IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2013-485-8675
[2013] NZHC 3346

BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	MARCUS SEYMOUR DYMOCK First Defendant
AND	CHARLOTTE JANE DYMOCK Second Defendant

Hearing: 11 December 2013

Counsel: P H Courtney and A B Goosen for Plaintiff
M T Lennard for Defendants

Judgment: 16 December 2013

JUDGMENT OF SIMON FRANCE J

Introduction

[1] This is an application by the defendants to set aside an *ex parte* freezing order over funds of $462,000 held by the second defendant in a personal account.

Background

[2] Three companies of which Mr Dymock was the sole shareholder were put into voluntary liquidation. At the time of the liquidation, two of the companies had, between them, $1.3 million in funds. These funds were proceeds from a sale of land. The two companies had originally purchased that land from the third company. The sale of the land will be non-taxable unless, as the Commissioner of Inland Revenue contends, the two companies are related by common ownership to the original owner, the third of the Dymock companies. This turns on whether Mr Dymock holds the shares in that company in his own right or as trustee.

[3] For some reason, despite it being advertised in July 2013, the Inland Revenue Department ("the Department") only learned of the liquidation on 5 September 2013. By then, no creditors having come forward, an interim distribution of $1.3 million had been made in mid August 2013 to Mr Dymock as sole shareholder. On 1 November 2013, the Department issued default assessments for the two companies to a total of $462,018.92.[1]

[4] Over the period between awareness of the liquidation and these proceedings, there was considerable discussion with the liquidator, and then with the Dymocks, over the money. The Department's view was that it all should come back. The liquidator, however, sought $450,000 from Mr Dymock. The liquidator already had $25,000 and the combined total would meet the default assessment if that ultimately proved to be the liability.

[5] The Dymocks agreed to return that amount. However, there were complications. The money had been transferred from Mr Dymock to Mrs Dymock. Some had then been sent to a solicitor for a potential house deposit, and at the time all this was happening, the Dymocks were temporarily in the Netherlands, a place they visited often.

[6] On 25 October 2013 counsel for the Dymocks advised the Department that $450,000 was being transferred back, but because of the circumstances there may be delays. Evidence was provided, at that time, of the first necessary transfer having happened. On 4 November 2013 the Department investigator was told by the liquidator that the transfer was progressing but was being delayed by mobile banking issues. The liquidator said he would update the Department. He did not do that. As it happens the money did arrive at the liquidators on 4 November 2013, and has been held since then in a solicitor's trust account.

[7] The Department in anticipation of that money coming in, but with it not yet having happened, had sought to obtain undertakings from the liquidator about the money being preserved. This request reflects the Department's lack of confidence in the liquidator. The undertakings were not provided. However, the liquidator has

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[1] It had on 11 October 2013 provided the liquidator with proofs of debt totalling $417,000.

sworn an affidavit for these proceedings confirming he has control of the money, is aware of the Department's claims and is taking advice.

[8] The Department, on 8 November 2013, filed the substantive proceedings together with an *ex parte* application for a freezing order. The application was supported by affidavit evidence from the Departmental investigating officer, also sworn on 8 November 2013, and by counsel's memorandum. Consequent on the application, on 14 November 2013 a freezing order was issued over the accounts of both Mr and Mrs Dymock restraining a total of $462,000.

[9] The timing proved unfortunate. The Court's ruling was issued on a Thursday afternoon. The banks were orally notified that night. Sealed orders were obtained late Friday morning and substituted service was effected on the Dymocks' tax agent on Friday afternoon by 2.00 pm.[2] By then Mrs Dymock had already encountered difficulties paying for things. It seems the freezing order was not initially implemented as accurately as intended and so access to all funds was frozen despite there being a considerable surplus.

[10] The existence of that apparent surplus had led the Judge issuing the freezing order to leave out the provisions found in r 32.6 of the High Court Rules which require that an order must not prevent access to the frozen assets for paying ordinary living expenses and legal expenses. The Judge considered it unnecessary because there was believed to be ample extra funds.

[11] Eventually the problems were sorted. On 18 November 2013, the Monday, revised orders were sought limiting the freezing order to one specific account of Mrs Dymock which contained sufficient funds to meet the specified amount. This was confirmed by consent, but without prejudice to the present challenges.

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[2] I indicated at the hearing that I considered it unfortunate and surprising that a copy was not served on Mr Lennard when it had been known for several weeks that he was acting for the Dymocks.

[12] Mr and Mrs Dymock now apply to have the freezing order discharged and also seek indemnity costs. Counsel on their behalf submits that:

(a) the omission of the living expenses provision made the order invalid;

(b) there are material misstatements in the application that of itself mean the order should be set aside;

(c) the liquidator holds $475,000 and so the order is no longer needed; and

(d) there was not originally, and still is not, an identifiable risk of dissipation justifying a freezing order.

[13] Before addressing these challenges it is necessary to comment on the substantive proceedings filed by the Department to which the freezing orders relate. The claim is for a sum of money, up to the maximum value of $462,000, to be held by the defendants on trust on the basis that the circumstances in which it was received create a constructive trust or alternatively on the basis that the defendants knew they should not receive the funds.

Decision

The need for an order

[14] I prefer to begin where I started the hearing, which is to challenge the Department to justify the freezing orders, given that the liquidator has within his control more than the sum covered by the order and more than the sum sought in the substantive proceedings. The Department's response is to say that the sum is not in the control of the Commissioner so it does not satisfy its substantive proceedings. The Department relies on s 301 of the Companies Act 1993 which authorises a creditor to seek orders from the Court requiring a director of a company to repay money that he or she has misapplied, or retained, or become liable or accountable for.

[15] Ms Courtney also submits more money may be needed than what the liquidator has. First, there is an on-going investigation. Second, there will be a liquidator's fee and third, the tax losses said to be available are not yet accepted.

[16] Nothing the Department has said counters the fact that both the substantive proceedings, and the freezing order application, seek security only for $462,000, and the liquidator has $475,000 in his control. The substantive proceedings do not seek to have the money placed in the control of the Department. The substantive proceedings are not satisfied only to the extent that the defendants themselves do not hold the money on trust, but they have instead given it to a liquidator who is bound by statutory duties, has placed the money in a solicitor's trust account and is taking legal advice.

[17] In my view that fulfils the purpose of the substantive proceedings. The fact that the Department would like the sum to be more is not relevant since nothing beyond $462,000 has been sought. I do not accept a trust imposed on the defendants is any better than what has happened. It should not be forgotten that the Department is the only creditor, and it was solely to meet the Department's potential claim that the liquidator sought to get the money back at all.

[18] For this reason alone I consider the orders should be discharged as being no longer needed. If the Department has concerns over the liquidator there are remedies available to it, but I do not consider it has established a basis for the continuation of the freezing order.

No risk of dissipation

[19] I am equally satisfied that the Department has failed to establish a risk of dissipation. Further, now armed with a fuller understanding of what was being said in the original application, I do not consider the risk was ever established.

[20] Mr Dymock as sole shareholder received an interim payment of $1.3 million when, in response to the liquidation advertisement, no creditors came forward. It is also to be noted that this was a voluntary liquidation of companies with sizeable cash

reserves and no apparent creditors. This is not a route consistent with a desire to hide money.

[21] The Department based its original case for there being a risk of dissipation on four factors:

(a) the sections had been sold and turned into liquid assets;

(b) Mr Dymock had gone to the Netherlands;

(c) Mr Dymock had a poor history of tax compliance; and

(d) there was an on-going investigation.

[22] The fact that Mr Dymock has now returned to New Zealand, and indeed had done so prior to the affidavit being sworn and the application being made, means that this ground is no longer maintained. I will return to it though.

[23] As for the others, I fail to see that the mere fact of a Department audit carries any real worth as a factor indicating risk. Mr Dymock has been audited before and has not bolted, nor removed funds. The audit may not lead to anything, and certainly his accountant/tax adviser, who has filed evidence, is of the view all is in order. Likewise the fact that the asset is cash makes it easier to remove, but is not an indication the money will be removed.

[24] Finally, there is the affidavit's claim that Mr Dymock has "a poor history of tax compliance". The material supporting this is threefold. First, a previous investigation found that Mr Dymock had incorrectly not filed returns, he believing he did not have to. Ultimately he was assessed as having a tax liability, which when confirmed, was paid. Second, his current affairs are being investigated and the investigator has formed the view there is an issue. That is, at this point, an untested view of things. Finally, it was also noted in the affidavit that Mr Dymock has overseas interests but has never returned any income on them. Whether he should have is not known – it is, as far as I can see, just a gratuitous observation by the deponent, presumably designed to have a prejudicial effect.

[25] I consider that to describe this tax history to a Court on an *ex parte* application as a "history of poor tax compliance" is misleading. Nor is it enough to say the facts that support the proposition are set out in the affidavit. More care is needed with the language used and claims made. An application such as this is not an opportunity to venture broad brush assessments of a tax payer. More objectivity is required, and a clear basis for any such claim articulated. It should also have been noted when making this comment that Mr Dymock has always paid assessments once finalised.

[26] In terms of the risk of dissipation, the facts as now appear are that Mr and Mrs Dymock live in New Zealand, there are health issues that keep them here, and there is evidence, which was known to the Department at the time of the application, that Mrs Dymock was seeking to buy a house in Auckland. Further, as noted, when asked by the liquidator to give back $450,000, the Dymocks did so as quickly as the banking system would permit. None of this shows a risk of dissipation.

[27] On the basis that there has not been shown to be a risk if dissipation, I would set aside the freezing order.

Misleading application

[28] Paragraph 94 of the affidavit supporting the application, under a section discussing the transfer of funds, concluded:

> Currently, all of the profits from the sale of the properties are out of the control of the liquidator. The timing of the sale of the properties, the transfer of funds, and Mr Dymock's departure for Netherlands indicate an intention that the money be moved beyond the reach of creditors. Mr Dymock knew that the assessed companies (and Abroad) were under audit and that assessments were pending.

[29] Mr Lennard submits that virtually none of this is correct. Whilst not alleging deliberate misleading, he submits that the errors are sufficiently culpable to justify cancelling the freezing orders. Because of my earlier decisions I do not need to consider whether these errors would on a standalone basis justify setting the order aside. However, the allegations are relevant to costs, so I dwell briefly on them.

[30] First, it was never the case as claimed that all of the profits were out of the control of the liquidator. $25,000 had been kept back. Second, $450,000 had been returned to the liquidator on 4 November 2013, four days before the application. This was unknown to the Department because it had been left to the liquidator to tell them when the mobile banking issue was overcome. The reasons why it was unknown need further consideration.

[31] The Department defends the inaccuracy by saying it was not its job to inquire of the liquidator. That submission fails to recognise the obligations that lie on an applicant for an *ex parte* order of this nature. The whole basis for the application would have to be different, and presented differently, once the liquidator had the money. It is to be recalled the substantive proceedings seek an order requiring the defendants to hold the money on trust. Plainly it would be significant to a court to know that the equivalent sum of money has already been placed by the defendants with the liquidator.

[32] A party who applies for a freezing order *ex parte* has a responsibility to the Court and that is not met by saying they were relying on someone else to keep them up to date. A simple phone call either to the liquidator, or his lawyer, or to the Dymocks' lawyer, would have put the Department in a position to properly inform the Court. That call should have been made given an *ex parte* order was being sought.

[33] The same lack of care is evident in the way in which the information about Mr Dymock being out of the country is presented. The paragraph plainly invites the inference that Mr Dymock has or may have moved permanently. Although it is later noted that his sons are schooling in Auckland, it is immediately then said that it is unclear if the couple "have left New Zealand permanently".

[34] There is absolutely no basis at all to think the Dymocks' trip was a permanent departure and the Department can offer no support for why it suggested it was. The Dymocks go to the Netherlands often. Further, and aggravating the situation, Mr Dymock had actually returned to New Zealand on 2 November 2013, six days prior to the affidavit being sworn and the application being made. The immigration

records that were being relied on by the Department were provided on 22 October 2013 and had not been updated. Nor had a courtesy call been made to Mr Lennard to ascertain the situation. This is unacceptable if the applicant for an *ex parte* order is then going to suggest to the Court that the subject of the application may have left the country permanently. I regard it as a serious omission in an area where the concept of "flight" is significant to whether a freezing order should be issued. I am also concerned that without any foundation the idea that Mr Dymock's departure was permanent was floated, in the context of suggesting freezing orders were needed.

[35] Finally, as another example of the loose use of language (the first being the "history of poor compliance"), I refer to the statement that Mr Dymock knew assessments were pending. This is again made as part of this building up a picture of funds being at risk. Mr Dymock did not know assessments were pending. His tax agent had been told that only on 4 November 2013 but of course that is three months after the interim distribution, and weeks after the internal bank transfers that were being referred to. It was thoroughly misleading to say this in a way that suggests actions had been taken by Mr Dymock in response to being told assessments were pending.

[36] I consider these errors significant, avoidable and troubling. They suggest a lack of objectivity and care that should not be found in a document filed to support *ex parte* orders of this type.[3]

Conclusion

[37] The matters I have covered are enough to dispose of this application. I have not addressed the issue about r 32.6(3). I note that I doubt it is as mandatory as it is worded.

[38] The amended freezing order of 22 November 2013 is set aside.

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[3] That is not to say they should be ever found. It is just that the context of *ex parte* orders for orders of this special type requires that the utmost care be taken.

Costs

[39] The defendants seek indemnity costs. The Department submits it had a legitimate basis for its application regardless of whether the money was paid to the liquidator and so indemnity costs are inappropriate.

[40] I have considered the authorities referred to me. I am of the view that a combination of factors makes such an award appropriate. First, I am not satisfied there is a sound basis for the orders once the liquidator received funds to a sum equivalent to that sought in the proceedings. If the Department had issues with the liquidator, it had other remedies. In my view, once it learned of the payment, it should have agreed to discharge the orders.

[41] Second, the application should not have been presented on the basis it was. This occurred only because of a failure to inquire, prior to swearing the affidavit, into the updated situation concerning the money. The plaintiff's responsibility is to the Court and it is to provide as accurate a picture as is available. I do not consider the orders would have been made had the correct facts been presented.

[42] Third, the other errors to which I have referred, particularly the totally unsubstantiated claim that Mr Dymock may have left New Zealand permanently, is at the upper end of misleading the Court. It was not deliberate misleading but it was a misstatement that reflects a lack of objectivity and care that supports the costs award being sought. The heightened responsibilities that apply in an *ex parte* situation are well known, and this application falls some way short, not only on this comment but on the several other inaccuracies I have highlighted.

[43] I consider these concerns bring the case within the general tenor of situations where indemnity costs are appropriate, and I award indemnity costs plus reasonable disbursements.

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Simon France J

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