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Soundhomes NZ Limited v Doughty [2024] NZEmpC 194 (7 October 2024)

Last Updated: 4 November 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2024\] NZEmpC 194](#)

EMPC 393/2024

IN THE MATTER OF an application for a freezing order
 and ancillary orders

BETWEEN SOUNDHOMES NZ LIMITED
 Applicant

AND PHILIP CARL DOUGHTY
 First Respondent

AND PROCLADD EXTERIOR SOLUTIONS
 LIMITED
 Second Respondent

AND BLACKDOG FINISHES LIMITED
 Third Respondent

AND PREVENT SERVICES LIMITED
 Fourth Respondent

Hearing: On the papers

Appearances: P Napier and M Bouzaid, counsel for
 applicant No appearance for respondents

Reasons: 7 October 2024

REASONS OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a without notice application for a freezing order and ancillary orders, and for directions as to service.

SOUNDHOMES NZ LIMITED v PHILIP CARL DOUGHTY [\[2024\] NZEmpC 194](#) [7 October 2024]

[2] The application is supported by affidavit evidence which I will summarise shortly. Also filed was a memorandum of counsel as to urgency, a draft order and an undertaking as to damages. After discussion with counsel as to some issues pertaining to the proposed draft order, a supplementary memorandum was filed as to whether the respondents have any possible defences, and annexing a document that needed to be provided to the Court; a further draft order was also filed.

[3] The application was dealt with urgently on 4 October 2024. I was satisfied that the circumstances justified the application being heard promptly on an ex parte basis. I issued a minute that day, summarising my conclusions and making the orders sought. I indicated that I would provide reasons for doing so. These are my reasons.

Background

[4] Soundhomes describes itself as a main contractor. Daniel Wright, who provided the affidavit in support, is the sole director and majority shareholder of the company. It was incorporated in 2014.

[5] In 2019, Soundhomes employed the first respondent, Philip Doughty, as its general manager.

[6] The second respondent, Procladd Exterior Solutions Ltd (Procladd), was incorporated on 29 September 2023, previously under the name of Team Coatings Ltd (Team Coatings). Mr Doughty was the sole director up until 1 October 2024. He was the majority shareholder of that entity, owning 90 per cent of its shares, with his partner owning the remaining 10 per cent. According to Companies Office records, this changed on 1 October 2024 when Mr Doughty's partner became the sole director and sole shareholder of that entity.

[7] The third respondent, Blackdog Finishes Ltd (Blackdog), was incorporated on 30 August 2017. Mr Doughty is its sole director. He is the majority shareholder, owning 90 per cent of its shares, with his partner owning the remaining 10 per cent, according to Companies Office records.

[8] The fourth respondent, Prevent Services Ltd (Prevent Services), was incorporated on 21 January 2020. Mr Doughty and Mr Wright are joint directors. The shares are held equally on a 50/50 basis according to Companies Office records. Mr Wright says the company has been issued a notice of removal from the Companies Register. He says he is unaware of any assets owned by the company, but says in case there are any bank accounts opened of which he is unaware but which Mr Doughty may be able to control, he has included information relating to it.

[9] Mr Wright says that as a main contractor, Soundhomes engages subcontractors to assist in completing projects. As the general manager, Mr Doughty was responsible for setting up payments and authorising payments to subcontractors.

[10] Mr Wright states that Mr Doughty gave verbal notice of his resignation in or around the end of March 2024. His last day of employment was 17 July 2024.

[11] In summary, Soundhomes alleges that Mr Doughty committed fraud and/or conversion during his employment with the company. It says systematic theft has taken place over a long period of time, and that the sums involved are significant.

[12] Accordingly, Soundhomes seeks orders restraining Mr Doughty and his apparently associated companies over which he has apparent control from removing, disposing of, dealing with or diminishing the value of certain assets. These are sought to preserve the company's position so that any funds that have been or may be paid into the respondents' bank accounts or to acquire property over which Mr Doughty has control, remain in New Zealand and are not dissipated pending determination of proceedings it intends to bring promptly in the Employment Relations Authority.

[13] Further, it also seeks ancillary orders requiring full disclosure of assets and accounts. It says these are required to ensure the freezing order it seeks will be complied with, establish the true extent of the theft, identify assets against which recovery could be sought, trace misappropriated funds to the respondents or other related parties, and assist in formulating the substantive claim which Soundhomes wishes to bring.

Relevant principles

[14] [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](#).

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

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

[17] 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.

[18] Rule 32.5 provides that the Court may make a freezing order against a respondent if an applicant has a good arguable case on a prospective cause of action. 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 Authority

– will give judgment in favour of the applicant.³

[19] 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

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 Rule 32.3.

[20] 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 respondents have 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.

Analysis

Good arguable case

[21] In his supporting affidavit, Mr Wright has explained how his concerns as to the issues he now raises developed.

[22] He said he did not think anything initially of Mr Doughty’s resignation from his position until September 2024.

[23] However, in that month, he was approached by a subcontractor with whom Mr Doughty had worked on a particular project, assisting in remediating window joinery.

[24] He was told by the subcontractor that Mr Doughty had asked him to increase the pricing for installing windows, and to pay him a 10 per cent margin of the total contract price for securing the subcontracting role for them. Mr Wright said that from memory, the total price of the contract was approximately \$400,000. Copies of the invoices associated with the payment were produced. They required payment to

5. See for example *Labour Inspector v Taste of Egypt Ltd* [2016] NZEmpC 31, [2016] ERNZ 309 at [13]–[23], citing *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 (EWCA); *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].

“Team Coatings” and into an ANZ bank account, which I infer was not an account belonging to Soundhomes.

[25] This information led to Mr Wright becoming suspicious as to whether further irregular payments had been made. He began an audit of outgoing payments on projects on which Mr Doughty had worked, and whether payments had been made from the company’s bank account to the relevant “Team Coatings” bank account.

[26] In one instance, he concluded that payments apparently made to a painting subcontractor were significantly higher than would be expected for a project of the size involved. He obtained copies of the original invoices supplied by the subcontractor and compared them with those entered on the company’s Xero accounting system. There were material differences. For example:

- (a) The invoiced amounts on the invoices saved on the company’s system were higher than the amounts on the subcontractor invoices.
- (b) There were some invoices in the company’s system which the subcontractor had never issued.
- (c) The bank account number shown on the copies of documents on the company’s system differed from that which the subcontractor had provided on its invoices.

[27] The company’s bank account records showed that, in line with the invoices recorded on its system, payment had been made to a bank account which was not that of the subcontractor, at the higher rate.

[28] The subcontractor then provided information to Mr Wright from its system which showed that payments to it had been received from an account owned by Mr Doughty, with the payee details being “P C Doughty”.

[29] This led Mr Wright to conclude that the payments the subcontractor had received were from a Westpac account to which unauthorised payments had been made on behalf of Soundhomes. Based on this information, he concluded that Mr Doughty

had been “skimming the top” of invoices payable to the subcontractor, and creating fake invoices.

[30] Further investigations with regard to the account holders led to other apparently irregular transactions in addition to the two examples just recorded.

[31] A further random check relating to an invoice in 2022 produced another apparently fraudulent invoice.

[32] Mr Wright also said he had discovered an apparent transaction relating to payments to a close friend of Mr Doughty and involving a substantial sum, which he believed may also be irregular.

[33] All such payments were summarised in a schedule and totalled a significant amount.

[34] In summary, Mr Wright had concluded that there were two categories of irregular payments. The first is what he described as a “secret commission”.⁶ The second category relates to fraudulent invoices, and payments made without invoices, for the purposes of enriching Mr Doughty or entities associated with him, including the second, third and fourth respondents.⁷

[35] Following his audit of accounts, Mr Wright said he was certain that Mr Doughty had fraudulently converted company funds into personal and/or accounts associated with Procladd, Blackdog and Prevent Services over which he had control.

[36] Mr Wright said that outside his employment as general manager, Mr Doughty had not provided the company with any subcontracting services. Moreover, the respondents had not provided any subcontracting services to Soundhomes. The invoices which were located and produced did not relate to actual work completed by Mr Doughty for Soundhomes, or at its direction.

6 As described at [23]–[24] above.

7 As described at [26]–[28], [30] and [32] above.

[37] These concerns led Mr Wright to instruct a forensic accountant to analyse the position, which work was under way at the time of the application to the Court.

[38] Mr Napier, counsel for the applicant, said that a claim would be brought by the company against Mr Doughty, alleging a breach of cl 8.2 of the relevant individual employment agreement (IEA) (which, amongst other things, required the employee to perform his duties with all reasonable skill, care and diligence), and an implied term both under the IEA and at common law not to steal money from his employer, or wrongfully obtain a benefit to which he was not entitled.

[39] I conclude that the allegations of the company’s proposed claim against Mr Doughty are capable of tenable argument and are supported by sufficient evidence.⁸

Assets within the jurisdiction

[40] Mr Doughty is one of two registered proprietors of a property in Auckland.

[41] Mr Wright provided details of various New Zealand bank accounts, which he believes are associated with Mr Doughty as follows:

(a) A Westpac account is associated with Mr Doughty because payments that one of the above subcontractors received in relation to invoices it had issued to Soundhomes, had Mr Doughty’s name recorded as the payee.

(b) An ANZ account is believed to be associated with Procladd, Blackdog and Prevent Services because, following inquiries with the ANZ Bank, Mr Doughty had contacted Mr Wright and advised him that ANZ had inquired about some of his accounts and suggested that they meet to discuss.

[42] Mr Wright believes it is likely Mr Doughty would, in the circumstances, have moved money around and across accounts owned by the entities in which he is believed to have a controlling interest.

⁸ *Hannay v Mount*, above n 1, at [22].

[43] Finally, reference was made to vehicles owned by Mr Doughty. Mr Wright says he was aware that Mr Doughty collects classic vehicles which are valuable, and that he owns a 1950s Chevrolet Belair of some value.

[44] I am satisfied, for preliminary purposes, that Mr Doughty has assets in the jurisdiction and that Procladd, Blackdog and Prevent Services may also have relevant assets in the jurisdiction.

Danger of disposition

[45] It was submitted that there is a high risk of dissipation here because:

- (a) Mr Wright is satisfied from the circumstances that Mr Doughty had misappropriated significant funds from Soundhomes;
- (b) Mr Wright considers that those funds may well have been dispersed to various accounts or to other associated entities, or spent by Mr Doughty on renovations to his home or on other personal items such as vehicles, (this being a reasonable inference in the circumstances); and
- (c) Mr Wright considers that it is highly likely that the various respondents would attempt to place relevant funds in sources where they would not be available for recovery.

[46] I accept this submission for preliminary purposes. There is a legitimate basis, in the circumstances which have been raised with the Court, for concluding that there is a danger of dissipation.

Possible defences

[47] Consistent with counsel's duty to the Court, Mr Napier made submissions as to possible defences on which the respondents might rely, including any facts that would support their positions.

[48] With regard to the category relating to the obtaining of a secret commission, it was noted that Soundhomes had relied on the advice of a subcontractor as to

effectively being asked to pay the sums involved to Mr Doughty. It was noted a possible defence that the subcontractor was untruthful and that the evidence of the amount paid as a secret commission was, in itself, fabricated.

[49] Counsel submitted that such a defence would be unlikely to succeed. The subcontractor would have had to go to some trouble to provide this information, and it is hard to see why they would do so.

[50] Turning to the allegations made relating to false invoices and payments made without invoices, it was noted that a possible defence was that the documentary records were somehow not accurate and/or that there was a possible benign reason for such payments being made.

[51] Counsel submitted that such a defence would be unlikely to succeed, I assume because of the level of detail which had been provided, including documents.

[52] I also note that there is a broad consistency in confirmation of information which has been obtained from several subcontracting sources.

Relevant procedural issues

[53] These points suggest that a freezing order may be made, at least in the interim, and until further information is sought.

[54] Soundhomes says that analysis has been carried out for the years 2023 and 2024. However, Mr Doughty was employed for a longer period and there may be yet further information relevant to the company's claims. The extent of the alleged irregularities is still under investigation with the assistance of a forensic accountant.

[55] Accordingly, a statement of problem has not yet been filed, although it is intended that this step will be taken shortly.

[56] A related issue concerns the extent to which the respondents may have actively disposed of assets with the intention of defeating creditors or the interests of the company. Accordingly, ancillary orders are sought under r 32.3 of the High Court

Rules in order to elicit information that may be relevant for the purposes of the freezing order.

[57] Disclosure is sought from all respondents by way of affidavits listing their assets, bank statements, financial records and all invoices and particulars relating to work completed for Soundhomes. The applicant also asks for permission to use the disclosed information to formulate its substantive claims, and to make relevant inquiries for that purpose. It also seeks directions to serve the relevant banks operating the accounts subject to the freezing order.

[58] As noted, a statement of problem has yet to be filed. Previous cases have recognised that it may not be necessary for a statement of problem or draft statement of problem to be filed in support of an application seeking freezing and ancillary orders which is being heard under urgency.⁹

Balance of convenience and interests of justice

[59] I am satisfied that the effect of a freezing order would be to effectively preserve the status quo.

[60] When weighing the balance of convenience, I must assess the prejudice which Soundhomes could suffer if funds which have been wrongly obtained were dissipated before an enforceable judgment could be obtained. I accept that risk is significant in light of the financial harm that may be suffered.

[61] I must also consider, if possible, the position of the respondents who may suffer inconvenience, if not hardship, by the making of a freezing order. I accept the submission that such hardship may be mitigated by:

(a) a direction that the freezing order will not prohibit the respondents from dealing with the assets covered by the order for the purposes of paying ordinary living expenses, legal expenses relating to the freezing order, or

9. See “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 8; *BD v FG* [2022] NZEmpC 94 at [4]; and *A v B* [2021] NZEmpC 118 at [36].

disposing of assets or making payments in the ordinary course of business; and

(b) the making of ancillary orders requiring the respondents to provide the details of their financial positions which may lead to greater clarity as to the position between the parties.

[62] I am satisfied that the balance of convenience and interests of justice favour the granting of the freezing order.

Undertaking as to damages

[63] The necessary undertaking as to damages has been provided. I have no reason to conclude that it cannot be relied on.

Conclusion

[64] A freezing order is appropriate. Having regard to all the circumstances disclosed, I am satisfied that there is a danger that any judgment ultimately made in favour of the company will be wholly or partially unsatisfied because relevant assets may have been disposed of, dealt with or diminished in value.

[65] I am also satisfied that it is in the interests of justice to grant the application for ancillary orders as sought.

[66] Accordingly, I made orders as sought and confirmed these in my minute of 4 October 2024.

[67] As the orders were made without notice, they have limited effect. They will expire after 9 am on 24 October 2024. At 2.15 pm on 23 October 2024, the matter will be called in the Employment Court at Auckland for review. All parties may then appear and be heard.

[68] I also directed counsel for the applicant to ensure that a copy of my minute would be included in the papers for service on each respondent and on the three banks

identified in the orders, a copy of which is attached. I now direct that a copy of this judgment is to be served on each respondent, and on the banks identified in the orders.

[69] As noted, one of the ancillary orders which was authorised was that the respondents are to file and serve affidavits on financial matters within seven days of service of the documents on them. I also make a further direction that the statement of problem which Soundhomes proposes to file is to be finalised, filed in the Authority, and served on all respondents within seven days of the filing and service of the respondents' affidavits. A copy of the statement of problem is also to be filed in this Court.

[70] The Court is to be advised as soon as the documents described herein have been served, with the respondents being copied into this communication. The judgment will be published three working days after that notification has been received.

[71] I reserve costs.

