

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

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

**[2025] NZEmpC 197  
EMPC 349/2025**

IN THE MATTER OF            an application for freezing orders

AND IN THE MATTER OF    applications to vary or discharge freezing  
orders

BETWEEN                    OPEN COUNTRY DAIRY LIMITED  
Applicant

AND                            SIMON STEWART  
Respondent

Hearing:                    1 and 2 September 2025 (heard by AVL)

Appearances:            M J Hammond and J Russ, counsel for applicant  
E Macpherson, counsel for defendant

Judgment:                2 September 2025

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**JUDGMENT (NO 2) OF JUDGE M S KING  
(Application to vary the freezing orders by consent)  
(Application to discharge the freezing order)**

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[1]     On 19 August 2025 Open Country Dairy Ltd (the Company) sought, on a without notice basis, a freezing order against Mr Stewart.<sup>1</sup> The order was granted and applied to any funds held in any and all bank accounts in the names of Mr Stewart and a property registered in his and his wife's name (the family home). The order was scheduled to be reviewed at 9 am on 1 September 2025. Leave was reserved for Mr Stewart to apply on two working days' notice to vary or discharge the terms of the order.<sup>2</sup>

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<sup>1</sup>     *Open Country Dairy Ltd v Stewart* [2025] NZEmpC 182.

<sup>2</sup>     At [44].

[2] On 29 August 2025 the Court received a memorandum from Mr Stewart's counsel stating that Mr Stewart sought that the freezing order be discontinued. An affidavit in support of the memorandum was also filed by Mr Stewart. The memorandum claims that there is no real risk of dissipation of assets. It states that the Company unreasonably delayed applying for the order and the order is having an adverse impact on Mr Stewart's family. The balance of convenience therefore favours the discontinuance of the order.

[3] In his affidavit, Mr Stewart raised concerns that he had been unable to access funds to pay his ordinary living expenses and legal fees, despite the freezing order providing for him to have access to such funds.

[4] Mr Stewart's evidence deposes that he requires approximately \$69,809.39 in funds to pay legal expenses and specific ordinary living expenses he has identified. However, his bank accounts do not contain sufficient funds to meet these expenses.

[5] The family home is subject to a mortgage with ANZ bank of approximately \$437,763.38. Mr Stewart gave evidence that he was in the process of refinancing the family home with ASB bank. In particular, he and his wife were seeking to lend \$498,000 against the family home to:

- (a) pay off his legal debts;
- (b) secure funds for defending the proceedings brought by the Company and the Serious Fraud Office (SFO) prosecution which he is currently involved in;
- (c) pay off his flexible home loan account;<sup>3</sup> and
- (d) allow him to have funds to pay for his ordinary living expenses.

[6] However, due to the freezing order being made before the refinancing could be completed, Mr Stewart's solicitors returned the advance from the ASB bank and the refinancing of the family home has stalled. The refinancing lending appears to be well in excess of the legal debts and ordinary expenses disclosed in Mr Stewart's affidavit.

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<sup>3</sup> This flexible loan account forms a small portion of Mr Stewart's mortgage with the ANZ bank over the family home.

[7] On 1 September 2025 the Company filed a memorandum seeking for the freezing order to continue. The memorandum claims that the risk of dissipation remains heightened in the circumstances, that Mr Stewart’s dependants have derived benefit from his conduct and that any impact on them arising from the order is not unusual in the circumstances. The balance of convenience supports the continuation of the freezing order.

### **Legal framework**

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

[9] 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.

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

[11] 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.<sup>4</sup> Accordingly, there is jurisdiction to consider the intended application for discharge.

[12] The first legal point relates to the Court’s ability to consider the merits of an application to discharge.

[13] 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.<sup>5</sup> The Court was satisfied to the necessary standard.

[14] The Court of Appeal confirmed in *Hannay v Mount* that a good arguable case is established if the allegations in the proposed claim are capable of tenable argument

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<sup>4</sup> High Court Rules 2016, r 32.8.

<sup>5</sup> High Court Rules 2016, r 32.5(1)(b).

and are supported by sufficient evidence, bearing in mind the early stage at which the application is likely to be brought.<sup>6</sup>

[15] Thus, once made, a freezing order continues on the basis that the applicant's proposed claim is capable of tenable argument, as assessed on a provisional basis. Once that threshold has been cleared, the freezing order will continue until a party applies to vary or discharge the terms of the order.

[16] The second legal point which is relevant for present purposes is again affirmed in *Hannay*:<sup>7</sup>

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.

[17] 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.<sup>8</sup>

[18] For these reasons, a defendant is permitted to draw on assets to make payments incurred 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 to deal with assets covered by the order for the purpose of:<sup>9</sup>

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

## **Analysis**

[19] On 19 August 2025 the Court was satisfied that the Company had a good arguable case for damages up to the value of USD\$1,048,743 against Mr Stewart. Since that threshold has been cleared, the freezing order will continue until the Court

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<sup>6</sup> *Hannay v Mount* [2011] NZCA 530 at [22].

<sup>7</sup> *Hannay*, above n 6, at [20].

<sup>8</sup> See generally *Twentieth Century Fox Film Corp v Dotcom* [2016] NZHC 1948 at [28].

<sup>9</sup> High Court Rules 2016, r 32.6(3).

has had an opportunity to assess the merits of Mr Stewart's application to discharge the order and the Company's opposition to that application.

[20] However, I observe that Mr Stewart's refinancing evidence may raise further questions over the risk of dissipation of his assets.

[21] While the order is to continue, it is common ground that Mr Stewart should be permitted to utilise his bank accounts to pay his ordinary living expenses and legal expenses, not only in regard to the freezing order proceedings, but in respect of the other proceedings he is facing in the Authority and through the SFO prosecution.

[22] I adjourned the review hearing on 1 September 2025 and scheduled it to be reconvened at 2.15 pm today to monitor compliance with the terms of the freezing order, which provides that Mr Stewart is to be given access to funds to pay his ordinary living expenses and legal expenses.

[23] During the reconvened hearing, the parties advised that they had reached an agreement to vary the terms of the freezing order to allow Mr Stewart access to funds to pay the expenses set out in [18](a). Following the hearing, a joint memorandum of counsel was filed, together with a draft amended freezing order. In summary the parties have agreed to vary the freezing order to provide:

- (a) that Mr Stewart's refinancing with ASB bank identified in [5] above can proceed; and
- (b) an agreed method for Mr Stewart to pay his ongoing and current legal and living expenses. This includes Mr Stewart and his wife having restricted access to a nominated bank account, which will allow them to access ordinary living expenses up to a capped amount of \$10,400 per month.

[24] After hearing from the parties, I direct that the freezing order is varied by consent. It was agreed that the Court would treat Mr Stewart's memorandum of 29 August 2025 as an application to discharge the order and timetabling directions

were made to allow the application to discharge to be heard urgently at 10.30 am on 11 September 2025.<sup>10</sup>

[25] Until the Court can assess the merits of Mr Stewart's application to discharge the freezing order and the Company's opposition, I direct that the amended freezing order is to have effect until 5 pm on Friday 12 September 2025. The continuation of the order is a matter to be considered as part of an application to discharge the freezing order.

[26] Leave is reserved to any party to apply for any necessary direction in respect of the extended freezing order on two working days' notice.

[27] Lastly, an interim non-publication order was granted on 19 August 2025 preventing the publication of any information or identifying details in these proceedings relating to Mr Stewart's family members, his health, and/or any information that identifies the Company's customers or its confidential pricing information. It is appropriate that this non-publication order be continued.

[28] The Court file is not to be inspected by any person without leave of the judge.

[29] This judgment and my judgment of 19 August 2025 are not to be published until 5 pm on 19 September 2025.

[30] Costs are reserved.

M S King  
Judge

Judgment signed at 5 pm on 2 September 2025

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<sup>10</sup> Timetabling directions were set out in a minute issued on 1 September 2025.