

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CIV-2009-488-000566

UNDER the Arbitration Act 1996

IN THE MATTER OF an Arbitral Award

BETWEEN TGB HOLDINGS LIMITED
Applicant

AND BFP TRUSTEES NO. 1 LIMITED AND
BFP TRUSTEES NO.2 LIMITED
First Respondent

AND MANU CHHOTUBHAI BHANABHAI
Second Respondent

AND ANDREW GILCHRIST
Third Respondent

AND STEPHEN MCCOWAN
Fourth Respondent

Hearing: 4 April 2011

Appearances: W Peters for the Applicant
D Chesterman for Respondents

Judgment: 8 April 2011 at 4:00 PM

**JUDGMENT OF VENNING J
ON APPLICATION FOR FREEZING ORDER**

This judgment was delivered by me on 8 April 2011 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Wayne W Peters & Associates, Whangarei
Bruce Reid, Auckland
Copy to: D Chesterman, Auckland

Introduction

[1] This is an application for a freezing order under Part 32 of the High Court Rules. The application is made in the context of a dispute between TGB Holdings Ltd (TGB) and BFP Trustees No. 1 Ltd and BFP Trustees No. 2 Ltd (Birches Trust) which has unfortunately become unnecessarily complicated.

Background

[2] Birches Trust owns farmland. TGB and Birches Trust were formerly parties to a share milking agreement. TGB share milked cows on Birches Trust's property. The relationship between the parties broke down. TGB and Birches Trust then entered an agreement pursuant to which Birches Trust agreed to purchase approximately 1,000 cows from TGB for approximately \$2.3 million dollars.

[3] Birches Trust took issue with the state of about 200 of the cows supplied by TGB under the agreement and claimed TGB had wrongly removed 270 heifers from the property. The parties were unable to resolve their differences. Birches Trust withheld milk payments due to TGB to set off the damages it claimed TGB owed it due to the state of the cows and the missing heifers. Birches Trust also withheld retention moneys due under the agreement.

[4] The parties then engaged in litigation. In January 2009 TGB filed proceedings against Birches Trust in the Whangarei District Court to recover the retention moneys due under the sale and purchase agreement. In February 2009 Birches Trust filed proceedings against TGB in this Court alleging breach of contract and breach of the Fair Trading Act 1986 in relation to the dispute concerning the cows. Birches Trust sought to set off various retained Fonterra milk payments against the balance of the purchase price still owing under the sale and purchase agreement. It claimed a balance of approximately \$191,000 was due it after giving credit for the milk payments.

[5] TGB then brought arbitration proceedings against Birches Trust in relation to the Fonterra milk payments issue. Birches Trust did not engage in the process. TGB

appointed an arbitrator. TGB also opposed Birches Trust's request to transfer TGB's District Court proceedings to be heard with the High Court proceedings.

[6] In August 2009 the arbitrator made an uncontested arbitration award in favour of TGB in relation to the Fonterra milk payments in the sum of \$297,267 plus interest and costs. Subsequently the arbitration award was entered as a judgment of this Court.

[7] On 23 December 2009 Trustee Management Ltd (a trustee company used by Birches Trust's instructing solicitors Dyer Whitechurch) as lender, and Birches Trust as borrower, entered a term loan agreement for \$300,000 plus further advances in relation to the solicitors' and counsel's legal expenses. Birches Trust agreed to grant a mortgage over properties, including a property at Three Mile Bush Road, Kamo to secure the borrowing. The mortgage was unable to be registered because of a notice of claim lodged by a Ms Hull in respect of relationship property proceedings against one of the trustees of Birches Trust. Trustee Management Ltd registered a caveat against the property on 5 May 2010.

[8] On 14 December 2010 Birches Trust paid approximately \$310,000 into Court being the Fonterra milk payment funds held by the Trust plus interest. Also in December 2010 Birches Trust entered an unconditional sale and purchase agreement pursuant to which it agreed to sell the property at Three Mile Bush Road for \$242,000. On 15 February 2011 Birches Trust sought an adjournment of the substantive fixture scheduled for 4 April 2011 in this Court on the grounds it was unable to complete preparation for trial due to Ms Hull's notice of claim on the property which prevented Birches Trust paying its legal advisers to prepare for the fixture.

[9] Ultimately an arrangement was made with Ms Hull which enabled the sale of the Three Mile Bush Road property to be settled. In late February 2011 Dyer Whitechurch paid historical legal costs and disbursements totalling just over \$70,000 from the proceeds of sale. Other sums remain due and owing, including \$36,000 for GST, Dyer Whitechurch's costs of sale of \$4,751 and the balance of the real estate agent's costs of sale.

The practical position at present

[10] As at 22 February 2011 TGB was owed in excess of \$395,000 under the arbitration award entered as a judgment of this Court. Given the payment of approximately \$310,000 that Birches Trust paid into Court, approximately \$85,000 remains due and owing under that judgment.

[11] In addition, in the proceedings that Birches Trust brings against TGB, TGB has a counterclaim in excess of \$65,000. In total, TGB seeks to recover \$150,000 from Birches Trust (in addition to the \$310,000 already paid into Court).

[12] After taking account of the milk payments, Birches Trust claims approximately \$191,000 from TGB. If no credit is given for the milk payments, Birches Trust's claim is closer to \$500,000.

[13] Allowing for the payments for GST and other legal and agents' expenses on sale, Dyer Whitechurch calculate the balance remaining from the net proceeds of the sale of the Three Mile Bush Road property is just under \$80,000.

The application

[14] In making its application to vacate the fixture Birches Trust disclosed its financial position, and in particular, the difficulty it had regarding funding its claim against TGB. That prompted TGB Holdings to apply for a freezing order.

[15] The matter came before Heath J on a Pickwick basis. After a hearing by telephone in late February the Judge delivered a judgment on 1 March 2011 declining the application for freezing order. Heath J considered that proposed payments to the legal advisers were in the ordinary course of business and that, absent a deliberate (bad faith) attempt to divert assets, the r 32.6(3)(c) exception applied. The Judge, however, reserved the position for TGB to pursue its application on notice. TGB has pursued the application on notice.

TGB's position

[16] TGB's position is that:

- Birches Trust is effectively insolvent;
- Birches Trust is paying or intends to pay creditors on a preferential basis;
- TGB already has a judgment in its favour and a balance of at least \$85,000 remains unsecured; and
- the payments made and intended to be made by Birches Trust to the respondents in preference to its other creditors rely on a caveat which was itself defective.

Birches Trust's position

[17] Birches Trust's position is that:

- the net proceeds of sale are subject to a charge in favour of Trustee Management Ltd to cover the legal fees;
- the payment of legal fees is, in the circumstances of this case, a payment in the ordinary course of business; and
- it is in the interests of justice that Birches Trust be entitled to pursue its claim against TGB and have it heard on the merits rather than be prevented from doing so by the freezing order.

[18] During the course of submissions Mr Chesterman also submitted that the undertaking as to damages given by TGB was insufficient. However, that particular submission can be dealt with shortly. Ms Currin has deposed that the net worth of the TGB Trust (which supports TGB) is not less than a million dollars.

Decision

The status of the equitable mortgage

[19] The application comes down to an argument about the sum of approximately \$80,000. It is Birches Trust's position that that sum is secured by an agreement to mortgage in favour of Trustee Management Ltd. If that is correct, then it cannot be the subject of a charging order. It is TGB's position that the sum is not secured because the caveat lodged against the title purporting to support the agreement to mortgage was defective.

[20] Mr Peters submitted that the caveat, which was registered in reliance on an "agreement to mortgage dated 23 December 2009", was defective because it misdescribed the security relied on. He submitted that there was no such agreement to mortgage dated 23 December 2009. While the relevant term loan agreement annexed a mortgage document he submitted that was clearly different to an agreement to mortgage and the caveat was therefore defective: *New Zealand Mortgage Guarantee Co Ltd v Pye*;¹ and *Re Psychers' Caveat*.²

[21] However, with respect, that submission misses the point. The issue is not whether the caveat was valid. The issue is the effect of the loan and accompanying security documentation. In particular it is whether Trustee Management Ltd held an equitable mortgage over the land. If so then Trustee Management Ltd is entitled to an equitable security interest in the net sale proceeds of the land. Birches Trust has obtained an affidavit from Mr P H Nolan, an experienced conveyancing practitioner. Mr Nolan's summary of the documentation is helpful, but ultimately determination of the status and effect of the security Birches Trust purported to grant to Trustee Management Ltd must be for the Court.

[22] Birches Trust entered a term loan agreement in favour of Trustee Management Ltd dated 23 December 2009. The agreement was entered into in order to secure payment of legal services, including the cost of counsel as set out in table

¹ *New Zealand Mortgage Guarantee Co Ltd v Pye* [1979] 2 NZLR 188 (SC).

² *Re Psychers' Caveat* [1954] NZLR 285 (SC).

D of the annexure to the term loan agreement. Birches Trust agreed, inter alia, to grant as security an all obligations General Security Agreement (GSA) and an all obligations mortgage over several properties, including the property at Three Mile Bush Road.

[23] Under the provisions of the term loan agreement Birches Trust acknowledges the principal sum secured was \$300,000 plus further advances and covenanted:

All moneys that you owe us under this agreement and under any other agreement that you enter into with us will be secured to us by the securities set out in the Annexure Schedule. This contract is a secured agreement as defined by the Mortgage Memorandum (all obligations) 2007/4238 (Ref. 8010) / General Security Agreement Memorandum 2007/4240 (Ref. 6302) / Purchase Security Agreement (Ref. 6303) published by the Auckland District Law Society over the property set out in the Annexure Schedule.

[24] One of the securities was an ADLS all obligations memorandum of mortgage. The term loan agreement therefore included an existing agreement to give a mortgage over the relevant land. As such it was a specifically enforceable promise to grant a mortgage over land and created an equitable mortgage.

[25] Given the terms of the term loan agreement incorporating the document there was no need for the lender to sign the mortgage document. Nor did the lender need to formally request that a mortgage be executed. Mr Peters relied on the case of *Philpott v NZI Bank Ltd*.³ In that case the standard bank form provided for the customer, on request, to provide the bank with additional security. In those circumstances, a request was required to trigger the further security. Until then the customer was free to deal with the property.

[26] The present position is different. A request was not required to trigger the security. The mortgage had been granted. The security was provided for in the loan agreement and accompanying documents. Trustee Management Ltd held an equitable mortgage. Whether the caveat could be sustained (if challenged) is not the issue. Even absent the caveat, the security documents and the loan agreement would support an injunction to protect the proceeds of sale.

³ *Philpott v NZI Bank Ltd* (1999) 1 NZ ConvC 190,246 (CA).

[27] On the sale, the equitable mortgage was converted into an equitable charge on Birches Trust's interest in the surplus. In *Hope v Hope*⁴ Wilson J accepted the submission for the holder of an unregistered mortgage that the equitable charge in the land was converted, on the sale of the land, to an equitable charge on the landowner's interest in the proceeds and attached to the moneys payable to the vendor:⁵

In equity the equitable charge on the land is converted, on the sale of the land, to a charge on the proceeds. This is in accord with the intention of the parties to the mortgage ... that it should be registered - an intention which was frustrated by the action of the respondent in lodging a caveat against the title which in the event she was unable to sustain.

[28] Reference can also be to *Buhr v Barclays Bank Plc*⁶ for a discussion to the same effect (although under different legislation) in England.

[29] To this point, I have been discussing the loan agreement and mortgage. But in addition, there is also the GSA.

[30] The short answer to the application is therefore that the net proceeds of sale which are sought to be charged are not the assets of the respondent Birches Trust but rather are charged to Trustee Management Ltd. Birches Trust does not have assets a freezing order could attach to.

The ordinary course of business

[31] In the event, however, that I am wrong in that conclusion and the \$80,000 is available to Birches Trust, I turn to consider whether a freezing order should issue.

[32] The applicable rules are rr 32.2, 32.5 and 32.6 of the High Court Rules.

[33] The Court has jurisdiction to grant a freezing order if there is a danger the judgment held by TGB will be unsatisfied because the \$80,000 will be disposed of or dealt with by Birches Trust unless frozen.

⁴ *Hope v Hope* [1977] 1 NZLR 582 (SC).

⁵ At 583.

⁶ *Buhr v Barclays Bank Plc* [2001] EWCA Civ 1223.

[34] Mr Chesterman suggested that it was necessary to show a dissipation with the intent to defeat or cheat the applicant of any judgment sum. The authorities are not entirely consistent on that point. A number suggest the purpose of the injunction is to prevent the abuse of dissipating or hiding assets: *A v C*⁷ or to restrain a defendant from evading justice by disposing of assets to make itself judgment proof: *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd*.⁸ While undoubtedly the freezing order would be appropriate in such cases, it is not necessarily a requirement that there be such motivation. Other authorities suggest that such a purpose is not required. In *Bank of New Zealand v Hawkins* Gault J stated:⁹

[Counsel] further submitted that it is not necessary for a plaintiff to prove any nefarious intent on the part of the defendant. He submitted that if the likely effect or result is that the assets will be put out of reach of the plaintiff, that is sufficient, even if an intent to defeat the creditor is not established. I accept the submission which is supported by the Court of Appeal in *Ninemia Corp v Trave Schiffahrtsgesellschaft* [1984] 1 All ER 398, 419.

[35] I note that the rule refers to assets being “disposed of”, rather than dissipated. In its natural sense, “disposed of” does not require a particular intent. I accept that in this case there is a risk that the \$80,000 will be disposed of in terms of r 32.2 and 32.5(4) (in particular) by the payment of legal fees if a freezing order is not made. There is jurisdiction for an order.

[36] However, even if jurisdiction exists, the making of an order is discretionary, and there are certain express exceptions:

32.6 Form and further terms of freezing order

...

(3) The freezing order must not prohibit the respondent from dealing with the assets covered by the order for the purpose of—

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

⁷ *A v C* [1981] QB 596.

⁸ *Gangway Ltd v Caledonian Park Investments (Jersey) Ltd* [2001] 2 Lloyd’s Rep 715.

⁹ *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451 at 454.

- (c) disposing of assets, or making payments, in the ordinary course of the respondent's business, including business expenses incurred in good faith.

[37] Mr Peters submitted that as r 32.6(3)(b) expressly provided for legal expenses related to the freezing order, by implication other legal expenses (for the substantive proceedings) were excluded. However, in my judgment, the proper interpretation of r 32.6(3) is that the drafters of the rule wanted to put it beyond doubt that a party could access assets to respond to and, if necessary seek to vary an order made ex parte. The rule does not, however, exclude the possibility of legal expenses in the substantive or related proceedings being allowed as in the ordinary course of business, which will need to be determined on a case by case basis.

[38] In England, the authorities generally accept that payment of legal fees in the substantive proceedings are properly payable as expenses in the ordinary course of business: *Halifax Plc v Chandler*.¹⁰ The plaintiff bank was seeking to recover substantial sums of money advanced to the respondent. The respondent sought to vary an existing freezing order to enable him to access assets to pay legal expenses to defend the action brought by the bank and also to instruct solicitors and counsel in a separate claim (the Brown action). The Court of Appeal cited with approval the observation of Sir Thomas Bingham MR in *Sundt Wrigley Co Ltd v Wrigley*:¹¹

In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence.

The Court of Appeal then went on to conclude the appellant could access his funds even for the separate action:¹²

... the correct approach would have been to hold that the appellant was in principle entitled to incur reasonable expenses in connection with the Brown action and that the freezing injunction should be varied accordingly.

[39] Although the matter was not the subject of any argument or consideration, in the cases of *Rooney Earthmoving Ltd v McTague*,¹³ and *Ward v Forsyth*,¹⁴ this Court

¹⁰ *Halifax Plc v Chandler* [2001] EWCA Civ 1750.

¹¹ *Sundt Wrigley Co Ltd v Wrigley* (unreported, 23rd June 1993).

¹² At [23].

¹³ *Rooney Earthmoving Ltd v McTague* HC Christchurch CIV-2009-476-000471, 6 October 2010.

has also allowed parties to access funds for the purposes of substantive legal proceedings.

[40] This is essentially the position that Heath J reached when the matter was before him on a Pickwick basis. In the absence of bad faith, if the legal fees are, on the face of it, incurred for proper purposes, then they will fall within the exception of payments in the ordinary course of business and may be allowed as an exception to the freezing order.

The discretion – interests of justice

[41] Next, and further, a freezing order is a discretionary remedy. In determining whether to grant a freezing order the Court must weigh the potential injustice to the applicant, TGB, in permitting the funds which would otherwise be available to meet its judgment to be applied by Birches Trust to enable it to instruct solicitors and counsel to advance a claim against TGB, against Birches Trust being denied the opportunity to pursue its claim. In that regard, on the pleadings, it is not possible for this Court to make any assessment of the merits or otherwise of the claim. However, if successful, Birches Trust's claim could lead to a judgment in round figures of \$500,000 which, even netting off the judgment for the withheld risk payments would leave a balance of \$105,000–\$110,000 due to Birches Trust by TGB.

[42] It is also relevant in this case that the application for the freezing order has been made at a very late stage of the proceedings and in circumstances where the application effectively caused the vacation of a substantive fixture scheduled for 4 April 2011 which would have resolved all issues between the parties. Further, because TGB also cited Birches Trust's solicitors and counsel as respondents to this application fresh solicitors and counsel have had to be instructed and additional costs will have been incurred as a consequence.

[43] In summary, in the circumstances of this case I accept the argument for Birches Trust that the payment of legal fees can be seen to be in the ordinary course of business and to fall within that exception. Further, when assessing the interests of

¹⁴ *Ward v Forsyth* HC Auckland CIV-2010-404-006188, 22 September 2010.

justice in this case, and given the late stage at which the application was made, the interests of justice do not favour a grant of a freezing order.

Result

[44] For the above reasons the application for a freezing order is dismissed.

Costs

[45] Costs to the respondents on a 2B basis on this application and hearing and the earlier Pickwick hearing.

Venning J