

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 82
ARC 50/11**

IN THE MATTER OF an application without notice for a freezing
order

BETWEEN MASON ENGINEERS (NZ) LIMITED
Plaintiff

AND KAREN MARGARET HODGSON
Defendant

Hearing: 8 July 2011
(Heard at Auckland)

Counsel: Anthony Russell and Clare Mansell, counsel for plaintiff

Judgment: 8 July 2011

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiff has applied urgently, and without notice to the defendant, for a freezing order affecting monies it says have been transferred unlawfully by the defendant to her own bank accounts or to an account under her control.

[2] I deal first with whether the application should be heard without notice to the defendant. I accept that the plaintiff has established a sufficient case that this should be so. There is a real risk that if the application were to be made on notice to the defendant, the monies may be further disbursed by her rather than secured until there can be a decision about their ownership.

[3] The Employment Court is empowered by s 190(3) of the Employment Relations Act 2000 to make such orders as the High Court can under Part 32 of the High Court Rules. An application for a freezing order may be made whether or not a proceeding has been commenced (and in this case it has been) and its purpose is to

preserve property for enforcement purposes. The effect of a freezing order is the same as was formerly for what was known as a Mareva injunction. It is to preserve particular assets for whomever might be entitled to them without the defendant placing them beyond the reach of any creditors: *Dunbar Sloane Ltd v Gall*.¹

[4] I am satisfied to the requisite good case standard that it is just and necessary that the plaintiff have a freezing order in respect of the contents of two bank accounts. The plaintiff, which is the defendant's employer, or perhaps now former employer, because the position may be that the defendant has been constructively dismissed, has a claim for damages for breach of contract by the defendant. Theft or other wilful misappropriation of substantial sums of money as the plaintiff alleges, is a breach of implied but well established contractual obligations of trust and confidence, fair dealing, and good faith.

[5] I am satisfied that, unless the orders sought are made immediately and without notice to the defendant, there is a very real risk that such monies as the evidence identifies have been transferred from the plaintiff's accounts to the defendant's, or to an account under her control, will be removed therefrom by the defendant with a view to their concealment and to make impossible or more difficult their recovery by the plaintiff. There are a number of indicia in the evidence from which strong inferences can be drawn that this will happen.

[6] First, the defendant has been absent from work without explanation and unable to be contacted by the plaintiff for the last week. Such inquiries as have been made of the defendant's husband and father, who might usually be in a good position to know of her whereabouts, have not been productive. The defendant's father has returned substantial volumes of documents relating to the allegedly unlawful transactions by the defendant. The defendant's husband has told the plaintiff's representative that he has found it necessary to maintain separate bank accounts from the defendant.

¹ [1996] 3 NZLR 252; (1996) 9 PRNZ 511.

[7] Having heard from counsel, I am satisfied that any possible defences to the plaintiff's claim have been disclosed to the Court although it is difficult, in view of the evidence, to imagine what defence might be advanced by the defendant.

[8] The plaintiff has lodged a complaint of theft by a person in a special relationship, with the police and this complaint is being investigated.

[9] It appears that the monies in question may be in one or both of two bank accounts which are identified in the order which will be sealed and that order will be served on those banks so that, except as directed by this Court, there should be no withdrawals from those accounts following service on the banks.

[10] In view of the defendant's whereabouts being unknown, it is necessary to consider what steps should be taken to serve the orders, the proceedings, and this judgment, on the defendant. I direct that the plaintiff engage a licensed private investigator to attempt to ascertain the defendant's whereabouts and serve these proceedings on her. In any event, the plaintiff must also serve the proceedings, a copy of this judgment, and the orders immediately on the defendant's father and the defendant's husband. If the defendant makes contact with either of the banks affected by the orders made, I request that those banks draw the existence of the proceedings, and the reasons for judgment in particular, to the defendant's attention, including my strong recommendation to her that she takes legal advice about her circumstances.

[11] I accept that although the plaintiff has discovered more than \$77,000 missing and allegedly misappropriated by the defendant, there may well be more than this sum eventually at issue in the proceedings. There is already significant evidence that credit card expenditure wrongly incurred in the name of the plaintiff by the defendant, but which is not the subject of the freezing order sought, also amounts to a very substantial sum. For these reasons I do not propose to put a cap on the amount of monies that must be frozen in the accounts. Rather, I order that the whole of the balances in these accounts be frozen with two exceptions. The first is that the defendant may draw up to, but no more than, \$500 for living expenses for the forthcoming week. The second is that the defendant may withdraw up to, but no

more than, \$2,500 for payment of reasonable legal expenses in relation to this freezing order but that such sum should only be paid out to a lawyer's trust account to be held and disbursed solely for that purpose.

[12] The return date (by which I mean the date on which the freezing order expires, and on which the matter will be before the Employment Court at Auckland, and at which time the defendant will be entitled to be heard) is 10 am on Friday 15 July 2011.

[13] I reserve leave for either party to be heard on any other urgent applications for orders or directions on three days' notice before that return date. Freezing orders in terms of the draft orders filed as amended will be issued. I reserve costs on this application.

GL Colgan
Chief Judge

Judgment delivered orally at 3.26 pm