

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Infinity Investment Group Holdings Limited (Applicant)

AND Murray Peter Walker, Alan James McKenzie and Stephen John Grant as trustees of the Pinot Trust (First Respondent)
Murray Peter Walker (Second Respondent)

REPRESENTATIVES Karen Castiglione, counsel for applicant
Diccon Sim, counsel for respondents

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION On the papers
Applicant's submissions received 14 December 2006

DATE OF DETERMINATION 19 December 2006

DETERMINATION OF THE AUTHORITY

[1] By this application, both parties seek to have proceedings removed to the Employment Court pursuant to section 178 (2) of the Employment Relations Act 2000.

[2] The second respondent, Murray Walker, was employed by the applicant. The first respondents (who include Mr Walker) are the trustees of Mr Walker's family trust. The trustees own land transferred to them by the applicant. The trustees granted the applicant a mortgage over that land to secure a loan from the applicant to the trustees. Mr Walker is the covenantor under the loan agreement. He says that the transactions were with his family trust at his request and were part of his employment agreement with the applicant. The written employment agreement dated 21 December 2000 included provision for the second respondent to receive a *free house section ... up to a ceiling of \$200,000* subject to a pro-rata claw back provision operative for 8 years. The loan agreement does not include the same provision. Rather, it provides for repayment of the principal sum on the earliest of the following three events: ten years from the date of the advance; or the cessation of the borrower's/covenantor's employment; or sale of the land.

[3] The employment ended by redundancy in September 2005. In October 2005, the applicant commenced proceedings in the District Court against the respondents to recover the principal and interest under the loan agreement. The respondents then sought a stay or an order dismissing the proceedings on the basis that the matter is an employment relationship problem within the exclusive jurisdiction of the Employment Relations Authority. Mr Walker says that no money is owed by him or the other trustees because of the terms of his employment. He also says that he is entitled to a discharge of the mortgage, there being no debt to secure.

[4] The important questions of law said to arise other than incidentally are: whether the Authority has jurisdiction over the trustees who (excepting Mr Walker) were never the

applicant's employees; and whether the Authority has jurisdiction to order the applicant to provide a discharge of the mortgage over the land owned by the trustees. Reference is also made to the large sum in dispute. The Authority provided a minute to the parties giving them an opportunity to make written submissions about removal or request a hearing. Counsel for the applicant lodged submissions. It is submitted that a question arises about indefeasibility of land title in the employment context and whether the employment relationship can impact on the enforceability of a mortgage granted by non parties to the employment relationship. There is said to be a question of law about whether the evidence about the employment relationship can be used as extrinsic or parol evidence to contradict the express terms of the loan agreement. Finally, more is said about the large sum at issue and the parties' preference for use of a formal procedure to resolve difficult questions of credibility.

[5] The point made in the minute to the parties is that the questions of law arising in respect of the power of the Authority to make orders effective against the respondents other than Mr Walker and against the applicant in respect of a discharge or mortgage are really incidental. The Authority can make appropriate orders binding on Mr Walker whether as a trustee or personally provided the matter is an employment relationship problem. There is no reason to think that the applicant would not willingly provide a discharge of mortgage once the dispute about liability under the loan agreement is resolved.

[6] The matter will be an employment relationship problem if the loan and mortgage arrangements were entered into pursuant to the employment between Mr Walker and the applicant. That is an inquiry into the meaning of the written terms in the letter of employment and whether there was any agreement to amend those terms as reflected in the loan agreement. It is essentially a factual inquiry together with a dispute as defined in the Employment Relations Act 2000. The point is implicit in the submissions made by counsel about the application of the parol evidence rule and the apparently difficult issues of credibility.

[7] For these reasons I conclude that there is no important question of law arising other than incidentally so the matter cannot be removed to the Employment Court under section 178 (2) (a) of the Employment Relations Act 2000. No public interest issues arise, nor are there other related proceedings already before the Employment Court.

[8] What remains is whether the matter should nonetheless be removed under subsection (d) given the joint application, the large sum in dispute, the apparently difficult credibility issues, tax and accounting issues and the desire for a prompt resolution. The Authority is able to convene a meeting quickly and can permit cross examination. I infer that tax and accounting issues will be referred to in order to explain the difference between the letter of employment and the form of the loan agreement. In the end, the most telling factor in the application is its joint nature. However, I am not persuaded that the ordinary dispute resolution processes provided by Parliament should not be applied.

[9] For the foregoing reasons, the application for removal is declined. Costs are reserved. The Authority will convene a directions conference shortly.

Philip Cheyne
Member of Employment Relations Authority