



# Employment Court of New Zealand

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## Labour Inspector of the Ministry of Business, Innovation and Employment v Jeet Holdings Limited [2019] NZEmpC 2 (31 January 2020)

Last Updated: 5 February 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 2](#)

EMPC 469/2019

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

Hearing: 30 January 2020  
(Heard at Wellington)

A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT v JEET HOLDINGS LIMITED [\[2020\] NZEmpC 2](#) [31 January 2020]

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

Judgment: 31 January 2020

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

(Application for variation of a freezing order)

## Introduction

[1] This judgment which resolves an urgent application to vary a permanent freezing order was heard urgently yesterday.

[2] On 13 December 2019, the Court made a comprehensive freezing order against all defendants, on a without notice application brought by the Labour Inspector.<sup>1</sup>

[3] The order was made on an interim basis until 19 December 2019, when it was to be reviewed by the Court after service of the documents on the defendants.

[4] The order directed each defendant to serve on the plaintiff a schedule fully particularising their financial position and identifying all assets and their values by 19 December 2019.

[5] The position was reviewed by the Court on that date. There was no appearance for any defendant, and no schedule had been filed. The Court made a permanent order, based on the earlier order but with minor variations. Included in the order was a direction that each defendant was still required to serve on the plaintiff a schedule fully particularising their financial position and identifying all assets and their value.<sup>2</sup>

1 *A Labour Inspector of Ministry of Business, Innovation and Employment v Jeet Holdings Ltd*

[\[2019\] NZEmpC 188.](#)

2 *A Labour Inspector of Ministry of Business, Innovation and Employment v Jeet Holdings Ltd*

[\[2019\] NZEmpC 194.](#)

[6] On the same date, Mutual Credit Finance Limited (MCF), a creditor of the first, fourth, fifth and seventh defendants, filed a memorandum describing general security interests it held over the assets of those defendants. The memorandum recorded MCF's understanding that the three relevant companies were in financial difficulty, and that each of the restaurant businesses operated by the companies were listed for sale with NAI Harcourts Christchurch City Commercial; however, trading continued with the intention of a sale as a going concern in order to maximise the return to all interested parties.

[7] There was a concern that the terms of the order as originally made could impede the payment of wages on an ongoing basis, but the permanent order made it clear that there was no difficulty of this kind.

[8] It appears that attempts have been made to enter into agreements for sale and purchase of three particular restaurants owned by the first, fourth and fifth defendants, all trading under the name of "Corianders". There was over time some interest in buying one or two of the restaurant businesses, but Mr Amar Deep Singh, the seventh defendant, and sole director of the relevant companies, instructed the agents he wanted to sell all three contemporaneously, and that the trading name of "Corianders" would only be sold if that condition was met.

[9] Negotiations for the sale of these assets occurred in December 2019 and January 2020 with two particular parties. By mid-January, a set of offers was presented from each.

[10] The first was from Innovative Hospitality Group Limited (Innovative). Ultimately, it advanced three offers in respect of the three restaurants for a total of

\$500,000, with no condition as to finance, and a prompt settlement on 1 February 2020. A second offer for the three restaurants was received from Gurbinder Singh and Namrata Singh, whom the Court is told are not related to the seventh defendant. Their offer totalled \$760,000 for the three restaurants, but they were subject to a condition as to finance to be satisfied within 15 working days of agreement, and settlement on 31 March 2020 so as to allow for staffing of a new operation.

[11] Mr A Singh considered Innovative's cash offer with a prompt settlement to be preferable in the circumstances, and agreement was reached on 20 January 2020.

[12] On 22 January 2020, lawyers for the parties to the transactions agreed to a number of matters, including some special conditions applicable to the agreements for sale and purchase. Included was this provision:

The parties agree that the Agreement is subject to the Vendor being satisfied that it can complete the sale contemplated by the Agreement in accordance with the requirements of the Freezing Order obtained by the Labour Inspector of the Ministry of Business, Innovation and Employment over the assets of the Vendor dated 12 December 2019 (sic) and any negotiated variation thereto or court directed variation thereto. The Vendor shall have seven working days from the date of this Agreement to confirm that it has satisfied the requirements of this condition.

[13] At the same time, there were exchanges between lawyers for the parties as to whether the Labour Inspector would be

prepared to consent to a variation of the freezing order to permit the transactions to proceed and for the proceeds to be paid to MCF. At that stage, the Labour Inspector's position was that the transactions could proceed, but that the proceeds of sale should be paid into Court.

[14] On 23 January 2020, MCF applied to the Court for leave to be joined as a party to the proceeding, and for formal orders of variation in terms of the request which had been made to the Labour Inspector.

[15] At a telephone directions conference held later that day, I joined MCF as a third party. Initially, I was told that the three transactions were subject to the Court's order being formally varied by 5.00 pm on 23 January 2020, and that the Court should consider the application under urgency that day. Later, I was advised that in fact the deadline was at 5.00 pm the next day, but that in any event the parties to the transaction had agreed that the relevant condition could be extended to 5.00 pm on 31 January 2020. I timetabled the application accordingly for urgent disposition at a hearing to be held on 30 January 2020. At the hearing, I was told that settlement of the Innovative transactions was now agreed to take place on 18 February 2020.

[16] It is also relevant to mention that liquidation proceedings have been placed before the High Court in respect of the first, second, fourth and fifth defendants; these are set down for hearing on 5 March 2020.

### **The position and evidence of the parties**

[17] By the time of the hearing, the Court had received a range of affidavits from all parties.

[18] In support of its application for variation, MCF filed two affidavits from its Chief Executive, Mr Clint Barry, providing amongst other documents copies of the security agreements relating to the assets of the first, fifth and sixth defendants, as well as the seventh defendant; and the agreements of sale and purchase of the three restaurants. Mr Barry said that since MCF was under its securities owed more than

\$600,000 and that the proceeds of sale would amount to only \$500,000, all proceeds after payment of certain costs would have to be paid to MCF and not to any of the vendor companies.

[19] The defendants support MCF's application. So as to deal with contentions raised by Ms N Singh as described in the next paragraph, the defendants filed an affidavit from the real estate agent involved, Ms Premilla Sharma, in which she outlined the history of the presentation of the two sets of offers referred to earlier, and as to the selection by Mr A Singh of the lower of the two sets. An affidavit was also filed from him, explaining why he made this decision.

[20] The Labour Inspector neither consented nor opposed the making of the orders sought. However, an affidavit had been taken from Ms N Singh, raising her concerns as to the process leading to the rejection of the offer she and her husband had made. She outlined the process of due diligence she had undertaken over several months, prior to the advancing of offers in January. She described her surprise that her offers were not accepted; she also said she had heard that the vendors had made "some arrangements" with the purchasing party; the implication of this evidence was that there was a private arrangement with Mr A Singh, which was to his advantage and/or his interests, which had not been disclosed.

[21] I will refer in more detail to relevant factual disputes later.

### **Submissions of the parties**

[22] In summary, Mr Vinnell submitted for MCF:

- a. Given that the purpose of a freezing order was to prevent the disposal or dissipation of assets, a bona fide sale could not offend that purpose. The transactions would convert business assets into funds which, if available to any defendant, could be held pursuant to the freezing order. In this case, however, the funds were not available to the defendants because of the effect of the securities.
- b. The interests of a secured creditor must prevail, there being no dispute that MCF has the status as a secured creditor of the relevant defendants' assets. Those assets would not be available to any defendant and could not therefore be available to the plaintiff.
- c. A charging order is not put in place to provide the claimant with a security for its claim: *Taylor v Van Dutch Marine Holding Ltd*.<sup>3</sup>
- d. Accordingly, the grounds to support the continuation of the freezing order do not exist, because the requirement to establish a real risk of dissipation is central to the jurisdiction.
- e. MCF was satisfied that the agreements of sale and purchase were in respect of a transaction with an unrelated third party, at arms' length, and represented the best price available in the circumstances. It would be prepared to release its securities to enable these sales to proceed, despite the shortfall.

[23] In summary, Mr Evans submitted for the first, fourth, fifth and seventh defendants:

3. *Taylor v Van Dutch Marine Holding Ltd (TCA Global Credit Master Fund LP, 3rd Party)* [\[2017\] EWHC 636 \(CH\)](#).
- a. Ms N Singh, the disappointed intending purchaser of the businesses, was unsatisfactory in a number of respects. She said, for instance, that she indicated to the agent there would be higher counter-offers if her original offers were not accepted. It was submitted this approach misunderstood the multi-offer document she had signed indicated that because another offer was being made, she should make the best offer she could in the first instance.
- b. Reference was made to aspects of the steps taken prior to Ms N Singh present her company's offers. These indicated changing positions as to the source of finance, a statement that the obtaining of funds to purchase the restaurants would not be a problem, followed by the advancing of offers with finance conditions. Reliance was also placed on the evidence of the agent involved, Ms Sharma, that a finance clause would cause difficulties for any vendor, because the obtaining of finance for the acquisition of businesses of this kind is not currently easy in Christchurch.
- c. Mr A Singh had indicated he wanted a contemporaneous settlement of all three restaurants; this had been made plain to Ms N Singh, but she had sought staggered possession dates.
- d. An alleged lack of impropriety had been made by Ms N Singh in her affidavit, which demonstrated unsubstantiated commercial naivety. No evidence had been put forward to support her claim which was based on hearsay and smacked of a disappointed intended purchaser trying to negotiate further. Mr A Singh, in his affidavit in reply, had categorically denied any hidden deal or other payment. The offer that had been accepted from Innovative was to be regarded as genuine.

[24] In summary, Mr La Hood, for the Ministry of Business, Innovation and Employment, submitted:

- a. It was confirmed the Labour Inspector neither consented nor opposed the application for variation. Because Ms N Singh had raised her concerns with the Labour Inspector, she had been interviewed and an affidavit which she prepared was then placed before the Court; the Labour Inspector considered the concerns raised to be relevant to the current issues.
- b. The application for variation had to be evaluated in the context where the Court had found, when making the original orders, that there was a strong inferential case, as well as a prospect of assets leaving the jurisdiction if not frozen.
- c. The background to the making of offers by Ms N Singh followed a period of extensive due diligence, the selling of other assets to facilitate a purchase of the Coriander restaurants, and clear evidence she was prepared to advance higher offers. Her statement that she had been told there were "arrangements" between the parties to the transactions had to be considered in the context where offers had been accepted which would were some \$260,000 lower than her own offers. This raised a serious question as to whether the proposed sales to Innovative were legitimate, and therefore whether the Court should vary the freezing orders.

### **A preliminary matter**

[25] In the course of the hearing, I noted there had been no compliance by the defendants of the directions made by the Court that each defendant was to file a schedule fully particularising their financial position and identifying all assets and their value. I took the view that though the application for variation was brought by the third party and not the defendants, had MCF not brought that application the defendants would need to have done so themselves in order to obtain approval for the transactions.

[26] After hearing counsel, I concluded that since the defendants were strongly supporting the application, a failure to comply with the Court's earlier direction

indicated an absence of good faith in a situation where bona fides was in issue. Accordingly, I directed the filing of this material on an urgent basis.

[27] Mr A Singh has now filed an affidavit setting out the financial position of the various defendants, including himself. He says the first, second, fourth and fifth defendants will be placed in liquidation for substantial debts due to the Inland Revenue on 5 March 2020; and that he is not solvent. The Court is, however, in no position to conclude that it has a full picture from this evidence of the apparently complex dealings involving multiple companies, including a trust company.

### **Issues**

[28] Distilling the various submissions, the two main issues to be resolved by the Court are:

- a. the status of MCF's position as a secured creditor, in light of the freezing orders; and
- b. whether the transactions for sale of the Coriander businesses are legitimate.

[29] On the broader question of the legal approach to be taken on an application for variation, I am guided by the well-known principles relating to the making of freezing orders. The four essential requirements that must be satisfied are:

- a. that the plaintiff has a good arguable case;
- b. that the defendants have assets within the jurisdiction;
- c. that there is a real risk that the property will be moved out of the jurisdiction or dissipated; and
- d. that the balance of convenience and interests of justice require the order to be granted.

[30] The present application does not raise issues in respect of the first three criteria. Rather, it relates to the balance of convenience and interest of justice, particularly as it affects a third party, MCF.

[31] At this stage, given untested evidence, the Court must assess the evidence in a realistic and careful way, recognising that its conclusions as to the background facts may have to be subsequently analysed in greater depth, whether by a relevant authority or court.

### **First issue: MCF's position as a secured creditor**

[32] There is no dispute that MCF is a secured creditor owed \$600,000. Nor is it in issue that subject only to the agreed costs of the transaction, the full proceeds of the current sales of the restaurant businesses to Innovative are payable to MCF under its securities.

[33] I accept the submission that such a possibility could not compromise the making of the freezing order. The making of that order did not give the plaintiff any proprietary rights over assets, nor did it give him preference over other creditors of the defendant. It is well established that such an order is one made in personam, against the conscience of each defendant, rather than an order in rem attaching the assets themselves.<sup>4</sup>

[34] This was well explained by Mann J in *Taylor* when he said:<sup>5</sup>

In the absence of authority it would seem to me to be clear that principle does not stand in the way of a secured creditor enforcing its security over charged assets caught by a freezing order. The whole point of a freezing order, as is now well established, is to prevent a defendant from dissipating its assets improperly in the face of a claim by the claimant. It is a remedy which operates personally against the defendant (or any other person identified as a respondent in the injunction and against whom the injunction is specifically directed). It does not operate so as to give security to the creditor; and it does not operate so as to affect the genuine rights of third parties over those assets.

<sup>4</sup> *Equitable Remedies*, ICF Spry, (9th ed), Sweet & Maxwell, p 547-548.

5. *Taylor v Van Dutch Marine Holding Ltd (TCA Global Credit Master Fund LP, 3rd Party)*, above n 3, at [10].

[35] The Court in that case went on to find that strictly speaking a third party with security over property which is frozen by a freezing order would not need to obtain permission in order to exercise that security, because the exercise of disposal rights would not be an act prohibited by the order.<sup>6</sup>

[36] That was a case where a secured creditor was exercising its right to realise property. Although, strictly speaking, the secured creditor did not need the Court's approval to exercise its rights, the Court took the view it should be sympathetic to a third party that desired clarity, and for that reason made the orders sought.

[37] The present case is a little different, in that the third party did not itself realise the assets over which it held security, by appointing a receiver to sell those assets. But the dicta in *Taylor* as to the position of a secured creditor, is in my view, nonetheless relevant for present purposes.

[38] In short, providing the transaction is legitimate, MCF is entitled under its securities to the proceeds of sale. The obtaining of the freezing order by the plaintiff did not amount to a charge over the assets and could not inhibit the exercise of MCF's rights.

### **Second issue: a legitimate sale?**

[39] The main issue relates to the legitimacy of the sale to Innovative.

[40] It is apparent that the process of sale of the restaurants has not been straightforward, has taken time, and has occurred in a commercial environment where a vendor may well have difficulty in obtaining a sale, which it could be confident would proceed, or, in a case such as the present where leases are to be assigned, that there will be no ongoing liabilities to a landlord.

[41] There is no doubt that Ms N Singh asked a range of questions of Ms Sharma, the real estate agent, before advancing her offers. She is not to be criticised for that prudence.

[42] Although she says that a prior business was sold to facilitate an acquisition of the Coriander restaurants, no details of the funds this realised were provided to the Court; nor was any information provided as to the prospects of satisfying the conditions as to finance.

[43] Ms Sharma states that major banks and lenders have seriously tightened the amount of money they are willing to advance to potential purchasers in the hospitality industry, and that finance often does not get approved and deals fall through, leaving a vendor having to continue marketing an unsold business. Consequently, a vendor is more likely to accept an offer that is either unconditional or does not contain a finance condition.

[44] A further issue relates to the fact that Ms N Singh signed a multiple offer presentation document, in which she clearly acknowledged that because there was more than one offer being made, she would make the best offer she could, and would not have the chance to make a better offer. Her statement that she wished to advance counter-offers does not recognise that reality.

[45] As noted earlier, the Inland Revenue has brought petitions against the three defendant companies involved, which are to be heard in the High Court at Christchurch on 5 March 2020; at this stage, it appears the companies will be placed in liquidation on that date. The possession dates proposed by Ms N Singh were in respect of a later date. Although it is not clear when the petitions were filed, the importance to the vendors of a prompt possession date is, at least on a prima facie basis, understandable because it would allow MCF to realise its security in a timely way, and arguably would reduce the issues to be resolved on a liquidation.

[46] Mr A Singh states that upon receiving the cash offer on behalf of Innovative's interests, he was more attracted to it because there were no finance conditions. He said there was some negotiations to see if an increase of the offers could be obtained. Counter-offers were made but not accepted, because two out of the three businesses had been losing money over the previous two years.

[47] Another factor which Mr A Singh said was relevant was that he was not confident that a sale to the company of which Ms N Singh and her husband were directors would not give rise to rental issues. He said that if there was an adverse history of rental payments on the part of the purchasers, a landlord would be more reluctant to agree to an assignment of the applicable leases; preliminary inquiries he made suggested this was the case. It is also understandable this factor could have been relevant if any assignment of lease was subject to an ongoing personal guarantee of rental payments.

[48] He rejected the assertion that he would receive a secret commission under the transaction which had been agreed. He said the full extent of the money or other benefits to be received as part of the transaction were recorded in the written agreements for sale and purchase.

[49] Referring to an email held by MCF, which indicated prior business relationships between them and himself, Mr A Singh said that one of the persons involved was a builder, and that some two years ago he had obtained a price for some building work that he was thinking of undertaking on his house. He did not proceed with the work. Apart from that, he had no other dealings with that particular person, nor his two associates involved in the purchase.

[50] Ms N Singh's sole piece of evidence to support her concerns as to a possible non-disclosure of the full consideration to be paid, is that she has heard that "arrangements" had been entered into between the parties. It is left to the Court to infer this could mean a secret commission may be payable to Mr A Singh. Not only is this hearsay evidence, but it is bereft of any details at all, and could not provide a proper basis for concluding there are undisclosed financial details, even when considered in the context of the various matters raised by Ms N Singh.

[51] Finally, I take into account the position of MCF. It has plainly been involved with regard to lending issues to the various defendants for some months. Reference was made to two previous sales in the Corianders group, namely, restaurants at Edgware and Hanmer. Mr Barry said it had been suggested that this was to permit funds to be channelled overseas. In dealing with this assertion, he confirmed that the

proceeds of sale of the Edgware business were partially retained by the Corianders group and used for business expenses, including the making of regular payments of MCF, with the balance being paid to MCF. The proceeds of sale of the Hanmer business were mainly paid to MCF in reduction of its debt, with the balance being paid to the Inland Revenue, and to meet sale expenses.

[52] Notwithstanding the fact that MCF will still be out of pocket as a result of the sale of the businesses to Innovative, on the basis of its knowledge of the circumstances, it has decided to support that particular transaction; it has not sought to do otherwise, even when Ms N Singh's affidavit was filed indicating a higher offer would be forthcoming from her and her husband's company.

[53] On the basis of the evidence currently before the Court, it cannot be concluded for present purposes that the current transactions are not legitimate.

## Conclusion

[54] In the unusual circumstances which have arisen, I am satisfied that the interests of justice require the making of the order sought so as to allow the restaurant sales to proceed, and for MCF to exercise its security rights.

[55] The order I now make is in two parts. The first will allow the current transactions to proceed. The second will allow MCF as a secured creditor to exercise other rights, such as the appointment of a receiver to realise its securities, if the present transactions cannot for some reason proceed.

[56] The Court's orders are as follows:

- a. The freezing order made on 19 December 2019 is varied so that:
  - i. the first, fourth and fifth defendants are permitted to sell their restaurant businesses to Innovative pursuant to the Agreements for Sale and Purchase dated 20 January 2020 (the "Agreements");
  - ii. the assets being sold pursuant to the Agreements are released from the freezing order for the purpose of being transferred to the purchasers under the Agreements;
  - iii. the proceeds of sale under the Agreements shall be made available to meet the costs of sale (as approved by MCF) with the balance being paid to MCF under its securities;
    - iv. any funds held for the credit of the first, fourth and fifth defendants (including funds held in accounts of Westpac New Zealand Limited) are released from the freezing order for the purpose of payment to MCF under its securities and reduction of its debts.
- b. The freezing order shall not operate to prevent MCF from exercising its rights under the assets, otherwise subject to the freezing order, under its securities.

[57] I reserve costs. 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.

[58] If any party chooses to make an application for costs, that should be filed and served within 21 days; any response is to be given within a further period of 21 days thereafter. It is likely I would consider the appropriate costs classifications to be Category 2, Band B.

B A Corkill Judge

Judgment signed at 3.15 pm on 31 January 2020