

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 121
ARC 35/11**

IN THE MATTER OF an application for a freezing order

AND IN THE MATTER OF proceedings removed

BETWEEN HALLY LABELS LIMITED
 Plaintiff

AND KEVIN POWELL
 Defendant

Hearing: By submissions filed on 26 June and 23 July 2012
 (Heard at Auckland)

Counsel: Chris Patterson, counsel for plaintiff
 Andrew Gallie, counsel for defendant

Judgment: 25 July 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] On 26 June 2012, the plaintiff filed an interlocutory application on notice for a freezing order, restraining the defendant, in respect of certain listed assets, from removing them from New Zealand or disposing of, dealing with or diminishing the value of them, other than for certain purposes (including payment of ordinary living expenses), until further order of the Court.

[2] The grounds included the following. The Court had issued a judgment in these proceedings on 13 June 2011,¹ which issued a declaration that the defendant had breached a restraint of trade obligation that he owed to the plaintiff. The plaintiff also has outstanding proceedings in the Court against the defendant for breach of his obligations of confidence, good faith and fidelity. There are parallel

¹ [2011] NZEmpC 60.

proceedings in the High Court at Christchurch against both the defendant and the entity that employed him. Damages in relation to the proceedings in both Courts have yet to be determined. The defendant has assets within New Zealand and, pending the final determination of the defendant's liability to the plaintiff, there is said to exist a danger that if these were to be sold, any judgment in favour of the plaintiff may be wholly or partially unsatisfied. The plaintiff has provided an undertaking as to damages and evidence of its ability to honour that undertaking was contained in an affidavit of Derek Trevor Westward Kamins, filed in support of the application. Other grounds for the application are also contained in that affidavit.

[3] In a supporting memorandum, filed with the application, Mr Patterson notes that while the plaintiff accepts that the issues in the proceedings before this Court overlap with issues in the High Court, he submits that it is clear that the Employment Court has no jurisdiction over the defendant's new employer or over the causes of action in conversion or the tortious breach of confidence pleaded in the High Court proceedings. The plaintiff also seeks that the proceedings in this Court be stayed until the related proceedings in the High Court are resolved with leave being granted to either party to bring the matter on for hearing by way of a request for a judicial conference.

[4] The defendant did not file any notice of opposition within the 14 days notice period provided in the application. On 23 July, a memorandum of consent, dated 18 July, was filed in the Court. It advises that the parties have been in discussions following the plaintiff's application for a freezing order and sets out what the parties have consented to by way of a Court order. A form of an interlocutory freezing order has also been filed.

[5] I am satisfied that the Court has under s 190(3) of the Employment Relations Act 2000, in addition to the powers described in ss (1), the same powers as the High Court to make a freezing order and search order as provided for in the High Court Rules. I have had regard to both the High Court Rules and this Court's practice direction.²

² Practice Direction: Search and Freezing Orders April 2012.

[6] A similar situation of a freezing order by consent was dealt with in a very recent judgment of Judge Inglis in *Horton Media Ltd v Tither*.³

[7] The present proceedings have a substantial history in this Court with detailed pleadings, affidavits and the judgment I have referred to above as well as others.⁴ I am satisfied from the application and affidavit of Mr Kamins dated 8 June 2012 that this would have been a proper case for the granting of the orders sought, on adequate evidence of dissipation of assets, because there was a danger that any judgment in favour of the plaintiff might be wholly or partly unsatisfied. In view of the lack of opposition and instead the consent filed by counsel for the plaintiff, this is an appropriate case to make the orders sought with necessary modifications to conform to the High Court Rules and this Court's practice direction, having regard to the overall interests of justice.

[8] Accordingly there will be an order by consent in the following terms:

1. Restraining the defendant, until further order of the Court and in respect to his interest in those assets listed in paragraph (2) below, from removing any assets from New Zealand or disposing of, dealing with, or diminishing the value of those assets which have an approximate value of \$1,000,000 other than for the following:
 - i. To pay his ordinary living expenses;
 - ii. To enable him to pay and continue to pay his reasonable legal expenses associated with defending these proceedings and any appeal there from;
 - iii. To pay his legal expenses related to the freezing order; or
 - iv. To commence and prosecute any bona fide claims in his own name;
 - v. To meet his taxation liabilities;
 - vi. To comply with any statutory requirements to which he is subject;
 - vii. To meet his normal accountancy fees; and
 - viii. To pay ordinary and proper business expenses.
2. The following assets:
 - (a) 629 Birchs Road, Christchurch being an estate in fee simple being Lot 29, deposited Plan 384799 and described in identifier 338973 (Canterbury);
 - (b) Purchas Street, Christchurch being an estate in fee simple being Lot 1, Deposited Plan 400545 and described in identifier 400675 (Canterbury);

³ [2012] NZEmpC 116.

⁴ See [2011] NZEmpC 43, (2011) 8 NZELR 532 and [2011] NZEmpC 63, (2011) 8 NZELR 547.

- (c) Manchester Street, Christchurch, being an estate in fee simple being Lot 1 of Deposited Plan 332739 and described as identifier 134091 (Canterbury);
 - (d) 44 Packe Street, Christchurch being an estate in stratum in freehold being Unit 5 Deposited Plan 340088 and described in Identifier 164615 (Canterbury) but the defendant wrongly listed as Kevin James Murray and not Kevin James Powell.
- 3. The defendant shall be entitled upon reasonable notice to the plaintiff to sell any assets listed in paragraph (2) above provided that any net sale proceeds are used to either:
 - i. pay any debt secured over that asset and any of the assets described in paragraph 2 above; or
 - ii. with the plaintiff's approval, such consent not being unreasonably withheld, reinvested which will then be subject to the same terms and conditions of this order.
- 4. This order shall remain in force for a period of 12 months from the date it is made with leave reserved for either party to refer the matter back to the Court on notice should there be any material change of circumstances.
- 5. The undertaking as to damages given by the plaintiff is to be attached to the freezing order issued by the Court.

[9] I also grant the plaintiff's application to stay the proceedings in this Court, with leave being granted to either party to bring the matter on for hearing by way of a request for a judicial conference.

[10] Although not expressly asked for in relation to either matter, costs are reserved.

B S Travis
Judge

Judgment signed at 4pm on 25 July 2012