

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2013] NZEmpC 196  
ARC 83/13**

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

BETWEEN                LABOUR INSPECTOR, MINISTRY OF  
BUSINESS, INNOVATION AND  
EMPLOYMENT  
Applicant

AND                      CIVIC CITY LIMITED  
First Respondent

AND                      RUM LIMITED  
Second Respondent

AND                      123J LIMITED  
Third Respondent

Hearing:                On papers filed on 17 and 22 October 2013

Appearances:         Sarah Blick, counsel for applicant

Judgment:             23 October 2013

---

**JUDGMENT OF CHIEF JUDGE G L COLGAN**

---

[1]     These are the reasons for granting, without notice to the respondents, the freezing orders which are attached to this judgment.

[2]     By a determination dated 28 August 2013<sup>1</sup> the Employment Relations Authority directed the three respondents to pay to the applicant sums totalling more than \$200,000, plus interest, together with costs which have still not been determined.

---

<sup>1</sup> [2013] NZERA Auckland 385.

[3] The Labour Inspector is representing the interests of 11 employees who worked for one or more of the three respondent companies and who claimed that they had been underpaid. The detail of those claims and the Authority's determination can be ascertained from the latter.

[4] On 25 September 2013 the respondents, as plaintiffs in ARC 77/13, filed a challenge to parts of the Authority's determination but have elected to proceed other than by hearing de novo. The time for the Labour Inspector to file and serve a statement of defence is still running.

[5] On the afternoon of 17 October 2013 the Labour Inspector filed an application for a freezing and associated orders which were referred to a Judge and considered immediately. The Court identified, by Minute issued later that day, a number of issues on which it required more information by affidavit and/or memorandum. This additional information was provided to the Court yesterday.

[6] The Court is empowered to make a freezing order by s 190 of the Employment Relations Act 2000. Under subs (3) the Court has the same powers as the High Court in such matters. This means that, in practice, the Court follows closely the practice and procedure of the High Court set out in r 32 of the High Court Rules, and I have done so in this case.

[7] The relevant facts established by affidavit evidence filed by the applicant include the following.

[8] Before the Employment Relations Authority's investigation meeting, the respondents acknowledged some holiday pay liabilities due to the 11 affected employees and a sum of a little more than \$2,000 was paid in to the Authority at that stage.

[9] Each of the respondent companies, which operated liquor stores in central Auckland, had a business bank account, two with the ANZ Bank and one with the BNZ. These were trading accounts through which passed funds including to

suppliers, employees, landlords and, it appears, insurers. The bank statements for these accounts also recorded deposits which appeared to be shop takings.

[10] Each of the three respondent companies is a separate legal entity although they were incorporated at different times. When the proceeding was before the Authority, the sole director of, and shareholder in, each of the companies was Mr Ala'a Bader.

[11] It has recently come to the Labour Inspector's notice that Symonds Liquor, situated at 83 Wakefield Street, Auckland, and operated by Rum Limited, has been sold. The statutory liquor licence appears to have been transferred to a company called Beerapu Limited which is owned by Beerapu Venu Mohan Reddy.

[12] Another of the respondents, 123J Limited, has recently changed its trading name from "Sky Liquor" to "City Liquor Stop" although the liquor licence remains also in the name of Mr Bader. This business operates at 16 Pitt Street, Auckland.

[13] The Labour Inspector's evidence is that on 8 October 2013 she interviewed Mr Reddy who is effectively the new owner and operator of Symonds Liquor which he told the Labour Inspector he purchased in July 2013. The sale of the Symonds Liquor business was not publicly advertised: rather, Mr Bader's agent made direct contact with Mr Reddy. The Symonds Liquor business appears to have been sold by Rum Limited to Beerapu Limited for a sum, including the value of stock on hand, that exceeds the amounts due by the respondents under the Authority's determination. The Labour Inspector has been unable to persuade Mr Reddy to affirm this evidence by affidavit but the Court has now been provided with a copy of the agreement for sale and purchase. Pertinently for the purpose of this application, the Labour Inspector deposes that Mr Reddy told her that Mr Bader's agent said that the Symonds Liquor business was being sold because Mr Bader wished to send the proceeds of sale to family members in Jordan.

[14] The Labour Inspector deposes to the retention by Rum Limited of a motor vehicle, a 1997 Toyota Hiace van, registered number DNG818. No further

information about this vehicle, including its value or whether title to it is encumbered, is provided.

[15] The applicant has adduced evidence which appears to show that Mr Bader departed from New Zealand for Thailand on 21 September 2013. Only the first destination of an outwards flight is shown. The Labour Inspector's investigations reveal that Mr Bader has not returned to New Zealand since that time. Similar evidence discloses that Mr Bader's wife departed from New Zealand on 2 July 2013 and has not returned. Both Mr Bader and his wife are citizens of the Hashemite Kingdom of Jordan.

[16] A Labour Inspector called recently at the respondents' registered office which is a residential address in the suburb of Ponsonby. Although this property appeared to be unoccupied, a letter of demand was delivered to a person who identified himself as Ala'a Bader who arrived at the address. Without more, this leaves open a number of possibilities including that this person was not Mr Bader, that Mr Bader has recently returned to New Zealand, and there may be other explanations.

[17] On 17 July 2013 a new company, of which Mr Bader is the sole director, was incorporated. This is Isiah Trustee Limited whose shares are owned by Mr Bader and his wife. Also incorporated on the same day, 17 July 2013, is another company of which Mr Bader is the sole director. This company, Pinnacles Trading Limited, has its registered office at 16 Pitt Street, Auckland, which is the same address at which 123J Limited operated and still operates Sky Liquor (although now trading as City Liquor Stop). The Labour Inspector does not know of the circumstances in which those two companies were incorporated but points out that they both came into being at the same time which coincided with the sale of Symonds Liquor before the Authority issued its determination.

[18] So far as the Labour Inspector knows, the assets of the respondent companies are their leases, liquor and food licences, goodwill, equipment and fittings, and stock in trade. The Labour Inspector's concern is that any sale of these businesses and the dissipation of the proceeds of sale would result in the loss of any chance of recovery of the amounts owing in minimum wages and holiday pay to the ex-employees, not

to mention the penalties which are payable in part to the Crown and in part to those complainants.

[19] There are four circumstances of which the Court must be satisfied before making a without notice freezing order.

[20] The first is that the applicant has a sound arguable case against the respondents. This is to be stronger than the arguable case necessary for an interlocutory injunction but need not be so strong as to entitle the applicant to a summary judgment if the proceeding were in another court.<sup>2</sup>

[21] The Labour Inspector has obtained a determination in her favour on the merits in the Employment Relations Authority. Although there is a challenge to aspects of this determination by the respondents, the existence of a challenge does not operate as a stay of proceedings and the fact of a challenge alone has little significance. What may be ascertained, however, from the Authority's determination and the respondents' statement of claim on the challenge, is the apparent strength of their cases. Both in the Authority and in this Court, the respondents are represented by counsel including, now, a barrister experienced in employment law.

[22] As to a fair assessment of the case that the respondent may have to resist the Labour Inspector's claims which will be dealt with in the context of their challenge to the Authority's determination, there is helpful information both in that determination and in the respondents' comprehensive statement of claim on that challenge prepared by counsel.

[23] The respondents admit owning and operating liquor stores in central Auckland and employing the complainants at various times in 2011. They say that they maintained records of the hours worked by those employees and, from these records, calculations were made by their accountant of wages and PAYE payments. The respondents dispute the applicant's case and the Authority's findings that each of the complainants worked substantially more than the maximum of 20 hours per week

---

<sup>2</sup> The Employment Relations Act 2000 prohibits the Court from granting orders for summary judgment (s 187(2)) although this does not preclude the Court from applying the same standard of proof.

allowed for on their temporary student visas. The respondents assert that the complainants were paid “at least the minimum wage for all hours worked”. They claim that one of the complainants, Manish Sharma, took records of the hours worked by the complainants away from the respondents’ premises, showed them to an employment relations consultant, but did not return these records.

[24] Without conceding liability for any arrears, the respondents say that even if they may be liable for arrears of wages and/or holiday pay, their breaches do not warrant penalties and certainly at the level imposed by the Authority. Finally, the respondents’ case is that the Authority incorrectly determined that they were operating together in the nature of a partnership so that it was appropriate that their liabilities to their employees be joint and several across all respondents.

[25] Although the respondents dispute that they breached ss 50 and 60 of the Holidays Act 2003 because they say the complainants did not work on public holidays, they do not contest the Authority’s finding that they each breached s 23 of the Holidays Act and s 65 of the Employment Relations Act but say that the penalties imposed upon by them by the Authority were excessive in light of their limited financial means.

[26] I am satisfied that the applicant succeeds on the first test, that is that she has a good arguable case in defence of the respondents’ claims.

[27] Next, it must be shown that the respondents have assets that are within the jurisdiction. That is satisfied both by the Authority’s determination and the evidence set out above about the businesses. I accept that the assets of the businesses probably include also stock and computerised sale systems, cash registers, chillers for alcoholic beverages, and security camera systems. There is also the evidence that the Symonds Liquor business recently sold for a specified sum and although there is no evidence of the comparative scales of the other businesses, I am prepared to assume that each will have more than a minimal inherent value.

[28] Next, and perhaps most significantly, is the issue of the risk of dissipation of funds or assets by which the Authority’s determination, or the Court’s judgment on a

challenge from that determination, may be satisfied. This is always a difficult issue for an applicant to satisfy evidentially. As Ms Blick has pointed out, affirmative proof of the likelihood of dissipation or of other nefarious intent in relation to assets is unnecessary: *Bank of New Zealand v Hawkins*<sup>3</sup> and *McNaught v Predict (NZ) Ltd.*<sup>4</sup>

[29] The strongest evidence of an intention to dissipate funds is the reported statement by Mr Bader's agent to Mr Reddy that the sole director of, and shareholder in, the respondent companies wished to send the proceeds of the sale of Symonds Liquor to Jordan, combined with the fact of the absence of Mr Bader and his wife from New Zealand, and the likelihood, given their Jordanian citizenship, that they are now in that country.

[30] I am not, however, prepared to accept that the Authority's findings of credibility of the ex-employees necessarily mean that Mr Bader or other representatives of the respondents who gave evidence were not truthful witnesses or, especially, that they are likely to act dishonestly to avoid liability by moving assets from the jurisdiction or otherwise dissipating them. That submission does not avail the applicant.

[31] Finally, the Court must consider the balance of convenience and the overall justice of making a freezing order. It is a serious step to interfere with the business of a trading company by constraining what it may do with its assets. As against that, the Labour Inspector has a decision from the Employment Relations Authority following a lengthy and detailed investigation in which the respondents participated with the benefit of counsel. The monies relate, in substantial part, to fundamental employment elements such as arrears of wages and holiday pay.

[32] Another relevant consideration that was not originally touched on when the papers were filed, but on which further information has now been supplied to the Court, is the respondents' response to requests or demands for compliance with the Authority's determination. Even when, as here, a challenge is filed and served

---

<sup>3</sup> (1989) 1 PRNZ 451.

<sup>4</sup> [1996] 2 ERNZ 546.

within time, it is usual to expect a successful party to inquire about payment. That has now occurred and counsel representing the respondents has advised the Labour Inspector that the companies are working with an accountant to finalise statements of financial position to use these to support an application for stay of execution of the Authority's orders if that is necessary. Counsel has advised the Labour Inspector:

The companies would of course prefer to reach an agreement with the Ministry about an appropriate payment into court rather than formally apply for a stay of proceedings.

So as soon as they have a clear picture of their financial position, which is expected to be within the next one or two weeks, I will likely be in touch with you to discuss whether agreement can be reached on that issue.

[33] Whilst that response does indicate a positive engagement with their obligations by the respondents, it also indicates that it will be some time before they are in a position to address the issue of what is to happen until the challenge is heard. The respondents appear to accept principle that at least some of the monies ordered by the Authority should be paid into Court pending the conclusion of their challenge. It is notable, however, that there is still no reference to the sale of one of the businesses.

[34] The Labour Inspector relies upon what he says was a failure by the respondents to advise her or the Authority of the sale of the Symonds Liquor business, which process began when these proceedings were before the Authority. This failure is said to support nefarious intent on the part of the respondents and, thereby, to increase the likelihood of dissipation of their assets. When I inquired of counsel for the Labour Inspector what obligation there was on the respondents to disclose to the Labour Inspector or the Authority information about the actual or pending sale of one of the businesses, Ms Blick conceded that there was no express statutory requirement to this effect.

[35] The Labour Inspector's point is, however, that the respondents have been less than forthright about their financial positions, and continue to be so to date. Despite the absence of a positive obligation in law to make frank disclosure, I consider that the absence of any reference by the respondents to a significant element of their



actual financial position (the recent sale of one of the businesses), is a factor which counts in favour of the exercise of the Court's discretion to make a freezing order.

[36] There are protections which must attach to any freezing and associated orders that are made. They are to be limited in time and there must be a certain date when they will be reconsidered by the Court. Further, the respondents will have the opportunity to apply to vary or set aside the freezing orders and the Court will accord urgency to any such application that is made.

[37] Not all of the respondents' assets can be frozen. Exemptions apply to funds for the payment of legal expenses relating to the freezing order and for the purchase and sale of stock to customers or the making of other payments in the ordinary course of business including business expenses incurred in good faith.

[38] If the respondents had continued not to pay the sums directed by the Authority or otherwise made arrangements for these to be secured, the Labour Inspector could have applied for an order staying the challenge conditional upon the payment of the sums to the Registrar to be held pending the outcome of the challenge. Such orders are frequently granted on these conditions. On the information available to the Court at this stage, there would be a prima facie case for staying the challenge on such conditions, at least so far as the arrears of wages and holiday pay (and interest on these sums) is concerned but perhaps also in respect of the penalties or a proportion of them. In these circumstances the interests of justice would seem to favour the making of the freezing orders concerned.

[39] I confirm that I have waived a requirement for the applicant to give the usual undertaking as to damages required on such an application. That is in the following circumstances.

[40] Although r 32.2(5) of the High Court Rules requires an applicant for a freezing order to file a signed undertaking that the applicant will comply with any order for the payment of damages to compensate the respondent for any damages sustained in the consequence of the freezing order, r 32.6(4) provides, somewhat enigmatically: "Unless there are special circumstances, the court must require the

applicant for a freezing order to give appropriate undertakings, including an undertaking as to damages.”

[41] Ms Blick for the applicant points out that s 65ZC of the Public Finance Act 1989 provides: “Except as expressly authorised by any Act, it is not lawful for any person to give a guarantee or indemnity on behalf of or in the name of the Crown.” Although Ms Blick submits that there is no express statutory provision authorising the applicant to give an undertaking as to damages which would amount to a guarantee or indemnity, and therefore that any requirement by the Court would be in conflict with s 65ZC of the Public Finance Act, the High Court Rules just referred to would appear to provide statutory authority to this effect. The question was the subject of observations by Judge AA Couch in *Y v Kevin Hyde Engineering Ltd*<sup>5</sup> where the Judge had to deal with an application for exemption from giving an undertaking although not by the Crown. At [29] of the judgment the Judge noted: “The decided cases regarding that rule, however, identify exceptions to the absolute nature of it. Those exceptions include applications made by officers of the Crown and in some public law cases.”

[42] The Judge cited, as authority for the proposition that applications by officers of the Crown are exempt, the judgment in *Registrar of Companies v Nearzero Inc.*<sup>6</sup> Ms Blick has also cited a number of cases where the Crown being an applicant amounts to special circumstances under the High Court Rules. These include *Official Assignee v Fry.*<sup>7</sup>

[43] I accept that an application by a statutory Labour Inspector for orders as claimed in this case constitutes the special circumstances which may exempt the applicant from giving such an undertaking. I am satisfied that the Crown will meet any order that the Court may make as to damages and so, in these circumstances, that requirement is waived.

[44] The freezing orders, a copy of which will be attached to this judgment, will expire at 4 pm on Monday 4 November 2013.

---

<sup>5</sup> [2013] NZEmpC 129.

<sup>6</sup> HC Nelson CIV 2007-442-220, 16 July 2007.

<sup>7</sup> HC Auckland CIV 2009-404-439, 4 February 2009.

[45] The case will be called in the Employment Court at Auckland at 10 am on Monday 4 November 2013 and, as already stated, any party has leave to apply for any further orders or directions including for modification or setting aside. Any such application must be brought on no less than 48 hours' notice to other parties.

[46] In the particular circumstances of the case, and because Mr Bader may be away from New Zealand, the sealed orders and a copy of this judgment must be served by the Labour Inspector not only on the registered offices of the respondent companies, but also on their solicitors, St Mark Law of Browns Bay, Auckland, for the attention of Mr N Faltaus of that firm.

[47] Costs on this application are reserved.

[48] There is to be no publication by or to any person of this judgment or that material contained in it (except to the applicant and otherwise as is necessarily required for service of the orders made), until after service of the orders has been effected.

GL Colgan  
Chief Judge

Judgment signed at 10.00 am on Wednesday 23 October 2013