



# Employment Court of New Zealand

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## Marryatt v Silver Ridge Group Limited [2017] NZEmpC 121 (3 October 2017)

Last Updated: 24 October 2017

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2017\] NZEmpC 121](#)

EMPC 276/2017

IN THE MATTER OF    an application for a freezing order

BETWEEN                SUZANNE LIZETTE MARRYATT  
                                 Applicant

AND                        SILVER RIDGE GROUP LIMITED First  
                                 respondent

AND                        SLVER RIDGE PROPERTIES LIMITED  
                                 Second respondent

Hearing:                2 October 2017 (by telephone conference)

Appearances:    A Twaddle, counsel for applicant  
                                 A Bajaj and S Bajaj, representatives for  
                                 respondent

Judgment:            2 October 2017

Reasons:                3 October 2017

### REASONS FOR JUDGMENT OF JUDGE J C HOLDEN

#### Introduction

[1] The applicant, Suzanne Marryatt, has applied for a freezing order in respect of assets of the first and/or second respondent, including the proceeds of sale of the business trading as Palmers Garden World – Hamilton, which Ms Marryatt says is owned by one or other of the respondents (that I together refer to as “Silver Ridge”).

[2] Yesterday I made a freezing order but on limited terms and for a limited period of time, at the end of which there is to be a further hearing.<sup>1</sup>

<sup>1</sup> *Marryatt v Silver Ridge Group Ltd* [2017] NZEmpC 119.

SUZANNE LIZETTE MARRYATT v SILVER RIDGE GROUP LIMITED NZEmpC AUCKLAND [\[2017\] NZEmpC 121](#) [3 October 2017]

#### Background

[3] Ms Marryatt was employed at Palmers Garden World both before and after it was sold to Silver Ridge at the end of October 2016. Her employment agreement, dated 31 October 2016, has the first respondent (Silver Ridge Group Ltd) as employer but she says both companies were referred to in the course of her employment and that she does not know which of them owns the franchise to operate the Palmers Garden World.

[4] Silver Ridge has stated that it is clear that Ms Marryatt was employed by the first respondent. Silver Ridge says that the second respondent has nothing to do with this case. However, emails produced by Ms Marryatt more often than not appear to come from the second respondent.

[5] It is apparent that Drs Ankush and Swati Bajaj are shareholders of both companies but that Dr Ankush Bajaj is the sole director of the first respondent. Drs Ankush and Swati Bajaj are married to each other and live and work in the Waikato where they are dentists. They also are directors and shareholders of other companies.

[6] At this early stage I considered it appropriate to include the second respondent in the freezing order.

[7] On the evidence of Ms Marryatt, and reflected in the documentation she attaches to her affidavit and draft statement of problem, the business has had some difficulties since the sale to Silver Ridge. There have also been differences between Ms Marryatt and Silver Ridge, and two warnings have been issued.

[8] From Ms Marryatt's perspective, matters became so difficult that on 12 June 2017 she tendered her resignation advising that:

- she considered she had been reasonable in asking how things were to be resolved between the parties;
- it had been made obvious to her that the Bajajs did not want her in their business, that she had no confidence that Dr Ankush Bajaj would address her concerns, and that she was mentally exhausted to figure out what the director wants so that he "can then spit me out";
- she felt forced into the situation through no fault of her own and the stress had impacted on her health; and
- she requested pay for sick leave and holiday pay.

[9] She stated that she was resigning effective immediately, and that she did not believe she had any other options.

[10] Ms Marryatt raised a personal grievance by letter dated 20 June 2017 on the grounds of unjustifiable disadvantage; breach of health and safety obligations; unjustified constructive dismissal; and breaches of good faith.

[11] The parties agreed to attend mediation. This was scheduled for 1 September 2017 but, apparently at the request of Silver Ridge, was rescheduled for 20 October 2017 and therefore has not yet occurred.

[12] Ms Marryatt has not filed a statement of problem with the Employment Relations Authority but a draft has been provided to the Court as part of this application. She says that earlier this month she became aware that the company was selling the franchise. She says she believes that the directors had told Silver Ridge's staff that they were selling to a new company, Bibi Maya Devi Ltd, to take over the business on 3 October 2017. She says she is very concerned that if the sale proceeds, the directors will be likely to strip the assets from the company, meaning that even if she was successful in her claim, she would not have access to any remedies, essentially making her claim worthless.

[13] Ms Marryatt says she does not know what assets Silver Ridge has but thinks the directors run their dental practice through a different company. She says she is

not trying to stop the sale of the business; she just wants to ensure that she has a fair opportunity to be heard, and to resolve her concerns in a meaningful way.

### **The application for a freezing order**

[14] Ms Marryatt's application for the freezing order was filed on Friday 29 September 2017 on an ex parte basis.

[15] Prior to that application being filed, Ms Marryatt's lawyers had been in recent correspondence with Silver Ridge, and had advised Silver Ridge that if it did not enter into urgent negotiations, and/or negotiations did not resolve matters urgently, they were instructed to apply to the Employment Court for freezing orders to prevent Silver Ridge from disposing of, dealing with, or devaluing the value of the company assets from the sale and/or settlement of the sale of the business.

[16] Ms Marryatt's lawyers also said that they required confirmation that Silver Ridge had made the franchisor, Palmers Franchise Holdings Ltd, and the purchaser aware of her claim and the potential implications for the sale of the business.

[17] As it appeared that the sale was not to take effect until Tuesday 3 October 2017, I directed that the application was to be served by email on the first and second respondents at the email address they were using, and that a telephone conference would be convened with the parties on the afternoon of Monday 2 October 2017.

[18] I also directed that Ms Marryatt was to provide further evidence as to her ability to honour her undertaking as to damages.<sup>2</sup> I did this because at that time, although she had provided an undertaking as to damages, and her lawyer has advised that she was aware of no information that would cast doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages, Ms Marryatt had not actually provided evidence to demonstrate that she would be able to

discharge those obligations if called upon. Ms Marryatt now has filed further evidence as to her financial position and I am satisfied that she would be able to

honour her undertaking if called upon to do so.

2. See [High Court Rules 2016](#) (HCR), r 32.2(3)(b); and the Employment Court Practice Directions, [Part 8](#) at [5]: <  
<https://www.employmentcourt.govt.nz/legislation-and-rules>>.

[19] Drs Ankush and Swati Bajaj, for Silver Ridge emailed the Court before the telephone conference as did Silver Ridge's commercial lawyer. Silver Ridge presently is not represented by counsel in these proceedings. In the emails Silver Ridge referred to the mediation scheduled for 20 October, where it expected there to be discussion between the parties. The emails also referred to the upcoming sale and to debts of the first respondent. At this stage, and understandably given the timeframes, no evidence has been filed on behalf of Silver Ridge.

### **Employment Court can issue freezing orders**

[20] The Employment Court is empowered to make freezing orders pursuant to s

190(3) of the [Employment Relations Act 2000](#) (the Act) and [Part 32](#) of the High

Court Rules.<sup>3</sup>

[21] There must be proceedings within the jurisdiction of the Court or the Authority to which the application for freezing orders relates or, if substantive proceedings have not been able to be filed because of urgency, to which the order can relate. Ms Marryatt has not yet filed her statement of problem but she has provided a draft to the Court.

[22] In order to succeed in obtaining a freezing order Ms Marryatt must satisfy the

Court of four essential ingredients:<sup>4</sup>

(a) that she has a good arguable case;

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

(c) that there is a real risk that the assets will be removed from New

Zealand or disposed of, dealt with, or diminished in value; and

(d) that the balance of convenience and interests of justice require that the order be made.

<sup>3</sup> See especially HCR r 32.5.

<sup>4</sup> *A Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31 at [13]- [23]; citing *Mareva*

*Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (CA).

### **Ms Marryatt has a good arguable case**

[23] The good arguable case threshold is met if the allegations in the (draft) statement of problem are capable of tenable argument and are supported by sufficient evidence, bearing in mind the preliminary stage at which the application is brought.<sup>5</sup>

[24] Here Ms Marryatt has given evidence and pointed to correspondence that she says demonstrates she has a good, arguable case. Based on that untested evidence I agree there is a foundation for her claim, particularly in respect of the warnings it appears she received during her employment. Therefore this part of the test is satisfied.

### **There are assets within the jurisdiction**

[25] It is common ground that Silver Ridge owns the Palmers Garden World –

Hamilton franchise. Therefore the second part of the test also is satisfied.

### **Is there a risk the assets will be disposed of, dealt with, or diminished in value?**

[26] It is not disputed that the franchise for Palmers Garden World - Hamilton is being sold. Settlement is to occur early this week.

[27] That in itself would not be sufficient to justify a freezing order. Ms Marryatt would need to demonstrate that as a result there was a real risk that the proceeds of sale would dissipate, other than through payments made in the normal course of business. Ms Marryatt is not required to show nefarious intent on the part of Silver Ridge. There may be a risk of dissipation simply because of the financial circumstances of the first respondent.<sup>6</sup>

[28] Here it seems that certain payments will have to be made at the time of sale to enable the sale to proceed, and it may be that little,

if anything will be left once

that occurs. However, if the sale is stopped, it seems likely that the situation will

<sup>5</sup> *Hannay v Mount* [2011] NZCA 530 at [21].

6. *Mobil Oil New Zealand Ltd v Courtenay* HC, Auckland CP276/97, 17 September 1997 at [9]- [10]. See also *Bank of New Zealand v Hawkins* [1989] NZHC 198; (1989) 1 PRNZ 451 (HC) at 454.

become more grave. This would impact not only on Ms Marryatt but also on the creditors with registered interests and other creditors, including staff. Of course the prospective purchaser also would be affected. Thus the risk that the value of the assets of the first respondent will be diminished exists either way.

### **Urgency favours a freezing order, but in limited terms**

[29] In considering the balance of convenience and the interests of justice I have taken into account the impact a freezing order would have on third parties. I acknowledge Ms Marryatt's stated position that she does not wish to prevent the sale proceeding. I also recognise that a freezing order ought not be granted simply to

give Ms Marryatt a preference over other creditors.<sup>7</sup> Nor in my view is it

appropriate to issue a freezing order so that the applicant can use it as leverage to force Silver Ridge to settle a claim that it genuinely believes is unmeritorious.

[30] Bearing in mind the imminent sale, the information before me as to the state of the business of the first respondent and the limited time within which the first and second respondents have had to respond to the application, I made a freezing order effectively over \$42,043.73 from the proceeds of sale but only to the extent funds are available after allowing for the first respondent to make the payments required to creditors with registered interests and/or from whom consent is required to settle the sale of the Palmers Garden World – Hamilton franchise. This will allow the sale to proceed.

[31] In addition, and as is standard, the freezing order does not prevent Silver Ridge from paying legal expenses related to the freezing order, or from disposing of assets, or making payments in the ordinary course of business, including business expenses incurred in good faith.

[32] The amount of the freezing order reflects Ms Marryatt's estimate of her claim

before the Employment Relations Authority together with an amount that would allow for costs on the application before this Court, calculated on a 2B basis.

<sup>7</sup> *Palmer v Leespower SED (1995) Ltd* [1995] NZHC 1539; (1995) 8 PRNZ 694.

[33] The freezing order is to have effect until 5 pm on Monday 9 October 2017, by which time it is anticipated that the Court will have heard further from the parties at a hearing scheduled to take place at 10am on that day.

[34] For the avoidance of doubt, any of the parties has the right to come back to

Court before then to apply for the freezing order to be varied. [35] Costs on this application are reserved.

[36] The Court recommends that the first and second respondents obtain legal advice and representation about these proceedings as soon as possible. It also recommends that the parties endeavour to attend mediation as soon as possible in an effort to resolve the differences between them.

JC Holden

Judge

Judgment signed at 4 pm on 3 October 2017

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