IN THE ENVIRONMENT COURT
AT AUCKLAND

[2011] NZEmpC 147
ARC 50/11

IN THE MATTER OF	an application without notice for a freezing order
AND IN THE MATTER OF	an application for judgment
BETWEEN	MASON ENGINEERS (NZ) LIMITED Plaintiff
AND	KAREN MARGARET HODGSON Defendant

Hearing: 10 November 2011
(Heard at Auckland)

Appearances: Anthony Russell and Claire Mansell, counsel for plaintiff
No appearance for defendant

Judgment: 10 November 2011

ORAL JUDGMENT NO 4 OF CHIEF JUDGE G L COLGAN

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[1] There are two matters in this case that I need to deal with today. The first, although only filed as an application earlier this morning, is a further claim, brought without notice to the defendant, for another freezing order. This relates to a bank account of the defendant, the existence of which was discovered by the plaintiff only in the course of preparing detailed evidence to support its claim to judgment, with which I will deal shortly.

[2] In deciding this further without notice application for a freezing order, I intend to rely upon the judgments[1] I have given previously in this case including making freezing orders in respect of two bank accounts in July 2011. In those

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[1] [2011] NZEmpC 82; [2011] NZEmpC 87; [2011] NZEmpC 105; [2011] NZEmpC 133.

circumstances, I can state quite shortly the grounds which have persuaded me to make a further freezing order without notice to Mrs Hodgson.

[3] The evidence establishes that on a number of occasions Mrs Hodgson transferred sums from a Mason Engineers ASB bank account to an account with the ANZ Bank Ltd in her name, which she was not authorised to do. Some of these transfers were made at times when other legitimate payments, including particularly payments of salary to other staff at Mason Engineers, were being made by Mrs Hodgson. The narrations attributed by her to these payments that she made to herself included references such as "Salary", "Wages" and "Bonus" and I am satisfied from the evidence that she was not entitled to any of those payments so described.

[4] The plaintiff is not yet of course able to ascertain whether the bank account to which the payments were made, continues to contain any of those monies or their equivalent. That will only be able to be achieved once a freezing order is made and the plaintiff's solicitors can make inquiries of the ANZ bank.

[5] I am also satisfied that it is a proper case in which to make a further freezing order because, in addition to the grounds for making the initial freezing orders in July, there is evidence that on at least one occasion since then, Mrs Hodgson has attempted to withdraw monies from accounts which were the subject of those freezing orders.

[6] There will be an order in terms of the draft filed this morning, with the exception that the initial duration of the without notice order should be shorter than had been proposed originally by the plaintiff.

[7] The order will expire at 2 pm on Wednesday 16 November 2011. In those circumstances, the matter will be listed to be called in the Employment Court at Auckland at 10 am on that day, Wednesday 16 November 2011, to enable Mrs Hodgson, if she wishes, to apply to vary or set aside the freezing order or, alternatively, to enable the plaintiff to seek its extension if it wishes to do so.

[8] It is a condition of making the additional freezing order that it, together with a copy of this judgment, be served forthwith on the defendant. The draft order filed also includes at para 6 the usual provision for withdrawal from the otherwise frozen funds of sums for living expenses and legal expenses. I do not propose to allow that in this case and the order to be sealed will need to delete what is now para 6 in the draft. That is because, under the existing freezing orders, Mrs Hodgson has that ability and, I am told by counsel, has exercised it although only in relation to living expenses of $500 per week. To again allow those withdrawals would be to permit double dipping. That is not the intention of the allowance for living costs and I am satisfied that the allowance for living expenses referred to in the earlier freezing orders is sufficient for Mrs Hodgson.

[9] I turn now to the substantive application which was set down for hearing today and which I am satisfied has been served on Mrs Hodgson.

[10] The defendant not having taken any steps to defend this proceeding, the plaintiff seeks judgment against her.

[11] There is, again, no appearance for the defendant. She is not entitled now to defend the substantive proceedings without leave. I am satisfied that Mrs Hodgson has been properly served with a copy of the amended freezing order made on 20 October 2011, a copy of the Court's oral judgment delivered on that date,[2] and notice of today's hearing.

[12] Because the notice of hearing specified another courtroom than we are now in, we began this hearing late to ensure that nobody was waiting at the other courtroom and I am advised by the Registry staff that that is so. Not only is there no appearance for the defendant today, but no step has been taken by her in response to service of those documents on 21 October 2011.

[13] When the matter was before the Court on 12 August and again on 20 October 2011 I made a number of directions which I am satisfied have been complied with. These include the filing and service of an amended statement of claim and directions

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[2] [2011] NZEmpC 133.

for service of that amended statement of claim. The period of more than 45 days has expired since the amended statement of claim was served in accordance with those directions and no statement of defence or other step has been taken by the defendant.

[14] Neither the Employment Relations Act 2000 (the Act) nor the Employment Court Regulations 2000 (the Regulations) provides what is to happen in cases such as this where a proceeding such as this is not defended. In these circumstances, the Court has recourse to the High Court Rules pursuant to reg 6(2)(a)(ii) of the Regulations. Rule 25.29 of the High Court Rules provides:

> (2) A plaintiff to an action *in personam* is entitled to proceed to judgment if the defendant fails, within the period specified ..., either to enter an appearance or to file a statement of defence.
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> (3) Judgment under this rule must not exceed the amount endorsed on the notice of proceeding or claimed in the statement of claim concerning the demand for costs.

[15] Rule 15.7 is also applicable. It deals with a liquidated demand which the plaintiff's is. It provides:

> (1) If the relief claimed by the plaintiff is payment of a liquidated demand in money and the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, the plaintiff may seal judgment for a sum not exceeding the sum claimed in the statement of claim (or less or nothing) and—
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> (a) interest (if any) payable as of right calculated up to the date of judgment (if interest has been specifically claimed in the statement of claim); and
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> (b) costs and disbursements as fixed by the Registrar.
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> (2) If the plaintiff claims costs and disbursements, the plaintiff must file a memorandum setting out the amount claimed and how that amount is calculated, together with any submissions in support of the claim.
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> (3) Every Registrar has the jurisdiction and powers of the court under these rules to fix costs and disbursements under subclause (1)(b).

[16] The plaintiff's amended statement of claim of 26 August 2011 seeks judgment in the sum of $688,457.22 plus interest and costs. For reasons that I will address shortly, that has now been revised slightly downwards but the revised sum, which is about $17,000 less than that originally claimed, represents the plaintiff's proved calculation of its losses as a result of the defendant's fraud and theft of the plaintiff's property in the following circumstances.

[17] The defendant was employed by the plaintiff for about four years until July 2011 as an administrator/accounts sole charge and subsequently office manager. In that latter role she had complete control over the plaintiff's bank accounts and salary and wage payments. The defendant made payments from the plaintiff's bank accounts to herself, as both additional and unauthorised payments, and purportedly from a fictitious debtor. Further, she made unauthorised payments to herself from one of the plaintiff's bank accounts into which its customers continued to pay money, even although the account was meant to have been closed, and I am satisfied that the defendant was so instructed. In her role as office manager, the defendant obtained or retained two credit cards in the names of other employees of the company to which the defendant charged a number of personal expenditures and from which she also made significant cash withdrawals.

[18] The foregoing merely summarises very briefly a combination of lengthy, but not particularly sophisticated, fraudulent dealings by the defendant and thefts of her employer's property.

[19] It is incontrovertible that an employee who steals and otherwise fraudulently obtains money, to which she is not entitled, from her employer, is in fundamental breach of her employment agreement and the employer is entitled to recover damages for the breach. It is nevertheless necessary to identify the express or implied terms of the contract that were breached. In this case there do not appear to be express terms, at least in writing, but that does not detract from the strong case for implied and statutory terms. They include, as an office manager with sole and complete responsibility for the company's bank accounts and for payments made and received, an obligation to deal with the company's monies faithfully; to act generally in good faith towards the company (that is, not to mislead or deceive it); and, in particular, not to appropriate to her own use the company's property (including its money or rights to money) without the consent of the company that she did not have.

[20] I am satisfied that these actions of the defendant were in breach of her contractual terms and conditions as an employee. They amounted to fraudulent and deceptive conduct contrary to contractual terms that she would not so conduct herself. They amounted to breaches of the defendant's duty of good faith to the

plaintiff and of an implied term to act with honesty and integrity in respect of the plaintiff's assets and property.

[21] I am satisfied from the uncontradicted evidence presented to the Court that the plaintiff has suffered losses as a result of these breaches as specified in para 8 of the amended statement of claim, but as reduced in Court today. The reduction of about $17,000 from the originally claimed sum of $688,457.22 is as a result of the concession by the plaintiff's counsel. It cannot, at least to the same high standard, establish in evidence the receipt of those amounts totalling about $17,000 by Mrs Hodgson personally, although the evidence does establish that sums totalling about that figure were deducted from the plaintiff's accounts by Mrs Hodgson. In these circumstances it is appropriate to enter judgment for a lesser sum than claimed and I am satisfied that the plaintiff's losses amount to $671,391.29.

[22] The Court is empowered to enter judgment against the defendant in her absence and because she has taken no step to defend the proceedings despite having had clear, repeated and lengthy opportunities to do so.

[23] The Court enters judgment for the plaintiff in the sum of $671,391.29 together with interest thereon at the Judicature Act rate for the period commencing 8 July 2011 until the date of payment by the defendant of the principal sum.

[24] There were two further orders that the plaintiff sought although Mr Russell conceded, as a matter of practicability, that he would not pursue one of these. It may be helpful, nevertheless, if I mention it because the abandonment of one of those remedial orders was really a reflection of the practical consideration that there is now insufficient money in one of the frozen accounts to make that economically worthwhile.

[25] Until its abandonment, that application was that the monies frozen by order of this Court in a Westpac bank account, be released to the plaintiff in part-payment of the judgment. Although the Court is empowered to make a freezing order in respect of those monies, as it did in this case, matters of execution of judgments of this Court are not within its realm and execution must occur elsewhere. Not only

does the Act not provide a regime for executing judgments of the Court except by compliance orders which are not applicable in a case such as this and are not claimed, but the legislation provides expressly that such judgments of the Court may be recovered in the same way as other civil debts.

[26] There is a second reason for my significant doubt about the appropriateness of such an order, even if it had been pursued. In the other jurisdiction in which freezing orders can be made, the High Court, para 131 of the *Laws of New Zealand* (Banking) provides as follows:

> … a freezing order **does not operate as security over the assets that are the subject of the order** (a Mareva injunction was not a form of pre-trial attachment, but was a relief in personam that prohibits certain acts in relation to the assets named in the injunction). (emphasis added)

[27] *Halsbury's Laws of England*[3] reiterates that the purpose of a freezing injunction is not a form of pre-trial attachment, but a relief in personam which prohibits certain acts in relation to the assets in question.

[28] Rule 32.5 of the High Court Rules provides that a freezing order may be issued against a judgment debtor where judgment has been given in favour of the applicant by the Court. However, that is a different matter to the Court directing that payment be made to the judgment creditor from the defendant's frozen bank accounts. Nothing in any other part of r 32 dealing with freezing orders appears to explicitly or implicitly give the Court jurisdiction to order the payment of the frozen funds in this way.

[29] That is not to say, of course, that a party in the position of the plaintiff in this case may not be able to use the protection obtained by a freezing order in the execution of its judgment and the orders that I will make in respect of the current Westpac freezing order will permit conventional judgment execution in respect of those matters. I simply note, in this regard, that r 17.3 of the High Court Rules confirms that judgments in that Court may be enforced by one or more enforcement processes including attachment orders, charging orders, sale orders, possession

[3] *Halsbury's Laws of England* (5th ed, 2008) vol 49 at [998].

orders, and (although probably inappropriate in this case) arrest orders and sequestration orders.

[30] The District Court has similar debt recovery provisions although I am unsure whether that may extend to a debt of the sum for which judgment has been given in this case. In any event, that will be a matter for the plaintiff to pursue on advice.

[31] The second consequential application that the plaintiff does pursue is described as one for an asset ownership order. I am not without considerable sympathy for the plaintiff and indeed its solicitors but that cannot affect the existence of a power or jurisdiction of the Court to make an order.

[32] Since Mrs Hodgson's fraud and theft have come to light, it appears that she has been co-operative in identifying not only what she misappropriated and purchased, but also a number of those items, and has returned a large quantity of chattels, things such as designer clothing, jewellery, appliances and furniture to Mason Engineers. These are being held by its solicitors, the more manageable items in their offices and the less manageable items in rented storage. Nor am I in doubt, from the evidence, that these are chattels to which Mrs Hodgson does not have good title and are, morally at least, the property of Mason Engineers.

[33] The Act and the Regulations do not provide either an enforcement regime for Employment Court Judges, as I have already set out, nor the power to determine ownership of items and direct their return, even as between parties to an employment relationship. Mr Russell sought to persuade me of the existence of that power in a number of interesting ways but ultimately unsuccessfully. He referred, for example, to litigation in the Employment Relations Authority involving a party called Zion Wildlife Park in which the Authority has apparently directed the return of property between the parties.[4] I am not sure whether the question of the Authority's power to do so was at issue in that case and, of course, that was something undertaken by the Employment Relations Authority which is not the Employment Court.

[4] *Zion Wildlife Gardens Ltd v Busch* AA 257B/09, 4 November 2009.

[34] Mr Russell sought to draw an analogy with the Court's determination of the ownership of intellectual property in such cases as *Peterson v P and B Engineering Limited*[5] but again that is a very different thing from determining ownership of chattels which were purchased by an employee from the employer's property and which are sought to be transferred between parties. The recent case of *New Zealand Fire Service Commission v Warner*[6] does not extend, in my view, to confirming this Court's power to make such orders. Rather, it deals with whether an employer can recover monies overpaid to employees in the Employment Relations Authority. Nor do general statements about the Court's or the Authority's power to give effect to its other powers (that are clearly within jurisdiction) assist the plaintiff. Nor does s 189(1), the Employment Court's equity and good conscience jurisdiction.

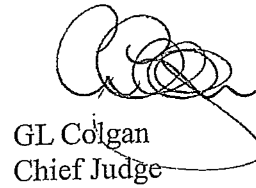
[35] In the absence of an express power in relation to execution and, in particular, one allowing the Court to determine property in chattels and direct their transfer to a party, I am not prepared to make the asset ownership order that the plaintiff seeks. That said, I have little doubt that the long schedules of items that have been presented are accurate and may be useful in a judgment execution exercise the plaintiff may need to take elsewhere.

[36] The current freezing orders in respect of the Westpac bank are extended to 12 noon on 1 February 2012 to enable execution against those funds by one of the several means that the plaintiff has open to it as a debt collection exercise. I acknowledge this is a somewhat artificial extension because by the terms of that freezing order, Mrs Hodgson will by then have been entitled to withdraw monies for her living expenses which will have exhausted the available funds in the account. But, for the sake of clarity, the current freezing order in respect of the Westpac bank account will expire on that day and will not be renewed.

[37] The plaintiff has sought what it describes as a modest award towards its costs, appreciating, I imagine, the practical futility of obtaining what would have been an unrealistic award. Although I would have been prepared to have made a more realistic award, I allow the plaintiff nominal costs of $3,000 on the judgment,

[5] AC 16A/09, 9 December 2009.
[6] [2010] NZEmpC 90.

together with such disbursements as may be approved by the Registrar, which disbursements may include the costs of forensic investigation and reporting incurred with the accountancy firm BDO, and the plaintiff's private investigators' reasonable costs.



GL Colgan
Chief Judge

Judgment delivered orally at 11.33 am on Thursday 10 November 2011