

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 124
WRC 27/11**

IN THE MATTER OF an application for a freezing order and an
 ancillary order

BETWEEN JAIME MELGAREJO AMIEN, OF SAN
 DIEGO, USA
 Applicant

AND KARL HEINZ REIPEN
 First Respondent

AND AWAKINO FORTUNE LTD
 Second Respondent

AND BAILEY INGHAM LTD
 Third Respondent

Hearing: (on the papers)

Appearances: Kate Hay, counsel for the applicant

Judgment: 5 October 2011

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The applications

[1] The applicant, Jaime Melgarejo Amien, a horse trainer from San Diego, California, USA has made urgent interlocutory applications without notice for a freezing order and an ancillary order. The stated grounds for the application are that unless the applications are dealt with on an urgent basis, there is a real risk that the first respondent, who is also the respondent in proceedings before the Employment Relations Authority (the Authority), will permanently relocate his assets overseas.

[2] The jurisdiction of this Court to issue freezing orders was recently discussed by Chief Judge Colgan in *Mason Engineers (NZ) v Hodgson*,¹ where his Honour stated:

[3] The Employment Court is empowered by s 190(3) of the Employment Relations Act 2000 to make such orders as the High Court can under Part 32 of the High Court Rules. An application for a freezing order may be made whether or not a proceeding has been commenced (and in this case it has been) and its purpose is to preserve property for enforcement purposes. The effect of a freezing order is the same as was formerly for what was known as a Mareva injunction. It is to preserve particular assets for whomever might be entitled to them without the defendant placing them beyond the reach of any creditors: *Dunbar Sloane Ltd v Gall*.²

[3] In accordance with the requirements of r 32.2 of the High Court Rules, the applicant appears to have fully and frankly disclosed to the Court all material facts including any possible defences known to the applicant and information relevant to the substance of his undertaking as to damages. The relevant background is fully canvassed in a supporting affidavit filed by the applicant which has, as attachments, copies of relevant documentation filed in the Authority.

[4] In brief, the applicant's case is that he was employed by the first respondent (Mr Reipen) as a dressage rider and trainer under a fixed term employment agreement commencing on 20 August 2009 and expiring on 20 August 2012. Prior to taking up his appointment in the small Waikato town of Awakino, the applicant operated his own horse training business in Berlin, Germany. He claims that an important motivating factor in taking up the employment opportunity with Mr Reipen was the prospect of being able to take a horse to the 2012 Olympic Games.

[5] The applicant alleges that he was unjustifiably dismissed from his employment on 10 February 2010. It is unnecessary at this stage to record the circumstances surrounding the dismissal. A statement of problem was lodged with the Authority on 27 June 2011. Part of the applicant's claim is that in order to take up his new employment, he had to sell his business in Europe and use the proceeds

¹ [2011] NZEmpC 82.

² [1996] 3 NZLR 252; (1996) 9 PRNZ 511.

to relocate in New Zealand. As a result of losing his job only a few months later, however, he lost his residency status in New Zealand and was forced to incur the expense of moving his family overseas to search first in Europe, and then in the United States for alternative suitable employment. He seeks a freezing order over the first respondent's assets in the sum of \$170,000 in order to secure his claim before the Authority for unpaid wages and holiday pay, future loss of earnings, bonuses and compensation for non-economic loss.

[6] In his affidavit, the applicant describes Mr Reipen as "a multi millionaire with significant resources at his disposal". He lists a number of companies of which Mr Reipen is the sole shareholder including Awakino Fortune Ltd which is said to own five properties held in 11 titles with a combined rating valuation of \$6,920,000. These same properties would appear to comprise the block of land described in a real estate advertisement attached to the applicant's affidavit as the "Awakino Estate". The total area is said to be 1,100 hectares. The asking price for the Awakino Estate is stated in the advertisement to be \$6,500,000. The applicant deposes that the property is presently subject to a conditional agreement for sale and purchase. The applicant states that he does not want to take any action that might adversely affect the proposed sale of the Awakino Estate. The applicant also deposes that none of Mr Reipen's other companies own any property and that Mr Reipen does not own any property in New Zealand personally.

[7] Although Mr Reipen is aware of the employment proceedings before the Authority, Ms Kate Hay, counsel for the applicant, advised the Court that he appears to have decided not to participate in the proceedings. Counsel records that he failed on two occasions to file a statement in reply, although his solicitor had advised the Authority that such a statement would be provided. Ms Hay has also informed the Court that Mr Reipen left New Zealand earlier than previously advised and failed to keep in contact with his solicitors with the result that they have now withdrawn as solicitors on the record. The solicitors have advised the Authority that Mr Reipen is permanently moving overseas; that he is moving all of his business interests overseas and that his only remaining property in New Zealand is under contract. Counsel submitted that given these developments, there was a significant risk that in the absence of a freezing order, any determination by the Authority in the applicant's

favour would be unable to be enforced. Documentary evidence has been provided confirming counsel's advice to the Court.

[8] The draft freezing order filed in support of the applicant's application describes the assets over which the order is sought in these terms:

4. This freezing order is made in respect of the following assets: Funds to the amount of \$170,000 as identified as a result of the ancillary order applied for with this application for a freezing order.

[9] The draft ancillary order filed in the proceeding is directed at Mr Reipen personally, Awakino Fortune Ltd and the third respondent, Bailey Ingham Ltd who are said to be Mr Reipen's accountants. A letter from Bailey Ingham Ltd relating to the applicant's salary and taxation position prior to his dismissal is attached as one of the exhibits to the applicant's affidavit and it records the employer as Awakino Fortune Ltd. The draft ancillary order requires the respondents to provide, within so many working days full disclosure of all assets and funds held in New Zealand by Mr Reipen or Awakino Fortune Ltd.

[10] As required by r 32.2(5) of the High Court Rules, the applicant has filed a signed undertaking as to damages.

Discussion

[11] I have considered whether it is appropriate for the applications to be dealt with without notice to the respondents. The practical difficulty in proceeding on notice is that the Court has been informed that Mr Reipen is now at an unknown location overseas and that his former solicitors have no contact with him and have withdrawn from acting for him. His only business contacts in New Zealand appear to be his Otorohanga based accountants, Bailey Ingham Ltd, and the real estate firm that is acting in the sale of the Awakino Estate. In the circumstances, I accept that it is appropriate for this Court to deal with the application without notice to the respondents.

[12] For the same reason, I see little point at this stage in issuing any orders against Mr Reipen personally when he is no longer in the jurisdiction and his

whereabouts overseas is completely unknown to the Court. Counsel for the applicant accepts the situation in this regard and at the same time she has stressed to the Court that the applicant does not wish to take any steps that might prejudice the pending sale of the Awakino Estate.

[13] The principles applying to freezing orders and ancillary orders have been largely codified in Part 32 of the High Court Rules but the relief is discretionary and it is appropriate for the Court to have regard to those principles recognised by the courts in earlier decisions relating to the grant of Mareva injunctions. Thus, in *Shaw v Narain*,³ Justice Gault in delivering the judgment of the Court of Appeal emphasised the flexibility of the jurisdiction and noted:

There must be a good arguable case that the person seeking the injunction will succeed in a claim against the owner of the property to be frozen. There must be a real risk that the property will be moved out of the jurisdiction or dissipated and the interests of justice must be weighed.

[14] As Lord Bingham expressed it in *Fourie v Le Roux*:⁴

[2] *Mareva* (or freezing) injunctions were from the beginning, and continue to be, granted for an important but the limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign; see Steven Gee *Commercial Injunctions* (5th edn, 2004) pp 77-83.

[15] On the documentary evidence before me, I am satisfied that the applicant has established a good arguable case that he will succeed against either/or the first and second respondent and that he has, therefore, established a sound basis for seeking the protection of a freezing order. At the same time, I have indicated to counsel for the applicant that it appears to me to be premature to be seeking a freezing order against an asset which is yet to be identified (see [8] above). Rule 32.2(2) of the High Court Rules provides for freezing orders to be made in respect of “any assets located in or outside New Zealand” and the prescribed form for a freezing order requires the assets in question to be described adequately so as to identify each asset.

³ [1992] 2 NZLR 544 at 548.

⁴ [2007] UKHL 1, [2007] 1 All ER 1087 at [2].

It seems to me, therefore, that the subject of a freezing order needs to be a tangible asset capable of being frozen rather than some prospective asset that may or may not (depending upon the outcome of the ancillary order) crystallise into something that is capable of being the proper subject of a freezing order. Ms Hay accepted that proposition and agreed to confine the present application to an ancillary order against the respondents' accountants.

[16] Rule 32.4 and 32.5 of the High Court Rules provide for the making of a freezing order or an ancillary order against a third party. I am satisfied that it is in the interests of justice for an ancillary order to be made against the third respondent and, accordingly, an ancillary order in terms of the draft order filed, as amended, will be issued.

[17] For the record, I confirm that although the applicant filed an undertaking as to damages, it was clear from his affidavit that he has no assets within New Zealand to discharge the obligation created by such an undertaking. His counsel argued that it would be inappropriate to require the applicant to provide security as the first and second respondents were responsible for his impecuniosity. In a telephone directions conference, however, I indicated to counsel that pursuant to r 32.6(5) of the High Court Rules, the Court required the applicant to provide security in the sum of \$10,000 and the Registrar has subsequently confirmed receipt of that amount.

[18] I direct that the applicant serve a copy of this judgment and the accompanying ancillary order on the third respondent, Bailey Ingham Ltd, forthwith.

[19] Costs on the present application are reserved.

A D Ford
Judge

Judgment signed at 11.30 am on 5 October 2011