

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUHAHI**

**[2020] NZEmpC 69  
EMPC 469/2019**

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| IN THE MATTER OF  | an application for variation of a freezing order   |
| AND IN THE MATTER | of applications for costs  |
| BETWEEN           | A LABOUR INSPECTOR OF THE<br>MINISTRY OF BUSINESS, INNOVATION<br>AND EMPLOYMENT<br>Plaintiff |
| AND               | JEET HOLDINGS LIMITED (IN<br>LIQUIDATION)<br>First Defendant                                 |
| AND               | JEET HOLDINGS NO 2 LIMITED (IN<br>LIQUIDATION)<br>Second Defendant                           |
| AND               | JEET HOLDINGS NO 5 LIMITED<br>Third Defendant  |
| AND               | JEET HOLDINGS NO 6 LIMITED (IN<br>LIQUIDATION)<br>Fourth Defendant                           |
| AND               | JEET HOLDINGS NO 8 LIMITED (IN<br>LIQUIDATION)<br>Fifth Defendant                            |
| AND               | JEET GROUP EMPLOYEES LIMITED<br>Sixth Defendant  |
| AND               | AMAR DEEP SINGH<br>Seventh Defendant   |
| AND               | JEET HOLDINGS NO 7 LIMITED<br>Eighth Defendant   |
| AND               | MUTUAL CREDIT FINANCE LIMITED<br>Third Party   |

Hearing: (on the papers)

Appearances: G La Hood, counsel for plaintiff  
H Evans, counsel for first, fourth, fifth and seventh defendants  
C Vinnell, counsel for third party

Judgment: 21 May 2020

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## **COSTS JUDGMENT OF JUDGE B A CORKILL**

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### **Background**

[1] On 31 January 2020, I varied a freezing order which had been made previously so that the first, fourth and fifth defendants could proceed with the sale of their three Coriander restaurant businesses to Innovative Hospitality Group Ltd (Innovative).<sup>1</sup>

[2] The variation application was brought by a creditor holding security over the businesses involved, Mutual Credit Finance Ltd (MCF) which had been joined as a party.

[3] The application was strongly supported by the first, fourth, fifth and seventh defendants, which had taken no part in the proceedings when the Labour Inspector sought and obtained a freezing order in December 2019,<sup>2</sup> despite being given the opportunity to do so.

[4] The Labour Inspector neither consented nor opposed the making of the orders sought; but he placed before the Court an affidavit taken from Ms N Singh, who raised concerns about the sale to Innovative for a consideration of \$500,000. Ms N Singh said that she and her husband had offered \$760,000 for the three restaurants, albeit subject to finance. Counsel for the Labour Inspector, Mr La Hood, had submitted there

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<sup>1</sup> *A Labour Inspector of the Ministry of Business, Innovation and Employment v Jeet Holdings Ltd* [2020] NZEmpC 2 (freezing order variation judgment).

<sup>2</sup> *A Labour Inspector of Ministry of Business Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 (first freezing order judgment). This was reviewed subsequently: *A Labour Inspector of the Ministry of Business and Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 194 (second freezing order judgment).

was a serious issue as to whether the proposed sales to Innovative were legitimate, and whether the Court should in those circumstances vary the freezing order.

[5] On the basis of the evidence before the Court at the time, I was not satisfied that the sale to Innovative was a sham involving a secret commission payable to Mr Amar Singh, the seventh defendant and director of the other defendants. Accordingly I varied the freezing order to allow the sale to proceed.

[6] I also reserved costs stating:<sup>3</sup>

... The defendants and third party indicated that the Labour Inspector should be liable for costs. I do not think this issue is straightforward, particularly as the defendants had not complied with the previous directions of the Court. My preliminary view is that it was not unreasonable for the Labour Inspector to take the position he did.

## **Applications for costs**

### *Defendants' application*

[7] Counsel for the defendants involved, Mr Evans, applied for costs against the Labour Inspector stating:

- a) It is doubtful whether the Court should have granted the freezing order in the first place. This is because, he said, the evidence supporting the plaintiff's application was speculative and inaccurate.
- b) MCF and the relevant defendants had raised issues as to the Labour Inspector's evidence at the earliest opportunity. He was asked to agree to the variation, but his consent was not given.
- c) The evidence of Ms N Singh placed before the Court by the Labour Inspector was that of an unsuccessful prospective purchaser, and it was unreliable.
- d) Costs were sought on a 2B basis.

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<sup>3</sup> Freezing order variation judgment, above n 1, at [57].

*Third party application*

[8] Counsel for MCF, Mr Vinnell, also applied for costs against the Labour Inspector stating:

- a) In the circumstances, costs should follow the event. A 2B calculation totalled \$10,277, but this amount should be increased. The fact the defendants had not complied with previous orders of the Court should not be held against MCF in its application. The freezing order directly affected MCF's secured assets and its financial interests. The financial disclosure aspects of the freezing order should be treated as a separate issue.
- b) Increased costs were justified because the Labour Inspector took and pursued a position that lacked merit, placing before the Court evidence as to an alleged secret commission being paid to the first defendant without sufficiently cogent evidence, and on the basis of hearsay rumours only. The Labour Inspector had been put on notice of the very arguments which ultimately succeeded.
- c) Further, grounds for obtaining the freezing order may not have existed in the first instance. A simple search of the Personal Properties Security Register would have established that MCF had an interest in all of the relevant assets, making it unlikely or at least questionable that they would be dissipated as alleged. In these circumstances, it was an abuse of process not to concede that the freezing order should be permitted to fall away.
- d) Costs on a 3B basis would be justified, a figure of \$15,179, although actual costs amounted to \$13,790.50. However, MCF would be meeting all of the defendants' legal costs in this matter as it had no choice but to do so. The third party's costs therefore totalled \$27,387.24.

*Further submissions as to position of the defendants*

[9] In subsequent memoranda, Mr Evans and Mr Vinnell each confirmed that on 5 March 2020 Jeet Holdings Ltd, Jeet Holdings No 2 Ltd, Corianders Ltd (formerly Jeet Holdings No 6 Ltd) and Jeet Holdings No 8 Ltd had been placed in liquidation on the petition of the Inland Revenue.

[10] It was also confirmed that MCF had now paid the defendants' costs. Both counsel submitted that if a costs award was made in favour of the defendants, these should be paid to MCF.

*The Labour Inspector's submissions*

[11] With regard to the defendants' application, Mr La Hood submitted in summary:

- a) After issuing the interim and permanent freezing orders in December 2019, none of the defendants complied with the directions of the Court to provide schedules of their assets. Nor did they take part in the hearing of the application.
- b) Then, the Labour Inspector received information from a person concerned about the legitimacy of a proposed sale of the defendants' three businesses. That person had undertaken extensive negotiations with a view to purchasing the businesses and had provided an offer which was rejected. She, Ms N Singh, was aware that the businesses were being sold at an amount significantly below her offer, which raised a genuine concern about the legitimacy of the transaction. Of concern was that the defendants, and Mr A Singh in particular, were undertaking a sham transaction whereby the businesses would be sold for an amount less than they were worth to friends, and that Mr A Singh would retain a portion of the proceeds for himself.
- c) The Labour Inspector interviewed the witness who provided information as to what Ms N Singh had offered, her negotiations with the real estate agent, and the fact that she saw no legitimate basis for her offer being rejected.

- c) The Labour Inspector considered it was prudent to offer the witness' evidence to the Court. Then he took a neutral position; he did not consent to or oppose the application to vary. It was a matter for the Court to objectively assess the credibility and materiality of the evidence produced.
- d) The Labour Inspector had acted in the public interest, and according to his statutory functions. He had obligations to the witness and the employees whose claim had been brought against the defendants, because he held concerns over behaviour which may have been fraudulent.
- e) Also relevant was the Labour Inspector's obligation to act in good faith, as he did.
- f) In his original assessment, the Labour Inspector had believed Mr A Singh may have been disposing of assets to a foreign jurisdiction for a new business venture in India; that concern was based on a consideration of facts which were evident from the various exhibits he placed before the Court for the purposes of the application for a freezing order.

[12] Turning to the application made by MCF, Mr La Hood submitted:

- a) It was brought by MCF to advance its own commercial interests.
- b) Normally, an application for variation would be made by the party whose assets were the subject of the freezing order. Now, the creditor was arguing that its position should be considered separately from that of the defendants, who were obviously open to criticism. However, MCF had initiated the application because the defendants, who were the proper party to make the necessary application, had not done so. In these circumstances, the Labour Inspector should not be liable for MCF's costs.

[13] In all the circumstances, Mr La Hood submitted that costs should lie where they fall.

### **Relevant principles**

[14] Under sch 3 cl 19 of the Employment Relations Act 2000 (the Act), the Court has a broad discretion in awarding costs. As has often been noted, that discretion must be exercised on a principled basis and in the interests of justice.

[15] Also relevant is reg 68 of the Employment Court Regulations 2000 which provides that the Court may take into account conduct which has contained or increased costs.

[16] Although costs will usually follow the event, that is not an inviolate principle.

[17] In *GSTech Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment*, there was a question as to whether costs should be awarded against the Labour Inspector who had been unsuccessful in exercising its discretion. Chief Judge Inglis noted that the Court could take into account a broad range of factors in a particular case, including issues relating to the broader public interest.<sup>4</sup>

[18] The Court noted that there may be some cases where it is appropriate not to order costs, or to order reduced costs, against the Labour Inspector in discharging his or her statutory functions.<sup>5</sup>

[19] This is not to say that the Labour Inspector as a statutory officer enjoys immunity with regard to costs, but it does acknowledge that in assessing the interests of justice the particular stance taken by the Labour Inspector can properly be taken into account.

[20] I take these factors into account when considering the present applications.

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<sup>4</sup> *GSTech Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 127 at [9].

<sup>5</sup> At [9]; this approach has been adopted in other jurisdictions, for example, in the context of liquidators executing their statutory duties: *Re Johnstone* [2019] NZHC 2291 at [26]–[28], relying on *Hart v Stiassny* (1998) 12 PRNZ 240 (HC) at 244. .

## **Application by the defendants**

[21] An important contextual matter is that the application for a freezing order against the defendants arose in the context of proceedings which had previously been brought by the Labour Inspector under pt 9A of the Act. In those proceedings, which have yet to be heard, it is alleged there have been serious breaches of minimum standards relating to the payment of wages and holiday pay, and a breach of the Wages Protection Act 1983 in respect of a payment of a premium. The Labour Inspector seeks recovery of arrears in respect of eight employees, a declaration of breach, ordinary and pecuniary penalties and banning orders. These claims were filed some months before the application for freezing orders was brought, and at a stage where they had been timetabled for hearing, a previous fixture having already been adjourned.

[22] Turning to the defendants' application, I do not accept the submission made for the defendant that the Court should not have granted a freezing order in the first place. The evidence placed before the Court by the Labour Inspector led to a *prima facie* finding that the Labour Inspector had a "good arguable case against the defendants" involving "widespread abuse of employees of the defendants."<sup>6</sup>

[23] It ill behoves the defendants to submit that the finding should not have been made, when none of those defendants took up the opportunity to participate with regard to the hearing of the application for a freezing order; a without notice order was made for a short period, and a return date directed for review of that order. At that point the defendants could have applied to set aside the freezing order which had been made but did not. Nor did any defendant comply with directions given on two occasions that each should serve on the Labour Inspector a schedule fully particularising its financial position and identifying all assets and their values, which may have been relevant to the issues under consideration.

[24] Second, and as I shall elaborate more fully shortly, I also do not accept the submission that it was inappropriate for the Labour Inspector as a statutory officer to have placed evidence before the Court as to whether the proposed transactions for sale

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<sup>6</sup> First freezing order judgment, above n 2, at [15] and [23].



of the Coriander restaurants were legitimate. Given the context of pending proceedings under pt 9A, this step was reasonable.

[25] Third, it is inappropriate to award costs to the defendants when they have not paid any, and there is no evidence they will be liable to reimburse the party which has.

[26] I agree with Mr Vinnell's submission that it would be inequitable for the defendants – now the Liquidator in three instances – should receive costs when they were met by the third party.

[27] For these reasons, I make no order of costs in favour of the defendants.

### **Application for costs by third party**

[28] As already noted, MCF submits that costs should follow the event, that the starting point should be costs on a 2B basis, and that this amount should be increased having regard to the fact that the Labour Inspector did not accept the information provided to him prior to the making of the application to vary, and that the third party had to meet the costs of the defendants.

[29] As already mentioned, relevant background matter is the fact that the defendants chose not to participate in the review of the ex parte order, although they were given the opportunity to do so.<sup>7</sup> At that stage, the Court had already made preliminary findings that there appeared to be good reason for the bringing of the application. The defendants took no step to assert otherwise or, as already mentioned, to comply with the Court's direction by providing financial information.

[30] Then, the Labour Inspector was provided with information which led him to conclude that the proposed transaction for the sale of the Coriander restaurants may have been entered into so as to provide a secret commission to Mr A Singh.

[31] When considered from an objective standpoint and given the failure of the defendants to participate constructively in the litigation about a freezing order to that

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<sup>7</sup> Second freezing order judgment, above n 2, at [4].

point, I consider it was not unreasonable for the Labour Inspector to have that concern and to place the evidence before the Court, taking the stance of abiding the decision of the Court.

[32] Such a statutory officer has a duty to consider alleged serious breaches of employment standards by employers, and where relevant, potential enforcement measures. If steps are being taken by a defendant against whom pt 9A proceedings have been brought which might compromise those measures, it is in the public interest for the Court to consider those concerns. It is appropriate for a Labour Inspector in such a case to adopt a safe and conservative approach, as occurred here.

[33] That approach meant that the evidence giving rise to the Labour Inspector's concerns could be tested objectively by the provision of detailed evidence given on oath. After a full hearing which allowed the issues to be explored, the Court was able to conclude that the concerns were not established, so that the sale transactions with Innovative could proceed.

[34] Next, I deal with MCF's assertion, also made for the defendants, that the Labour Inspector had incorrectly stated in support of his application for a freezing order that the proceeds of an earlier transaction involving the sale of a restaurant at Hamner, had gone to Mr A Singh in India.

[35] However, the Labour Inspector did not positively assert this, and nor was he understood by the Court as having said so. Rather, the Court found:<sup>8</sup>

[16] It is clear from the evidence, which has been presented in support of the application for a freezing order, that the defendants have assets within the jurisdiction and *may now have assets in India*. The evidence discloses that the defendants, over a lengthy period, have operated businesses in New Zealand, sold one of those businesses and now opened a new business outside New Zealand. The defendants continue to operate three businesses in New Zealand that are presently for sale. It also appears that the second and third defendants may have some assets that were not included as either part of any sale or are sale proceeds. These would likely include, but are not limited to, cash.

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<sup>8</sup> First freezing order judgment, above n [2].

[19] In addition to these matters demonstrating that there is a real risk that the defendants will further seek to dissipate assets in their ownership or control *if the proceeds of the sale of those assets are removed from New Zealand, then that will have serious consequences for, and substantially defeat, reimbursement to the employees. ...*

(Emphasis added)

[36] In short, the Labour Inspector was not understood to have said, and the Court did not find, that the proceeds of sale of a previous restaurant had indeed been channelled overseas. I do not consider the Labour Inspector can be criticised for the way he expressed his concerns when seeking the freezing order in December 2019.

[37] On this point, Mr Vinnell also submitted that any doubt that may have existed with regard to the disposition of the sale proceeds overseas of the Hamner restaurant was removed by a letter sent to the Labour Inspector by MCF's lawyers on 22 January 2020, in which it was positively stated that proceeds had not been transferred overseas previously, because they had been paid directly to MCF.

[38] However, by January 2020, the position concerning the Hamner proceeds was a secondary issue. As explained above, the real issue by that time related to the bona fides of the lower offer accepted by the defendants.

[39] Given the background, I find the Labour Inspector acted reasonably by placing the issues before the Court.

[40] Turning to MCF's position, there is no evidence that it played any significant part in the negotiations which resulted in the sale of the restaurants. Nor could it be blamed for the problems of non-disclosure created by the defendants.

[41] However, there were broader issues relating to significant allegations involving serious breaches of minimum standards resulting in the abuse of employees' rights.

[42] These issues were of no direct relevance to MCF, which understandably focused on its right to realise its security. However, MCF was not well served by the defendants. Such a creditor could normally expect a responsible borrower in a situation such as arose here to provide appropriate information to the Court as to why

it was disposing of its assets. Such a borrower could be expected to explain what had happened and would happen to proceeds of sale; and if need be, to take appropriate steps in relation to the position of a secured creditor to whom it owed duties. The defendants did not do any of those things. Unusually, it was left to MCF to take the step of applying to the Court to enable the proposed sales to proceed.

[43] Then the defendants became legally represented at the expense of MCF. It is likely this was a step taken for strategic reasons, so as to suggest that a more responsible approach was being taken by the defendants than had been the case previously.

[44] I make no criticism of MCF for electing to fund the defendants' representation, but that particular expense was the consequence of the defendants' previous failures to take appropriate steps. It may be an issue between those parties, but it is not an expense to which the Labour Inspector should contribute.

[45] In the end, the Court has to balance the steps taken by a statutory officer acting in the public interest, against the commercial interest of a private party which has become embroiled in an employer/employee claim in which it has no direct interest.

[46] In the particular circumstances which apply in this case, I consider the public interest factors must prevail: the interests of justice dictate that costs should lie where they fall.

[47] MCF's application for costs is accordingly dismissed.

[48] No party sought costs in respect of this application, and none are made.

B A Corkill  
Judge

Judgment signed at 2.15 pm on 21 May 2020