

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 190  
EMPC 401/2023**

IN THE MATTER OF a without notice application for a freezing  
and ancillary orders

BETWEEN SERVICE FOODS LIMITED  
Applicant

AND GONGQIAN LIU  
Respondent

Hearing: 3 November 2023  
(via telephone)

Appearances: D Brabant and T Sung, counsel for applicant

Judgment: 6 November 2023

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**JUDGMENT OF JUDGE M S KING  
(Application for freezing and ancillary order)**

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[1] The applicant in these proceedings, Service Foods Ltd (SFL), has applied without notice for a freezing order and ancillary orders under s 190 of the Employment Relations Act 2000 (the Act) and pt 32 of the High Court Rules 2016 (the Rules) in respect of the property of Mr Gongqian Liu, the respondent, to prevent him from disclosing or otherwise dissipating that property, pending the determination of the parties' substantive claims. This judgment resolves that application.

[2] In summary, SFL intends to issue proceedings against Mr Liu in the Employment Relations Authority (the Authority) alleging Mr Liu misappropriated SFL's stock and was able to sell or gift that stock to third parties. SFL alleges that Mr Liu caused it loss by breaching his duty of fidelity, his fiduciary duty, his employment

agreement and the duty of good faith in s 4 of the Act. The loss currently identified by SFL is \$2,856,538.42, the approximate cost price of the misappropriated stock (not including lost profits).

[3] At the same time as filing its application in the Employment Court, SFL has also filed an application in the High Court to freeze the assets of the third parties who it alleges benefited from the misappropriated stock. The untested evidence before the Court is set out in the affidavits of Mr Aneil Balar, the managing director of SFL, and affidavits from five other employees, including the general manager of SFL's Hamilton branch, a warehouse employee and three truck drivers who worked with Mr Liu.

### **Background**

[4] Mr Liu was employed by SFL from 1 April 2019 until 4 October 2023 as its operations manager for its distribution warehouse in Hamilton. In that capacity he:

- (a) had physical access and control over stock located in SFL's Hamilton Branch;
- (b) gave directions to drivers who deliver stock to customers; and
- (c) had access to SFL's SAGE Enterprise Resource Planning (ERP) software system.

[5] On 16 March 2021, Mr Liu filed documents to incorporate G&C Trading Ltd (G&C Trading). Following its incorporation, Mr Liu has changed the shareholding of this company (to remove, add and then remove himself as a shareholder) and to amend the address details of the company and his wife's details as a shareholder and director of the company. As at the date of this judgment his wife is a sole director and shareholder of G&C Trading.

[6] G&C Trading is a 50 per cent shareholder in Giant Me Ltd. G&C Trading and/or Giant Me Ltd trade as the Avalon Clearance Store.

[7] Mr Liu advised SFL that his wife is a stay at home mum and does not work or have any business interests.

[8] When Mr Liu commenced his employment with SFL in April 2019 he had a salary of \$63,000. On 4 October 2023 when Mr Liu's employment was terminated his salary had increased to \$85,000.

[9] In September 2022, SFL was notified by the Inland Revenue Department (IRD) that Mr Liu's "M" tax code was incorrect and it needed to be changed to "SA" (a secondary tax code for earnings over \$180,000). At the time, Mr Liu informed SFL that he did not know why IRD had changed his tax code and that he wished he earned that much. Mr Liu advised SFL that he would talk to IRD and sort out the matter. During a meeting held on 4 October 2023, Mr Liu's explanation changed. He advised SFL that he had a part-time job and this was the likely reason for the issues with his tax code. However, he still could not explain why this would result in IRD changing his tax code with SFL to a secondary tax code.

[10] When Mr Liu commenced employment at SFL he and his wife owned a residential property in Hamilton with a current estimated value of \$1,020,000. During his employment Mr Liu and his wife purchased two further residential properties in Hamilton with a joint estimated value of over \$2,470,000.

[11] During his employment Mr Liu was also sighted driving a 2022 Audi RS6 vehicle to work. The vehicle has a market value of \$220,000. When his manager, commented on the vehicle, Mr Liu advised that it was his friend's vehicle, and he was driving it while his friend was overseas. SFL has subsequently discovered that the vehicle is owned by G&C Trading.

[12] In late September 2023, SFL discovered multiple irregular transactions involving Mr Liu's user ID in SFL's ERP software system. In summary the transactions either involved:

- (a) Mr Liu's ID altered stock movement from the Auckland Branch to the Hamilton Branch so that stock losses (in record only) were recorded in the Auckland Branch enabling the physical stock to remain in the

Hamilton Branch as surplus stock. From there the surplus stock was able to be sold or gifted to third parties.

- (b) Mr Liu's ID altered shipping quantities of stock to third parties to a zero or a lesser amount to what was delivered to those third parties. This meant that these third parties received stock free of charge (at least from SFL).

[13] When the general manager of SFL's Hamilton Branch investigated the irregularities in stock in the Hamilton warehouse, he found that the volume of stock stored in the Hamilton warehouse far exceeded the amount that the branch would sell. In particular, he noticed for one type of product, the only customer that would purchase this type of product was the Avalon Clearance Store. However, the quantities of product stored in the Hamilton warehouse, were well in excess of what Avalon Clearance Store would ordinarily purchase.

[14] SFL's truck drivers and the warehouse employee also gave affidavit evidence that Mr Liu had instructed them to deliver stock to the Avalon Clearance Store and to other third parties without any paperwork. This was a breach of SFL's delivery procedures which required the drivers to provide the customer with an invoice on delivery, to allow the customer to check the invoice against the goods that had been delivered. When a truck driver queried the lack of paperwork, Mr Liu advised that he had already sent the invoices to these third parties by email. The other truck drivers considered it strange that they were making deliveries without paperwork. However, they considered Mr Liu to be their boss, the practice had been occurring for a long time and on that basis, they did not question the matter further.

[15] On 4 October 2023, SFL held a meeting to discuss the irregular transactions with Mr Liu. Mr Liu denied any wrongdoing or being involved with any of the third parties who received stock through the irregular transactions.

[16] As a result of what was discussed at the 4 October meeting, SFL terminated Mr Liu's employment effective immediately.

[17] Against that broad description of the background to the application, SFL intends to lodge proceedings in the Authority seeking:

- (a) A penalty for breaches of the employment agreement, including:
  - (i) A breach of cl 2 which required Mr Liu not to make contractual commitments which would conflict with the performance of his employment obligations.
  - (ii) A breach of cl 6 which required Mr Liu to, among other things, act honestly and diligently; in the interests of SFL, its clients, other employees; and in accordance with SFL's policies, as contained within any personnel manual, work rules or code of conduct, or any written or oral directions given by SFL.
  - (iii) A breach of cl 18 which restricted secondary employment and imposed duties of confidentiality in favour of SFL.
- (b) A penalty for breaches of s 4 of the Act.
- (c) A finding that Mr Liu breached the implied duty of fidelity and fiduciary duty owed by him to SFL.
- (d) An order for full reimbursement of unauthorised monies taken, a sum to be particularised after discovery, and interest on that amount.
- (e) Alternative causes of action for conversion and unjust enrichment.

[18] The pleadings in the draft statement of problem filed with this application are consistent with the breaches relied on in this application as summarised above.

### **The Employment Court may make freezing orders**

[19] The purpose of a freezing order is to preserve property for enforcement purposes in circumstances where there is a risk of dissipation.

[20] Section 190(3) of the Act provides that the Court has the same powers as the High Court to make a freezing order, as provided in the Rules. It applies pt 32 of the Rules, with appropriate modifications.

[21] This means that a freezing order may be made under r 32.2, which provides for the possibility that the Court may make such an order without notice, albeit subject to full and frank disclosure to the Court of all material facts.

[22] In order for the Court to grant a freezing order, SFL must establish that:<sup>1</sup>

- (a) it has a good arguable case within the jurisdiction of the Court or the Authority;
- (b) Mr Liu has assets within the jurisdiction;
- (c) there is a real risk the assets will be dissipated, or if relevant, will be moved out of the jurisdiction; and
- (d) the balance of convenience and interests of justice require the grant of interim relief.

[23] Ancillary orders may be made if the Court considers it just to do so, including where necessary to elicit information relating to assets relevant to the freezing order.<sup>2</sup>

[24] The Court is dealing with the matter at an early stage of the proceeding and takes that into account in considering the sufficiency of the evidence before it.<sup>3</sup>

[25] SFL has provided the Court with an undertaking as to damages, which is required by r 32.2, as well as a draft statement of problem that they intend to file in the Authority, and draft orders. They also have filed six affidavits in support of the application, which annex relevant documentation.

### **There is a good arguable case**

[26] The evidence from SFL, including the documentary evidence attached to the affidavits, suggests there is a good arguable case that Mr Liu has misappropriated SFL's stock and was able to sell and gift that stock to third parties, including to G&C Trading, a company that his wife is the sole director and shareholder of.

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<sup>1</sup> *Borsboom v Preet PVD Ltd* [2016] NZEmpC 168 at [25]; see also *Potgieter v Bliss Beauty NZ Ltd* [2022] NZEmpC 203 at [7]–[11].

<sup>2</sup> High Court Rules 2016, r 32.3(2)(a).

<sup>3</sup> *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, (2014) 22 PRNZ 479 at [18] and [31].

[27] As submitted by SFL, there is a good arguable case the actions alleged to have been taken by Mr Liu constitute prima facie breaches of the expressed and implied terms of his employment agreement with SFL, his statutory duty of good faith and his common law duty of fidelity to his employer.

[28] Those are all matters within the jurisdiction of the employment institutions.

[29] At this stage, SFL has estimated its damages to be is \$2,856,538.42, which is the approximate cost price of the misappropriated stock, not including lost profits which are to be quantified.

### **SFL had identified possible defences**

[30] Rule 32.2(3)(a) requires SFL to identify any possible defences available to the respondent. SFL has done so. Mr Liu denies any wrongdoing and has raised an issue about whether the irregular transactions that resulted in the misappropriation of stock was caused by user error when the entries were made in SFL's ERP software system. Mr Liu has also claimed that someone else may have had access to his password and was able to login to the ERP software system. He claimed that he often left his company computer logged into the ERP software system when he left the workplace.

[31] SFL does not consider Mr Liu's claim that the irregular transactions can be reasonably explained away as user error. This is due to the large volume of irregular transactions that occurred over a period of years, which consistently favoured the same third parties. Further, Mr Liu could not identify any other person who would have had access to his ERP software system login. SFL was able to refer to its GPS tracking to identify that the irregular transactions were being made at times when Mr Liu was present at the workplace.

[32] Those possible defences are acknowledged and have been taken into account.

### **The respondent has assets within the jurisdiction**

[33] The evidence provided demonstrates that Mr Liu has real estate and bank accounts held within New Zealand.

### **There is a risk of dissipation**

[34] There is prima facie evidence of fraud committed by Mr Liu which goes a considerable way to establishing there is a risk of dissipation of his assets.<sup>4</sup> Mr Liu has denied his involvement and his wife's involvement with third parties who have benefited from the irregular transactions.

[35] The evidence before the Court is that Mr Liu has altered the company ownership to add and remove himself from the Company Office records. He has denied his wife's involvement with G&C Trading or any business interests. When SFL produced company records connecting him and his wife to the ownership of G&C Trading and Giant Me Ltd, Mr Liu maintained his denial. The evidence suggests that he has also misled SFL over the ownership of the 2022 Audi RS6 vehicle owned by G&C Trading and that he has been evasive when questioned about his income and earnings outside of his employment with SFL.

[36] SFL has also raised concerns that Mr Liu and his wife may not be New Zealand citizens and could leave the jurisdiction.

[37] I am satisfied there is a risk the property of Mr Liu will be dissipated.

### **Balance of convenience and overall justice requires the order to be made**

[38] I am satisfied that the balance of convenience and overall justice of the case, as demonstrated by the evidence before the Court, require orders to be granted.

[39] Making such orders will likely cause a degree of hardship and concern for Mr Liu and his wife but, as required by r 32.6(3), the draft orders include that Mr Liu is not prohibited from dealing with the assets covered by the order for the purposes of:

- (a) paying ordinary living expenses;
- (b) paying legal expenses related to the freezing order; or

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<sup>4</sup> *Covington Group Holdings Ltd v Zhong* (2004) 17 PRNZ 819 (HC) at [58(e)].

- (c) disposing of assets or making payments, in the ordinary course of business, including paying business expenses incurred in good faith.

[40] The ancillary orders sought by the applicant would require Mr Liu to:

- (a) disclose by affidavit all assets held by him (either individually or jointly with any other person or entity) including but not limited to all accounts with any bank or financial institution whether in New Zealand or overseas;
- (b) provide all account statements with any bank or any financial institution whether in New Zealand or overseas for the last three years of accounts held in the respondent's name (solely or jointly with any other person/entity); and
- (c) his tax returns for 1 April 2019 to the date of this application, being 3 November 2023.

[41] Such orders are appropriate and for the benefit of all parties.

[42] Accordingly, I am satisfied that freezing and ancillary orders in the form submitted with the application should be made on condition that the proposed proceedings are filed immediately in the Authority.

[43] The orders are to have effect until 5 pm on Monday, 20 November 2023, unless prior to that time, they are continued or renewed. This case will be called again in Court at 9 am on Monday, 20 November 2023. The purpose of the hearing will be to review the orders now made. The hearing will be by telephone. Any party may apply in the meantime to vary or discharge the terms of the orders on two working days' notice.

[44] This judgment is not to be published other than to the parties, their representatives and to authorised persons and the Court file may not be inspected by a non-party without leave of the Court until the review hearing has taken place on 20 November 2023. At this time, or earlier, Mr Liu will have an opportunity to address

the allegations and decide whether to apply for a non-publication order to preserve his identity.

[45] A copy of the orders, this judgment and all documents filed by SFL are to be served on Mr Liu as soon as possible. The Court is to be notified as soon as these documents have been served, and an affidavit of service must be filed.

[46] Costs are reserved.

M S King  
Judge

Judgment signed at 5 pm on 6 November 2023