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A v B [2021] NZEmpC 118 (2 August 2021)

Last Updated: 6 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[\[2021\] NZEmpC 118](#)

EMPC 247/2021

IN THE MATTER OF	an application for a freezing order and an ancillary order
BETWEEN	A Applicant
AND	MS B First Respondent
AND	ASB BANK LIMITED Second Respondent
AND	KIWIBANK LIMITED Third Respondent

Hearing: (On the papers)
Appearances: C McGuinness, counsel for
applicant
Judgment: 2 August 2021

JUDGMENT OF JUDGE B A CORKILL

(Application for freezing order and ancillary order without notice)

Introduction

[1] This judgment resolves an application for a without notice freezing order and ancillary order.

[2] The application for these orders was filed late on 30 July 2021. The Court was advised that the matter was urgent.

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[3] The interlocutory application was supported by affidavit evidence which I will summarise shortly. Also filed was an undertaking as to damages and a memorandum from counsel.

[4] I convened an urgent telephone directions conference with counsel for A, as a result of which Mr McGuinness filed a supplementary memorandum on 1 August 2021, explaining in more detail particular issues the Court would need to consider.

The evidence

[5] A is a charitable trust funded by Crown entities. Ms B is the financial administrator of that organisation, with full access and control over its bank accounts and financial records.

[6] An initial investigation has identified that A has suffered losses resulting from alleged misappropriation of funds carried out between 1 January 2021 and 11 June 2021. The quantum misappropriated at this stage, but subject to finalisation, is in excess of one million dollars. Ms B has been linked to these activities.

[7] The initial investigation has been led by a chartered accountant from BDO Auckland (BDO) and its Business Recovery and Insolvency Services practice, Mr Andrew McKay. In an affidavit he has filed annexing those reports and appendices, he says this:

6. Funds were removed from [A] by the following activities:

6.1 Misappropriated payments from [A] bank accounts, based on false payment requests into accounts that appear to be under the control of [Ms B], (\$1,082,218).

6.2 [A's] funds being used for personal expenses, where [A's] Debit Cards were used to pay what appear to be online international gambling platforms (\$99,237).

6.3 [A] is likely to have claimed GST input tax (refunds) for misappropriated funds [Ms B] appears to have coded as a business expense in [A's] financial system (\$103,671). This will need to be adjusted in subsequent GST returns.

7. In addition, following the forensic investigation of [Ms B's] laptop we have identified the following events of questionable behaviour, including:

7.1 Forwarding a police report sent to [A] to her private email address.

7.2 Fake supplier invoices.

7.3 Batch payments that include misappropriated payments.

7.4 Sending out a falsified email under the guise of the former Finance Manager ... to [Ms B's] personal email address with fake payslips attached with an overstated salary of \$190k.

7.5 Sending out a falsified email to Kiwibank under the guise of the former Finance Manager ... This included fake invoices allegedly issued by [Ms B] for management services she was "engaged" to provide to [A].

7.6 Falsifying a service agreement allegedly entered between herself and [A] contemporaneously with her employment agreement in answer to a Kiwibank Anti-Money Laundering ("AML") query in May 2021.

[8] Mr McKay has said that the two banks involved, the second and third respondents, have so far assisted A by alerting it to concerns about irregular transactions across several accounts. They then agreed to freeze the accounts.

[9] Mr McKay says, however, the actions of the banks are at arms' length from A, and A has no final control over any bank action. Mr McKay is concerned that the banks could release the freezes they have in place. A's ability to recover any monies remaining in those accounts could then be threatened.

[10] The banks have returned approximately \$5,000 from some of the accounts which it is understood they have assessed as belonging to A. However, Mr McKay has no way of accurately assessing the transactions into the accounts, and possibly more importantly, to establish whether the funds remain in the accounts, and if not, where they may have gone.

[11] Furthermore, he is concerned there may be more funds that the banks may have been misled into believing are funds that have been legitimately obtained by Ms B.

[12] Until he and his team can trace the source of funds in Ms B's accounts, there is a risk they could be transferred by her in the meantime, to other parties or sources which could potentially be beyond the ability of A to recover.

[13] Therefore he has recommended to A that freezing order(s) and ancillary orders should be sought to facilitate the investigative process, and as a safeguard against monies being dissipated.

[14] Mr McKay has recommended to A that they seek the recommended orders on a without notice basis; he considers, on the basis of the information he has obtained to date, that if any funds remain under Ms B's control there is a risk they may be transferred to other parties if she becomes aware of the application of ancillary orders and attempts to recover funds; this assessment is based on Mr McKay's view about Ms B's conduct in all the circumstances he has reviewed.

[15] The additional information sought against the second and third respondents are to provide:

- the name of the account holder of each of the subject accounts;
- a full transaction listing of each of the accounts for December 2020 to date; and
- details of the account holders of all debit entries greater than \$1,000 from each of the accounts.

[16] Based on his experience and other investigations, Mr McKay says he will need the above additional information to trace the funds from Ms B's accounts out to other accounts. He says A may need to seek additional freezing orders to trace the funds further in an attempt to recover the funds, if possible. He says there is a need to "follow the money trail" and identify where funds have gone.

[17] An affidavit has been filed for A by its Chairman, Mr C. He is also acting Chief Executive Officer of a related company of

which A is the sole shareholder.

[18] Mr C has provided evidence confirming the original notification of concern as to abnormal activity, as raised by the ASB Fraud Investigation Unit on 11 June 2021.

[19] He said that on 13 June 2021, there was a meeting with Ms B, which resulted in her being suspended that day on full pay.

[20] He had subsequent communications with Ms B, and has requested documents and information. There was partial compliance only with the request.

[21] Mr C says anticipated next steps will be to write to Ms B setting out allegations or issues of concern and inviting her to meet with A, to provide an opportunity for any explanation she may wish to give, most likely in the coming week. He says no decisions regarding Ms B and her employment can be made without having offered her the opportunity to meet and respond. He says he has an open mind on these topics until such time as this step has occurred.

Relevant principles

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

[23] [Part 32](#) of those rules is applied by this Court, therefore, with appropriate modifications.

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

[25] This means that a freezing order may be made under r 32.2, which includes 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.

[26] Rule 32.5 provides that the Court may make a freezing order against a respondent if an applicant has a good arguable case not only on an accrued cause of action, but one which is prospective. The allegations in relation to a proposed claim

must be capable of tenable argument, supported by sufficient evidence.¹ The cases emphasise that the sufficiency of evidence required must reflect the early stage of the proceeding.² Thus, an order may be made if there is a sufficient prospect that another judicial body – here the Employment Relations Authority – will give judgment in favour of the applicant.³

[27] Ancillary orders may be made if the Court considers it just to do so, including where this is necessary to elicit information relating to assets relevant to the freezing order.⁴

[28] Numerous cases have established that in order to obtain such orders the applicant must satisfy four essential requirements:⁵

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

[29] I address each.

Good arguable case

[30] Mr McGuinness submitted there is a good arguable case that Ms B has wrongly obtained monies to which she is not entitled from A, and that her actions

¹ *Hannay v Mount* [2011] NZCA 530 at [21]–[22].

² *Dotcom v Twentieth Century Fox Film Corp* [2014] NZCA 509, [2014] 22 PRNZ 479 at [18] and [31].

³ [High Court Rules 2016](#), r 32.5.

⁴ [High Court Rules 2016](#), r 32.3.

⁵ See for example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 168 at [25]; and *A Labour Inspector of Ministry of Business, Innovation and Employment v Jeet Holdings Ltd* [2019] NZEmpC 188 at [5].

fundamentally breached the terms and conditions of her employment agreement.

Reference is made to applicable authorities in such circumstances.⁶

[31] For the purposes of the application, reliance is placed on the evidence that:

- (a) Ms B was employed as A's payroll and finance manager, and was the primary access point for all its financial systems.
- (b) She was one of three signatories for all financial transactions.
- (c) The BDO report establishes that significant sums of money were misappropriated from A's bank accounts from January to June 2021.
- (d) The report finds that Ms B was most likely the person responsible for these defalcations because in summary:
 - (i) Four of the six accounts into which alleged misappropriated funds were paid can be linked to her.
 - (ii) Ms B alone approved all alleged misappropriated payments for the accounts that required only one approver.
 - (iii) She was one of two approvers for all except one transaction from the account requiring two approvers.
 - (iv) There is a lack of evidence indicating collusion between approvers or evidence indicating concealment from approvers other than Ms B.
- (v) Various methods were allegedly used to conceal the activities.

⁶ See for example *Mason Engineers (NZ) Ltd v Hodgson (No 4)* [2011] NZEmpC 147 at [19].

[32] It was submitted that these circumstances would likely constitute a breach of implied and contractual obligations of trust and confidence, fair dealing and good faith.

[33] I am satisfied that at this preliminary stage, the necessary sufficiency of evidence is established in respect of a claim which would come within the exclusive jurisdiction of the Authority.

[34] Mr McGuinness submits that although a draft statement of problem has not yet been filed, the BDO report suggests there is a substantial basis for a good and arguable case. He says that a draft statement of problem will be provided to the Court as soon as possible, setting out the claims A could bring against Ms B for breaching her terms and conditions of her employment, and causing substantial financial loss to it, which it would seek to recover.

[35] However, Mr McGuinness emphasises that, notwithstanding the information contained in the BDO report, a disciplinary process relating to Ms B, and any outcome, has yet to take place, so that it would be premature to immediately file a proceeding in the Authority.

[36] It is well established that an application for a freezing order may be made whether or not a proceeding has been issued, although good and proper reasons must be given for not having taken such a step.⁷ I accept that appropriate justification for not having filed a statement of problem as yet exists in this case.

[37] I record Mr McGuinness' assurance that he will provide the Court with updates on the disciplinary process at the end of this week, and that as soon as possible, and if appropriate, A will provide a draft statement of problem to the Court.

Assets within the jurisdiction

[38] I am satisfied on the basis of the expert evidence before the Court there are assets within the jurisdiction held by the second and third respondents.

⁷ *Mason Engineers (NZ) Ltd v Hodgson* [2011] NZEmpC 82 at [3].

Danger of dissipation

[39] The Court is advised that the reason no disciplinary process has taken place at the time of filing this application, is due to the bringing of the application for freezing and ancillary orders without notice. In particular, Mr McKay, who has experience in matters of this kind, is of the view that if any funds remain under Ms B's control they may be transferred to other parties if she becomes aware of the applications made, and A's attempts to recover the funds.

[40] I accept that there is a legitimate basis for concluding that there is a danger of dissipation.

Possible defences

[41] To satisfy the obligation which must be made to the Court where an application proceeds without notice, emails from Ms B have been placed before the Court. She says she has been set up and is innocent; and that she is about to be blamed for something she did not do.

[42] For A, it is conceded Ms B has not had an opportunity to review the BDO report, or to attend a disciplinary meeting to answer any allegations; she has not yet had an opportunity of expanding on her assertion she is not responsible for what has occurred.

[43] Whilst A must keep an open mind in conducting its disciplinary process, there is a compelling basis for its suspicions.

[44] Having heard counsel, I am satisfied that at this early stage, A has a good arguable case for bringing a claim in the Authority.

Balance of convenience and interests of justice

[45] Mr McGuinness submits that Ms B continues to be paid her salary, in full, whilst suspended. It is being paid fortnightly into an account that is not one of the accounts over which A seeks freezing orders.

[46] Counsel submits that Ms B will therefore be able to pay for her ordinary weekly expenses and any legal expenses relating to this matter from her salary, a matter which the Court is required to consider.⁸

[47] For these reasons, it has not been submitted that allowance should be made for provision for living expenses and legal fees from the subject accounts.

[48] I accept this submission and waive the inclusion of the standard clause which would otherwise apply on this topic.⁹

[49] The prejudice that may be caused by a freezing order over the subject accounts may be mitigated by the fact it can be reviewed within a short period, and by reserving leave to all parties, including Ms B, to apply on short notice in the interim for any necessary modification.

Conclusion

[50] A freezing order is appropriate. I am satisfied having regard to all the circumstances disclosed by the affidavit evidence, there is a danger that any judgment in favour of it will be wholly or partly unsatisfied, because its assets may be disposed of, dealt with, or diminished in value.

[51] I am also satisfied on the basis of Mr McKay's evidence, it is in the interests of justice to grant the application for ancillary orders, as sought.

[52] The orders are to have effect until 9.00 am on Tuesday, 10 August 2021, unless prior to that date they are continued or renewed.

[53] The orders made are to be reviewed by the Court at Wellington at 10.30 am on Monday, 9 August 2021. Mr McGuinness is to update the Court as to all relevant circumstances by a memorandum which is to be filed and served by 4.30 pm on Friday, 6 August 2021.

⁸ [High Court Rules 2016](#), r 32.6(3) and Form G 38, sch 1.

⁹ [High Court Rules 2016](#), Form G 38, cl 6.

[54] Any party may apply in the meantime to modify the terms of the order, on one business day's notice.

[55] I direct that A is to serve a copy of all documents filed in the Court, as well as a copy of the orders made, my minute of today, and this judgment, on each respondent as soon as possible.

[56] A has sought non-publication orders in respect of the parties' names, on the basis it is necessary to protect the interests of both parties, but particularly Ms B given the without notice application.

[57] I agree that this is appropriate given the serious nature of the allegations which are under consideration. The high threshold for making such orders is established. I make an order of non-publication of the names of the applicant and the first respondent until further order of the Court. Those parties' names have been anonymised accordingly.

[58] The Court is to be advised as soon as the documents described at para [56] have been served. The judgment will be published after that notification has been received.

[59] I also order, until further order of the Court, that the Court file is not to be inspected by any person without leave of a Judge.

[60] I reserve costs.

B A Corkill Judge

Judgment signed at 3.30 pm on 2 August 2021

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