

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 225
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: 3 December 2013
(Heard at Auckland)

Appearances: Rebecca Denmead, counsel for applicant
Mark Donovan, counsel for respondents

Judgment: 3 December 2013

ORAL JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The applicant seeks a further extension of the freezing orders made originally on 23 October 2013 and renewed since then.¹ There is now a little more information before the Court about the financial positions of the three respondents. However, the applicant says that this is still insufficiently complete and/or so equivocal as to warrant an extension of the freezing orders until this information has been provided properly and clarified.

¹ [2013] NZEmpC 196, [2013] NZEmpC 198, [2013] NZEmpC 204.

[2] Evidence put before the Court by the applicant now establishes the following.

[3] In relation to 123J Limited, this company was, at 13 November 2013, in default of its statutory obligation to file an annual return and the Registrar of Companies was satisfied that 123J Limited had ceased to carry on business. The Registrar had initiated action to remove the company from the Companies Register in these circumstances. The Labour Inspector's evidence is that the company was nevertheless continuing to trade and she lodged an objection to the removal of the company from the Register. This objection was accepted on or about 26 November 2013 so that 123J Limited remains on the Register.

[4] Next, the evidence establishes that there is an agreement for the sale of 123J Limited's assets to a company called UP Enterprises Limited. This agreement is undated but provides for a sale price comprised of figures of which the Court and the parties are aware but which are not to be published pursuant to cl 12 of sch 3 to the Employment Relations Act 2000.

[5] In compliance with cl 9 of the freezing orders made by the Court on 23 October 2013 and extended until today, a form of report on the respondents' financial positions and identification of their assets and values was received by the applicant on 7 November 2013. These schedules have been prepared by Smart Tax Solutions, which appears to be a firm of chartered accountants and business advisers.

[6] As to the third respondent, 123J Limited, this report discloses that as at 6 November 2013 the current and fixed assets of the company were said to amount to about \$21,000, whilst its liabilities were almost \$39,000.

[7] As to the second respondent, Rum Limited, the current assets of this company as at 6 November 2013 were said to be about \$460. There were no fixed assets. Liabilities were said to be about \$175,000, consisting principally of a GST debt and what is described as "Ala'a Bader loan account". There is a notation that this "business was sold on 13 April 2013."

[8] Civic City Limited's assets and liabilities position as at 6 November 2013 are said to be as follows. Coincidentally or perhaps not, its current assets were precisely to the cent the same as those of Rum Limited's bank funds of \$359.96, although in different accounts with different banks. Civic City Limited had no other fixed assets. That company's current liabilities amounted to little more than \$9,000 including trade creditors of \$7,310, and the balance due to the Commissioner of Inland Revenue.

[9] The applicant is concerned that there is no information provided about the very low balance of funds available, nor where and how proceeds of the sale of Rum Limited have been disbursed. The Labour Inspector also expresses her concern that to date, no information has been provided about the proceeds of the sale of the business trading as Symonds Liquor. Nor, as is pointed out, is there any explanation for the substantial debt to Ala'a Bader or when this was incurred.

[10] The applicant has obtained bank statements for 123J Limited and Rum Limited for the period 1 January 2011 to 31 October 2013. Rum Limited held three separate accounts in respect of its business but into none of which had any proceeds of the sale of company assets been paid. The Labour Inspector is concerned that the proceeds of the sale of Rum Limited's trading entity, Symonds Liquor, which was sold either to Mr Bader or Beerapu Reddy, had not been deposited into Rum Limited's accounts. This may mean either that Rum Limited has other bank accounts of which the Labour Inspector is unaware or, she speculates, that the proceeds of the sale have gone directly to Mr Bader's personal account.

[11] The Labour Inspector accepts that Civic City Limited was sold for an amount of which the Court and the parties are aware but which is not to be published pursuant to cl 12 of sch 3 to the Employment Relations Act 2000, in September 2013 but there is no information yet provided as to where the proceeds of that sale were deposited or how the amounts were disbursed. The Labour Inspector does not have a copy of the sale and purchase agreement evidencing that sale.

[12] The Labour Inspector has produced a copy of an agreement for sale and purchase of the Symonds Liquor business. This shows the vendor as being Mr Bader

and the purchaser as Mr Reddy. The Labour Inspector's advice is, however, that the Symonds Liquor business was the property of Rum Limited and not Mr Bader personally. The Symonds Liquor business was sold for an amount of which the Court and the parties are aware but which is not to be published pursuant to cl 12 of sch 3 to the Employment Relations Act 2000.

[13] This caused the Labour Inspector to consider that there may have been a previous sale or other form of transfer of the Symonds Liquor business from Rum Limited to Mr Bader although no such transaction has been referred to previously and it is not apparent from the schedule of financial positions provided to the Labour Inspector. The applicant says that if this occurred it must have been after the Labour Inspector had brought claims against Rum Limited although neither the Labour Inspector nor the Employment Relations Authority was advised of any such sale despite proceedings being before it in respect of Rum Limited trading as Symonds Liquor. The respondents' schedule of financial positions states that Rum Limited was sold on 13 April 2013 which is the same date as that of the agreement for sale and purchase of Symonds Liquor between Mr Bader as vendor and Mr Reddy as purchaser.

[14] The Labour Inspector has obtained her own report from chartered accountants which examines the statements of financial position for the three respondents. This report, to which I will refer by the shorthand "the Pepper report", notes, first, that there are no contact or other address details for "Smart Tax Solutions" although the Pepper report has identified that this may be a company called Smart Tax Solutions Limited which is a member of the New Zealand Institute of Chartered Accountants.

[15] The Pepper report notes that, unusually for trading entities, there are no inventories listed under each of the businesses. Next, the Pepper report says that the information about Rum Limited shows substantial creditors and no assets, indicating that either the company must have been trading at a considerable loss or its assets were removed and sold at a loss. The Pepper report also notes that the creditors of Rum Limited are not sufficiently identified.

[16] The foregoing summary of the position indicates both its complexity and the inadequate explanations of it which underlie the applicant's request for a renewal of the freezing orders and for more particular information to be provided to the Labour Inspector and to the Court.

[17] The current freezing orders should be continued, if only because I am not satisfied that the respondents have complied sufficiently with the original orders made on 23 October 2013. Clause 9 of those required the respondents: "... within 10 working days of service of this order upon you to serve on the Applicant a schedule which fully particularises your financial position and identifies all assets and their value".

[18] Mr Donovan submits that this was interpreted by the respondents and their advisers as a requirement to provide a bare snapshot of that position but the requirement of that part of the order that the respondents fully particularise their financial positions goes further than that.

[19] The meagre and very probably incomplete information supplied by the respondents does not comply with this requirement. Fully "particularising" a company's financial position should, in my view, include at least a copy of its latest set of accounts, any interim accounts, and information about significant transactions such as a sale of the assets of a company.

[20] All of that information should be given to the Labour Inspector and to the Court and I think in the position now reached, this should be provided on affidavit to the Court. I should make clear that the sanctions for non-compliance with the orders that I am about to make may include a stay of the company's challenges to the Authority's determination, the summoning of key personnel including the businesses' accountants to be examined in court, orders for costs, and potentially a requirement to give security for costs on the challenge. Although the applicant does not contend, and I do not say that there has been deliberate disobedience of court orders or that the respondents have tried to obfuscate or mislead the Labour Inspector and the Court, the time has now come for clearer and more detailed information to be provided.

[21] There is another element which makes compliance by the respondents with the orders that I am about to make all the more important. As from 20 December 2013 the Court will not be able to deal with these matters until early February 2014 and, given Mr Bader's continued absence in Jordan and the difficulties of communication with him and his key role in the respondent companies, there is unfortunately going to be no alternative but to extend the freezing orders until early February 2014 to enable compliance with the directions that I am going to make.

[22] In these circumstances, the freezing orders made on 23 October 2013 are renewed and extended so that they will expire at 4 pm on Monday 3 February 2014. Additionally, the respondents must now provide further information covered by cl 9 of those orders and on affidavit by a knowledgeable representative of the respondent companies. That additional information to be provided by affidavit must include:

- Fuller particularisation of the companies' financial positions including copies of latest accounts and any draft accounts in existence for them;
- full disclosure of the circumstances of the sale of the business which traded as Symonds Liquor including, but not limited to, whether there was previously a sale of this business from Rum Limited to Mr Bader, the details of that sale to Mr Reddy, and otherwise how the sale now evidenced by an agreement for sale and purchase appears to have been by Mr Bader personally;
- the details of the persons and account or accounts to which the proceeds of the sale of Symonds Liquor were deposited; and
- the circumstances of the retail business Civic City Limited including disclosure of the sale and purchase agreement which has been referred to in this judgment but is not before the Court.

[23] I think it would be unreasonable to require that further information to be provided by the respondents within 10 working days from today which would, in any event, bring us to the eve of the Christmas vacation and would not allow the Labour Inspector sufficient time to consider that information and respond to it. In these

circumstances, the respondents may have until 4 pm on Friday 24 January 2014 to file and serve information including the affidavits that I have directed. That will enable the Labour Inspector to have a clear working week before the matter is back in court on Monday 3 February 2014 to consider her position and take advice.

[24] Following the pattern of this case so far, and the expiry of the freezing orders at 4 pm on Monday 3 February 2014, the hearing will now be adjourned until 10 am on Monday 3 February 2014 for the Court to consider the further information to be provided and how the proceedings may be disposed of.

[25] I will again reserve costs on today's hearing.

[26] This and the following paragraphs have been added to the foregoing text of the oral judgment that I delivered in court. I omitted to deal with one matter and do so now.

[27] The respondents have asked that the Court approve the expenditure by them on the preparation, collection and presentation of accounting evidence as now directed by the Court. This task probably does not fall within the ordinary course of business which the freezing orders permit to be paid for by the respondents. The Labour Inspector does not oppose such a provision. In these circumstances, the respondents are permitted to expend up to \$5,000 (including GST) on the costs of preparation and presentation of the evidence that the Court requires. This allowance is on condition that this work is charged for at standard chartered accountancy rates, and that a copy of the account for those services, describing them and the charges for them, shall be given by counsel for the respondents to the Labour Inspector and to the Registrar of the Court before the next hearing.

GL Colgan
Chief Judge

Judgment (paras [1]-[25]) delivered orally at 10.54 am on Tuesday 3 December 2013
Judgment (paras [26]-[27]) delivered at 9 am on Wednesday 4 December 2013