff with an interest free loan for up to ten years to cover the section purchase price. That arrangement saw Infinity liable only for fringe benefit tax on the interest free loan and provided the employees with the benefit of increased capital value in the sections over the ten year period. Mr Hogg also says that this was intended to replace rather than supplement the existing contractual entitlements.

[13] The task of documenting the proposed arrangements fell to Mr Walker. He prepared a single page draft loan agreement and forwarded it to Mr Hogg for comment. Mr Walker's draft provided the loan *less any amount repaid or forgiven will be repaid at the earlier of* specified events. Mr Hogg disagreed with that wording and required the deletion of the words *or forgiven*. Now, Mr Hogg does not specifically recall this part of the sequence. However, the documents make it clear that the deletion was made at his insistence. The amended draft was then referred to Mr Robertson who wrote on it:

Murray

Do we need any comment here re the claw back or is this covered in the employment contract or do we need a separate agreement?

[14] There were other discussions about Mr Hogg's proposal and other proposals. There is a note dated 11 November 2001 made by Mr Walker on a spreadsheet comparing Mr Hogg's proposal with the employee borrowing money externally. The spreadsheet details amortisation of the loan. Mr Walker noted on this document *Annual bonuses may cover amortisation over 8 years*. I accept that this note reflects discussions between Mr Robertson and Mr Walker at the time.

[15] Continued discussions resulted in different outcomes for the affected staff. Mr Hogg decided that he did not want a *free house section* in the particular subdivision and negotiated a different arrangement. Mr Hunt received money not land by way of an interest free loan of the net value of his original *free house section* entitlement, the loan to be amortised over six years by declared bonus payments. These arrangements were both documented as amendments to the respective employment agreements at the relevant times. Mr Moorfoot agreed to Mr Hogg's proposal. In April 2002 he signed a term loan agreement to fund the purchase of a section and granted Infinity a mortgage over that land. Infinity met the cost of the fringe benefit tax on the interest free loan. The *free house section* provision in Mr Moorfoot's employment agreement was not amended until 2005 when Mr Hogg prepared a revised employment agreement, signed by Mr Moorfoot on 30 October 2005.

[16] Also in April 2002 Mr Walker and the trustees signed a transfer, loan and mortgage agreements similar to those signed by Mr Moorfoot. The conveyancing transaction for Mr Walker's section was handled by the respective solicitors. It was agreed that the transfer, loan and mortgage would be between Infinity and the trustees of Mr Walker's family trust. In addition, Mr Walker executed documents as the covenantor. These documents are all standard form documents for transactions of this type. They make no reference to Mr Walker's employment agreement, nor does the correspondence between the solicitors. For present purposes, the loan agreement is the important document. That provides as follows:

THE PRINCIPAL SUM SHALL BE REPAID: *on the occurrence of the first of any of the following events:-*

1. *Ten years from the 1st day of March 2002 ("date of advance");*
or

2. *On the cessation of employment by the Borrower or Covenantor with the Lender; or*
3. *Sale of the land for the purchase of which the principal sum has been advanced.*

[17] By about April 2005, Infinity and Mr Walker were engaged in communication over his prospective redundancy. Around the same time, and because of changes arising from the Holidays Act 2003, Mr Hogg prepared revised employment agreements for staff including Mr Walker and Mr Moorfoot. That is the agreement subsequently signed by Mr Moorfoot which is referred to above. The proposed revision given to Mr Walker included an appendix providing for the interest free loan and the requirement for it to be paid on 11 February 2011, or earlier on the occurrence of the second and third events stipulated in the loan agreement. Mr Walker did not sign, return or discuss the revision with Infinity and Mr Hogg did not follow-up because of the impending redundancy situation. The difference between the proposed appendix and the loan agreement is immaterial for present purposes.

[18] Mr Hogg's evidence which I accept is that he did not prepare variations to the employment agreements for Mr Walker and Mr Moorfoot at the time of the land transactions because he assumed that the conveyancing documents would have that effect.

[19] There is a record of settlement entered into by Infinity and Mr Walker fully and finally settling all matters in respect of their employment relationship except for the issue regarding the purchase by, loan to, and mortgage from Mr Walker and the trustees. The circumstances by which the present proceedings are before the Authority are referred to above.

Was the Employment Agreement varied?

[20] It is common ground that Infinity has not performed the promise of the *free house section* as contained in the 21 December 2000 Employment Agreement. Infinity's position is that the loan agreement, transfer and mortgage reflect an oral agreement to substitute those arrangements for the original promise. On that basis, Infinity is free to enforce the obligations of the loan agreement and mortgage, Mr Walker's employment having ended.

[21] The position for Mr Walker is more complicated. I accept for present purposes that the transaction being with Mr Walker and others in their capacity as trustees is unimportant. Mr Walker says that the loan agreement, the transfer and the mortgage stand alongside but are subject to the express terms contained in the 21 December 2000 Employment Agreement. On that view, that documents are simply the form by which Infinity honoured its 21 December 2000 promise for the time being in order to mitigate the fringe benefit tax consequences of providing the *free house section*. Mr Walker says that the claw back provision in the 21 December 2000 agreement does not operate here because he did not *leave the company* but was dismissed for redundancy. If wrong in that view, he says that the claw back provision in the employment agreement means that only the relevant fraction of the original advance could possibly still be owed by him. Finally, there is an attack on Infinity's variation argument. Mr Walker says that there was no agreement to vary the employment agreement because there was no meeting of the minds on whether a gift of a *free house section* remained, given his evidence of his belief that the gift remained extant. There is also an argument that any purported agreement to vary the terms of the Employment Agreement must be invalid for want of consideration.

[22] As a starting point, I should note that the meaning of the loan agreement is not disputed, nor is the meaning of the *free house section* provision in the Employment Agreement. The employment having been terminated, Infinity is entitled to repayment of the principal advanced and interest in accordance with the terms of the loan agreement. The issue for determination is whether the *free house section* clause in the employment agreement remains in force as written or in some modified form given the loan, mortgage and land transaction.

[23] I find Mr Walker and Infinity agreed to substitute the original *free house section* provision in the 21 December 2000 employment agreement with the transfer, loan and mortgage arrangements as documented. There is a fundamental inconsistency between the two arrangements which means that they cannot both be operative. The April 2002 transactions unambiguously created a loan to be repaid in full at some point. The December 2000 provision created a right to a *free house section* subject to a repayment obligation which reduced over time to zero. The evidence establishes that the 2001 discussions were about seeking agreement to a variation of the existing promise of a *free house section* in the light of Infinity's desire to avoid the tax impost.

[24] In a legal sense it was open to Mr Walker to reject the proposed variation and require compliance with the existing entitlement but he did not do that. Instead, he agreed to the variation and executed the various formal documents. In taking these steps, Mr Walker knew he was substituting one set of rights and obligations for another. That was always clearly the context of the discussions from which the formal documents emerged. What was also discussed at the same time was the possibility that future bonus payments could be used to reduce the amount Mr Walker would have to repay in due course. That is why Mr Walker's note of 11 November 2001 said *Annual bonuses may cover amortisation over 8 years* (emphasis added). There are other documents to similar effect. For example, in September 2004, Mr Walker completed a statement of position for his bank showing the debt of \$180,000.00 (the loan principal) with a note that *Part of this could be remitted*. However, around the same time, Mr Walker wrote to Mr Robertson clearly acknowledging the debt of \$180,000.00 without any rider about amortisation or remission. At that point, there had been several performance reviews resulting in cash bonus payments so Mr Walker knew that he had no further bonus entitlement as at September 2004 that could be offset against the existing \$180,000.00 debt. Mr Walker produced a number of documents related to performance reviews on which he has made notes about amortisation or remission of the \$180,000.00. To the extent Mr Walker's evidence suggests that the notes reflected an agreement that Infinity would remit or amortise any part of the loan, I do not accept his evidence but prefer the evidence of Mr Robertson to the contrary.

[25] I am urged on behalf of Mr Walker to consider why an employee with a clear entitlement to a *free house section* would freely give up that right for the much lesser benefit of purchasing the section with a loan to be repaid in due course. The answer lies in the intended long term nature of the employment relationship. Mr Walker's employment with Infinity gave him access to investment opportunities that in the long run could have been much more valuable to him than the amount of the loan. Having recognised at the time that Mr Robertson made a mistake, Mr Walker was prepared to forego part of his right to a *free house section* with a view to maintaining the relationship for the future. The subsequent redundancy put an end to that but those issues cannot be revisited now.

[26] Mr Walker's argument about a lack of consideration remains. I am referred to *United Food Workers v Talley* WEC44/92 which is reported at [1992] 3 ERNZ 423.

In the circumstances of that case the Employment Court commented that *it could credibly be argued that ...the variation would be unsupported by consideration ...and totally unenforceable*. I accept that the law probably requires a valid variation to be supported by consideration but I do not accept that there was an absence of consideration in the present case. As counsel observed, the argument confuses adequacy of consideration with lack of consideration. Mr Walker received the benefit of an interest free loan and legal title to a section. I accept that this is of lesser value than the original promise but it amounts to consideration nonetheless.

[27] The finding that there was a variation to the 21 December 2000 employment agreement means that Mr Walker cannot rely on the original *free house section* provision to argue that he did not *leave the company*.

Conclusion

[28] Having found that there was an oral agreement to vary the written employment agreement replacing the original *free house section* provision with the loan, transfer and mortgage arrangements, it follows that those documents are enforceable without further reference to the employment relationship. The respondent originally sought judgment for the outstanding principal and interest under the loan agreement but I consider that those arrangements are properly the subject of judgment by the ordinary courts if need be. It is for the Authority to determine (as I do) that there are no terms of the employment relationship between Mr Walker and Infinity that prevent Infinity from enforcing its rights under the loan agreement or the mortgage.

[29] Costs are reserved.

Phillip Cheyne
Member of the Employment Relations Authority