

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 172
EMPC 320/2020**

IN THE MATTER OF	an application for a freezing order
AND IN THE MATTER OF	an application for a variation of an order
BETWEEN	NEW ZEALAND TECHNOLOGY GROUP HAWKES BAY LIMITED Applicant
AND	HAIG DAVID CHARLES FLASHOFF First Respondent
AND	DONALD PETER PRICE Second Respondent
AND	RAYMOND REGINALD TAYLOR Third Respondent
AND	SEAN GLASSPOOL Fourth Respondent
AND	ENGAGE TECHNOLOGY LIMITED Fifth Respondent

Hearing: 22 October 2020
(Heard at Wellington)

Appearances: W Hofer and K McLuskie, counsel for applicant
S Bisley and J Maltby, counsel for first, second, third and fifth
respondents
C Rieger and D Brabant, counsel for fourth respondent

Judgment: 23 October 2020

**JUDGMENT (NO 2) OF JUDGE B A CORKILL
(Application for variation of an order)**

[1] Last Friday, 16 October 2020, the applicant sought on a ‘without notice’ basis, and was granted, a freezing order against each of the respondents.¹ The order stated it would be reviewed at 2.15 pm on 22 October 2020, but leave was reserved to any respondent to apply on very short notice for any variation or other necessary directions.

[2] On 20 October 2020 the Court was advised by memorandum that the respondents wished to apply for discharge of the freezing order, but that the complexities of the case were such that it was not feasible for that application to be heard on 22 October 2020. The Court was also advised that an application for variation of the order to allow the payment of staff wages and relevant legal expenses would be filed. After hearing counsel, I timetabled that application for consideration on 22 October 2020. I also made one modification to the form of order and reissued it on that date.

[3] The anticipated application for variation then came before the Court, and was considered at a hearing held on an urgent basis yesterday afternoon. After hearing detailed submissions, I issued a further amended freezing order last evening, together with a minute timetabling further steps in the proceeding. Since it will be necessary to refer in some detail to the terms of the further amended freezing order, a copy is attached to this judgment.

Background

[4] The chronology of events giving rise to these steps is complex. There are significant disputes between the parties on some matters.

[5] Briefly, New Zealand Technology Group Hawkes Bay Limited (NZTG) provides ICT services to small to medium-size businesses in the Hawke’s Bay. In establishing its operation in that area, it identified local companies that also provided those services, and sought to acquire their assets and businesses and then employ relevant personnel.

¹ *New Zealand Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZEmpC 170.

[6] Five such businesses were acquired by NZTG in about 2017. The first to third respondents owned three of those entities.

[7] Agreements for sale and purchase (ASPs) were entered into, as were independent employment agreements between NZTG and the first four respondents.

[8] On 7 September 2020 each of the first to fourth respondents wrote to NZTG resigning with immediate effect; a letter was sent on the same day on behalf of the first to third respondents, and a fourth person, Mr Peter Dunkerley, seeking to terminate the ASPs under which the relevant businesses had been acquired by NZTG.

[9] Prior to these events, the first to third respondents and Mr Dunkerley had incorporated Engage Technology Limited (ETL), the fifth respondent in this proceeding.

[10] NZTG alleges that the first to fourth respondents, and 18 other employees, vacated NZTG's premises, taking assets, including confidential information, passwords, security data, vehicles, laptops, phones and other equipment. It also alleges that all these steps were pre-planned. It is contended that ETL then emailed all of NZTG's clients, directing them to pay it for services provided by NZTG and stating that ETL would be servicing the customers in the future.

[11] Proceedings based on the individual employment agreements were instituted by NZTG in the Employment Relations Authority. The background to those proceedings is set out in my first judgment of 16 October 2020.² On 29 September 2020 the Authority granted NZTG's application for an interim injunction.³ The order made by the Authority required the first to fourth respondents to comply with their employment agreements. The particular provisions with which the respondents were to comply related to not using or taking confidential information of NZTG; not soliciting its clients; returning all its property to it; and in some cases not working within a 50-kilometer radius of NZTG's offices for a business in the same industry.

² *Flashoff*, above n 1, at [10]–[12].

³ *NZ Technology Group Hawkes Bay Ltd v Flashoff* [2020] NZERA 388 (Member O'Sullivan).

[12] In relation to the order that property be returned, some items were then returned; however, NZTG contends that there are many more that should have been surrendered. Further, it says that ETL has effectively taken over its business, its assets, and its former employees. Finally, it is argued that ETL is retaining for its own use payments received which are, in reality, monies belonging to NZTG.

[13] For their part, the respondents strongly contest these assertions. They say that the ASPs were entered into in the expectation of shareholders' agreements being entered into, which would be finalised before the end of April 2017.

[14] It is contended that all such agreements provided that the owners in the businesses being acquired would obtain shares in NZTG, with the precise amount to be determined in different ways from a valuation of the business which would establish the value of the shares. It is their case that some, but not all, of the ASPs provide that if the shareholders' agreement could not be agreed, the vendors would be entitled to defer the settlement agreement or unwind the initial transaction. They say that this was an essential term of all the ASPs.

[15] It is contended that in fact the shares in NZTG were never transferred. Nor was any shareholder agreement executed. Thus the first to third respondents received either no, or greatly reduced, compensation for valuable businesses. They say that despite repeated efforts to perform the ASPs, NZTG has refused to do so. It is their case that, in effect, their businesses were taken from them.

[16] They also say the subject assets were removed on the basis that the ASPs were invalid for want of consideration, and that the employment agreements were void as a consequence of the breaches. When they removed their businesses from NZTG's possession, they considered that both the APSs and the employment agreements had no further effect.

Legal framework

[17] It is necessary to describe the legal principles which apply to an application for variation of a freezing order.

[18] Section 190(3) of the Employment Relations Act 2000 (the Act) provides that the Court has the same powers as the High Court to make a freezing order, as provided for in the High Court Rules 2016.

[19] Part 32 of those Rules is applied by the Court, therefore, with appropriate modifications.

[20] Rule 32.8 provides that a freezing order must reserve leave to a respondent to apply for the Court to discharge or vary the freezing order. There is accordingly jurisdiction to consider both the present application for variation and the intended application for discharge.

[21] The first legal point I should mention relates to the Court's ability to consider the merits on the present application for variation.

[22] The parties have agreed that the application for discharge will be considered at a hearing on 4 November 2020, on the basis that the freezing order will continue in the meantime subject to any directions the Court might make varying the terms of that order.

[23] Before the freezing order could be made, the Court had to be satisfied that the applicant had a "good arguable case on an accrued or prospective cause of action" against the respondent.⁴ The Court was satisfied to the necessary standard.

[24] The Court of Appeal has confirmed that a good arguable case is established if the allegations in the proposed claim are capable of tenable argument and are supported by sufficient evidence, bearing in mind the early stage at which the application is likely to be brought: *Hannay v Mount*.⁵

[25] Thus, a freezing order once made continues on the basis that the proposed claim brought by the applicant is capable of tenable argument, as assessed on a provisional basis.

⁴ High Court Rules 2016, r 32.5(1)(b).

⁵ *Hannay v Mount* [2011] NZCA 530 at [22].

[26] Since that threshold has been cleared, and it is common ground that the freezing order will continue, it is inappropriate for the Court to go any further in assessing the merits of the strongly contested claims and counterclaims which the parties either have raised, or intend to raise.

[27] The second legal point which is relevant for present purposes is that, as again confirmed by the Court of Appeal in *Hannay*:⁶

The essential basis of a freezing order is to prevent the dissipation of assets by an actual or prospective judgment debtor, when such dissipation has the effect or object of denying the claimant or judgment creditor satisfaction of their debt.

[28] A freezing order does not give a plaintiff priority; nor is it intended to have a punitive effect on a defendant against whom nothing has yet been proven.⁷

[29] For these reasons, a defendant is permitted to draw on assets to make payments in good faith in the ordinary course of business. That point is enshrined in r 32.6(3) which confirms that a freezing order does not prohibit a respondent from dealing with assets covered by the order for the purpose of:

- paying ordinary legal expenses; or
- paying legal expenses related to the freezing order; or
- disposing of assets, or making payments, in the ordinary course of business, including business expenses incurred in good faith.

[30] Any application for variation must, therefore, be considered in light of these principles. I have considered relevant authorities which have done so.⁸

⁶ Above n 5, at [20].

⁷ See, for example, *Twentieth Century Fox Film Corp v Dotcom* [2016] NZHC 1948 at [28].

⁸ *A v C (No 2)* [1981] 1 QB 961 (QB); *TGB Holdings Ltd v BFP Trustees No 1 Ltd* HC Whangarei CIV 2009-488-566; and *Dotcom*, above n 7.

Discussion

[31] I turn to consider each of the points that the Court has been required to consider, briefly summarising in each instance the case made for each party.

Nature of bank accounts which the order may affect

[32] The Court is advised that various banks have been served with copies of the freezing order, and that two of them have raised a query as to whether the terms of the freezing order as made apply to joint accounts in the absence of a specific reference in the order that it does.⁹

[33] In the course of the hearing, I indicated that the applicant had applied for, and been granted, an order in broad terms which related to any funds held in any and all bank accounts in the name of the first to fifth respondents. In my view, that formulation covered joint accounts. It appears that is not clear to two of the banks involved.

[34] Ms Rieger, counsel for the fourth respondent, raised a concern that an order which referred expressly to joint accounts would create undue hardship if a relevant bank was to freeze such an account, and then not permit any withdrawals at all as is the case in respect of her client.

[35] Mr Hofer, counsel for NZTG, advised that steps were being taken between the parties to agree the scope of “ordinary living expenses” which could be withdrawn, with a view to those agreements being advised to any relevant bank so as to ensure that appropriate withdrawals can be made.

[36] In light of that sensible step, I considered it appropriate to clarify the terms of cl 4 but, at Ms Rieger’s invitation, I have also reserved leave to any party to apply on short notice for any necessary further directions from the Court.

⁹ Reliance was placed by those banks on *Z Ltd v A-Z* [1982] 1 QB 558 (CA).

Staff wages

[37] The respondents sought a variation to allow the fifth respondent to pay staff wages and salary which were due for immediate payment. “Staff” comprises some 25 persons, including the four respondents and 21 persons who were previously employees of NZTG.

[38] It is accepted that all those persons are in fact employees of ETL. They are paid monthly. The total sum due for payment as at yesterday was estimated to be approximately \$90,000. ETL’s bank account held, as at 20 October 2020, \$154,958.96. Although no evidence was provided on the point, counsel accepted it is likely that sum will increase as customers credit sums for which they have been invoiced.

[39] For the respondents, it was submitted that the references in the Rules, and in the standard form of order annexed to those Rules authorising payments made in the ordinary course of business, must include wages and salaries.¹⁰ Typically, payments made in the “ordinary course of business” means normal, customary or usual payments. Wages and salary are such payments.

[40] For the applicant, it was submitted that the circumstances were highly unusual. Mr Hofer submitted that in considering whether ETL should be able to pay its staff, there should be an acknowledgement that the entire business has been created by utilising NZTG assets and former staff, and this meant that a different approach was justified, one which did not entitle it to benefit from the high-handed steps which had been taken. He said that ETL, the first to fourth respondents and for that matter the other staff who had resigned and taken up employment with the new entity, should not benefit from their own wrongdoing.

[41] Mr Hofer submitted that NZTG’s damages claim would eclipse the funds ETL currently holds; on that basis alone ETL’s bank account should not be dissipated by the payment of staff wages. He also argued that ETL was, in effect, proposing to use money that should have gone to NZTG.

¹⁰ High Court Rules, sch 1 form G38.

[42] There are several reasons as to why the Court cannot accept the applicant's submissions.

[43] First, as already explained, NZTG's claims have not been tested. All that has happened is that the Court has found it has a tenable claim. On an application for variation in these circumstances, it is not appropriate to make significant findings as to the merits.

[44] Second, it is clear from the Rules, and many authorities, that a party is not prohibited from making payments in the ordinary course of the party's business, including business expenses incurred in good faith. To do so does not amount to unjustified dissipation of assets.

[45] To some extent, the applicant accepted this at the outset, when acknowledging that ETL should be permitted to make payments to third party suppliers in the ordinary course of business incurred in good faith. But the order sought should not have been so limited.

[46] As noted in an English authority, "it could not possibly be said that [a respondent] is dissipating his assets by living as he has always lived and paying bills such as he has always incurred."¹¹

[47] That the payment of wages and salary is plainly an "ordinary business expense" is reinforced by the terms of the Minimum Wage Act 1983, which states that each employer carries a mandatory obligation to pay, at least, the minimum wage to its employees.¹² Plainly, Parliament has recognised that wages are not only an ordinary business expense but a mandatory one, at least to the extent of any current Minimum Wage Order. Mr Hofer properly accepted there was no obvious answer to this point.

[48] Inherent in Mr Hofer's submission is the proposition that not only the respondents, but NZTG's former employees who elected to resign and work for ETL, should not benefit by being paid wages. For several reasons, this submission cannot

¹¹ *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158 (QB) at 162.

¹² Subject to very limited exceptions which do not apply in the present case: eg Minimum Wage Act 1983, ss 7–8.

be accepted. First, there is no evidence relating to the circumstances of each of those individuals; second, they are not parties to this proceeding; and third, I have not been persuaded that there is any possible basis in law for reaching such a conclusion.

[49] For the foregoing reasons, I concluded that there should be a clarification of the order, making it clear that the fifth respondent is not prohibited from making payments in the ordinary course of its business, including business expenses incurred in good faith. I record that this amendment means the fifth respondent is permitted to pay wages and salary to its employees.

Legal expenses

[50] It is common ground that the first to fourth respondents should be permitted to utilise bank accounts in which they have an interest to pay legal expenses, not only with regard to the freezing order proceeding, but also in respect of the proceedings in the Authority.

[51] I interpolate that there was discussion at the hearing as to whether a proceeding might be issued in the High Court to deal with matters relating to the ASPs and ownership of assets. However, that step has not been taken to date; it is not necessary, therefore, to consider potential legal expenses with regard to any such proceedings.

[52] NZTG was opposed, however, to the possibility of ETL being able to meet legal expenses with regard to the proceedings in the Authority. Its primary concern focused on the possibility that its assets would be dissipated by meeting not only its own legal expenses in relation to the Authority's proceedings, but also those of the first to fourth respondents.

[53] In *TGB Holdings Ltd v BFP Trustees No 1 Ltd*, Venning J held:¹³

- (a) That Rule 32.6(3)(b) expressly provides for legal expenses related to the freezing order does not mean that, by implication, other legal expenses cannot be met.

¹³ *TGB Holdings*, above n 8.

(b) The rule does not exclude the possibility of legal expenses in the substantive or related proceedings being allowed as in the ordinary course of business, which would need to be determined on a case-by-case basis.

(c) The Court concluded:¹⁴

In the absence of bad faith, if the legal fees are, on the face of it, incurred for proper purposes, then they will fall within the exception of payments in the ordinary course of business and may be allowed as an exception to the freezing order.

[54] In the present circumstances, there is no proper reason for ETL not having the ability to meet its own legal expenses in the related proceedings in the Authority.

[55] I concluded that NZTG's concerns could be met by a proviso that the fifth respondent may not meet legal expenses in the Authority in relation to the first to fourth respondents.

Final matters

[56] I discussed with counsel a timetable for the filing and consideration of applications for discharge of the freezing order; the details are, as indicated earlier, contained in my minute of yesterday. As the hearing will take place at 10 am on 4 November 2020, the freezing order should continue to 9 am on 5 November 2020; this was stated in the order.

[57] There is a possibility that some variation of that timetable may be necessary in light of other issues I discussed with counsel, particularly as to whether a challenge to the interim injunction made by the Authority should be heard at the same time as the applications for discharge. Were that to occur, the current timetable would need to be revisited.

[58] An issue has been raised as to the adequacy of the financial information filed by the applicant in support of its undertaking as to damages. The Court is advised that

¹⁴ At [40].

not only will applications for discharge be filed, but also for fortification of the undertaking as to damages. Issues as to adequacy of NZTG's financial information can be considered then.

[59] In light of the foregoing issues, the further amended freezing order was issued last evening, together with the minute.

[60] Finally, I also discussed with counsel issues relating to mediation. I was advised that the Authority has made a direction for mediation, but that it will be some time before the Mediation Service will be able to assist.

[61] Given the unusual features of this case, including the significant commercial issues referred to, and the urgent circumstances in which those matters have arisen, counsel have agreed it would be prudent to obtain instructions as to whether an urgent private mediation should be convened by a senior commercial mediator. I strongly invite the parties to consider this possibility. I will review this and other issues at a telephone directions conference on 28 October 2020.

[62] I reserve costs.

BA Corkill
Judge

Judgment signed at 1 pm on 23 October 2020

UNDER THE EMPLOYMENT RELATIONS ACT 2000

**IN THE EMPLOYMENT COURT
WELLINGTON REGISTRY**

EMPC 320/2020

IN THE MATTER OF

a without notice application for a freezing order

BETWEEN

**NEW ZEALAND TECHNOLOGY GROUP
HAWKES BAY LIMITED** a duly
incorporated company having its registered
office at Grant Thornton New Limited, Floor
4, 152 Fanshawe Street, Auckland Central,
Auckland, 1010, New Zealand

Applicant

AND

HAIG DAVID CHARLES FLASHOFF of
103 Kent Terrace, Taradale, Napier, 4112,
New Zealand

First Respondent

AND

DONALD PETER PRICE of 171a Main
Road, Clive, 4102, New Zealand

Second Respondent

AND

RAYMOND REGINALD TAYLOR of 175a
Georges Drive, Napier South, Napier, 4110,
New Zealand

Third Respondent

AND

SEAN GLASSPOOL of 14 Keats Avenue,
Onekawa, Napier, 4110, New Zealand

Fourth Respondent

AND

ENGAGE TECHNOLOGY LIMITED a duly
incorporated company having its registered
office at Oldershaw & Co Limited, 106a
Kennedy Road, Marewa, Napier, 4110, New
Zealand

Fifth Respondent

**FURTHER AMENDED FREEZING ORDER
22 OCTOBER 2020**

To The Respondents

1. The Court has considered the Applicant's application for freezing orders and heard counsel on 16, 20 and 22 October 2020.
2. It finds that the Applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in the Employment Relations Authority.
3. It also finds that having regard to all the circumstances disclosed by affidavit evidence filed in support of the application, there is a danger that a determination against the First to Fifth Respondents in the Employment Relations Authority in favour of the Applicant will be wholly or partly unsatisfied, because the assets of the prospective judgment debtors might be disposed of, dealt with, or diminished in value.
4. This freezing order is made in respect of **any funds** held in any and all bank accounts in the names of the First to Fifth Respondents in New Zealand, whether those accounts are in each Respondent's own sole name, or in the joint names of any such Respondent and one or more other persons.
5. Subject to paragraph 6, this order restrains the First to Fifth Respondents from disposing of, dealing with, or diminishing the value of the assets referred to in paragraph 4.
6. In respect of the:
 - (a) First to Fourth Respondents, this freezing order does not prohibit them dealing with the assets covered by the order for the purpose of –

- (i) paying ordinary living expenses; or
 - (ii) paying legal expenses relating to the freezing order and to the existing proceedings before the Employment Relations Authority; the Fifth Respondent may not pay any legal expenses of the First to Fourth Respondents; or
 - (iii) making payments in the ordinary course of their business, including business expenses incurred in good faith.
 - (b) Fifth Respondent, this freezing order does not prohibit it from dealing with the assets covered by the order for the purpose of –
 - (i) paying legal expenses related to the freezing order and to the existing proceedings before the Employment Relations Authority; or
 - (ii) making payments in the ordinary course of its business, including business expenses incurred in good faith, including to third party suppliers; or
 - (iii) making payments to the Inland Revenue Department in the ordinary course of business.
7. The freezing order will have no effect after **9.00 am on 5 November 2020** unless prior to that date it is continued or renewed.
8. Leave is reserved to any party to apply for any necessary direction, on one business day's notice.

(Registrar)

Date order made: **22 October 2020**

Date order sealed: **22 October 2020**