

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

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CIV-2022-419-000232
[2024] NZHC 650**

UNDER Parts 19 and 32 of the High Court Rules 2016
and Senior Courts Act 2016

IN THE MATTER OF A without notice originating application for
freezing orders and ancillary orders under
rr 32.2 and 32.3 of the High Court Rules 2016

BETWEEN DU VAL GROUP NZ LIMITED and
DU VAL MANAGEMENT LIMITED
Plaintiffs

AND SERVSYNC LIMITED
First Defendant

STUART GOODFELLOW
Second Defendant

RED CELL CYBER LIMITED
Third Defendant

Hearing: 27 September 2023

Appearances: K A Lomas and L H H Hunt for Plaintiffs
C T Patterson and E J Grove for Defendants

Judgment: 22 March 2024

**JUDGMENT OF VAN BOHEMEN J
[application to discharge or vary freezing order]**

*This judgment was delivered by me on 22 March 2024 at 3 pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Counsel/Solicitors:
Braun, Bond & Lomas Ltd, Hamilton
C T Patterson and E J Grove, Hamilton
Lateral Lawyers Ltd, Auckland

[1] Servsync Ltd, a company incorporated in the British Virgin Islands, Stuart Goodfellow, Servsync's director and sole shareholder, who is currently resident in the United Kingdom, and Red Cell Cyber Ltd, a company registered in New Zealand and of which Mr Goodfellow is sole director (together, the Goodfellow entities), seek the discharge of a freezing order granted by Lang J on a without notice basis on 29 August 2022. The freezing order restrains the Goodfellow entities from removing assets inside and outside New Zealand or from disposing of, dealing with or diminishing the value of those assets.

[2] If a discharge is not ordered, the defendants seek an order discharging the freezing order upon payment to Du Val Group NZ Ltd (Du Val Group) and Du Val Management Ltd (Du Val Management) (together, Du Val), the sum of \$76,691.60, together with interest accrued to the date of payment.

[3] The Goodfellow entities say that, in seeking the freezing order, Du Val failed to comply with their obligation under r 32.2(3) of the High Court Rules 2016 to disclose fully and frankly to the Court all material facts. The Goodfellow entities also say that the freezing order does not comply with r 32.6(2) of the High Court Rules because the value of the assets frozen by the freezing order exceeds the amount of Du Val's quantified claim against the defendants.

[4] Du Val oppose the discharge of the freezing order. They say the application for discharge is an attempt to obscure gaps and inconsistencies in the evidence of the Goodfellow entities, that the allegations of material non-disclosure are misleading, that the information not disclosed in the application for a freezing order was not material to the proceeding, and that the evidence filed in support of the non-disclosure allegations relates primarily to factual scenarios that are not material to the freezing order application.

[5] The application for discharge was filed on 14 April 2023. It was heard by me on 27 September 2023. I apologise to the parties, particularly the Goodfellow entities, that my decision has been delayed longer than it should have been. That was the consequence of a backlog of judgments and the need to prioritise judgments in appeals I heard as a member of the divisional court of the Court of Appeal.

[6] A large amount of affidavit evidence was adduced in support of the parties' respective positions on the application for discharge. I refer to that evidence as I consider it to be relevant to the questions I must address when deciding the application to discharge the freezing order.

Relevant background¹

[7] Du Val Group is a residential property developer founded by John Kenyon Clarke and his wife, Charlotte Clarke. At the time of the application for the freezing order, Mr Clarke was Chief Executive Officer of the company and Ms Clarke was Chief Operating Officer. Du Val Management is a subsidiary of Du Val Group and is responsible for the day-to-day management of Du Val Group.

[8] Mr Goodfellow is a long-time family friend of the Clarkes. He is a systems engineering consultant with expertise in systems design, software development and information technology infrastructure. Mr Goodfellow is a national of the United Kingdom but has been granted permanent residence in New Zealand. He currently resides in England but lived and worked in New Zealand in the periods July 2017 to July 2018 and November 2020 to June 2022.

Mr Goodfellow comes to New Zealand and lives with the Clarkes

[9] In November 2020, Mr Goodfellow came to New Zealand to avoid the COVID-19 lockdown restrictions in the United Kingdom. In early 2021, he stayed with the Clarkes at their Muriwai beach house and then, at the Clarkes' invitation, moved into the Clarkes' rented property in Lucerne Road, Remuera. He stayed in the pool house on the property. During a COVID-19 lockdown in Auckland, Mr Goodfellow's partner, who was also a friend of Ms Clarke, moved into the pool house with him, although she returned to her own home when the lockdown ended.

¹ The information in this section is taken from the pleadings, affidavits and submissions filed by the parties and their counsel. The Court's task in understanding the sequence of events was made more difficult than should have been the case because the chronology provided by Du Val omitted obviously relevant material, particularly the email exchanges between Mr Goodfellow and the Clarkes in June and July 2022, and by the lack of any chronology from counsel for the Goodfellow entities.

Mr Goodfellow's roles at Du Val

[10] In early January 2021, the Clarkes offered Mr Goodfellow the position of Chief Technology Officer (CTO) for Du Val Group. No written employment or consultancy agreement was concluded.

[11] Mr Goodfellow had two roles with Du Val Group. One role was as CTO, for which Red Cell Cyber invoiced Du Val for services provided. It appears that the arrangement agreed with Ms Clarke was that Mr Goodfellow would be paid \$1,200 per day, in the expectation that Mr Goodfellow would work two days a week. That arrangement was later increased to three days' work a week.

[12] Mr Goodfellow's other role was as project manager for the development of a property investment platform (the PropTech platform). The understanding between Mr Clarke and Mr Goodfellow was that, in return for his services, Mr Goodfellow would be granted, by way of sweat equity, a 10 per cent shareholding in whatever corporate entity was set up by Du Val to own and operate the PropTech platform.² Mr Goodfellow's responsibilities as project manager for the PropTech platform included establishing an internal development team and hiring external contractors, including overseas contractors.

[13] According to Mr Goodfellow, one of the tasks agreed with Mr Clarke was to undertake what Mr Goodfellow describes as:

... commercially and/or legally sensitive "data-scraping" operations under which data was scraped from third party property websites (sometimes without express permission) for use by the Prop Tech platform.

[14] Mr Goodfellow says that, because web-scraping is a legally grey area and could have repercussions, he and Mr Clarke agreed that, to protect the Du Val name and brand image, the web-scraping would be carried out by an offshore entity removed from Du Val.

² Mr Clarke initially disputed that there was such an understanding but later confirmed Mr Goodfellow's account.

Servsync established

[15] In October 2021, Mr Goodfellow, through the services of BBCIncorp, incorporated and registered Servsync in the British Virgin Islands, with Mr Goodfellow as its sole director and shareholder. Mr Goodfellow says Servsync was set up with Mr Clarke's knowledge and agreement. Mr Clarke denies any knowledge of or agreement to the establishment of Servsync.

[16] Between February 2022 and May 2022, Servsync sent Du Val Group four invoices for services totalling NZD 76,691.60, which were approved for payment and paid by Du Val Management.³ The invoices were sent from Servsync to Mr Goodfellow's Du Val Group email address. Mr Goodfellow arranged payment through Du Val Management.

Mr Goodfellow moves into apartment

[17] In early May 2022, Mr Goodfellow moved out of the Clarkes' home in Lucerne Road and into an apartment in the same building in which the Du Val offices are located. He did this rather than move with the Clarkes to the new home into which they were moving. Mr Goodfellow's late change of plans and lack of communication caused some upset on the part of Ms Clarke. However, on Ms Clarke's account, she and Mr Goodfellow did some of their best work together in the following months.

[18] The arrangements for the lease of the apartment were made through Du Val's property management team. The lease was a short-term lease and expired on 13 June 2022. Mr Goodfellow says the lease of the apartment was only intended to take him through to a trip he planned to take to the United Kingdom. He says he and his partner, who was to join him later on in his trip to the United Kingdom, had agreed that they would rent a place and live together on their return to New Zealand.

Mr Goodfellow goes to the United Kingdom

[19] On 11 June 2022, Mr Goodfellow left New Zealand for the United Kingdom.

³ The invoices were in US dollars but were paid for in NZ dollars.

[20] On 12 June 2022, on his arrival in the United Kingdom, Mr Goodfellow received a message sent during his flight from Ms Clarke saying: “Please tell me it’s not true that you’re on a plane to the UK?!”

[21] Also on 12 June 2022, Mr Clarke emailed Mr Goodfellow stating that he was unhappy to find out from “junior staff” that Mr Goodfellow had “taken off to the UK without any update to the team”. Mr Clarke’s email asked Mr Goodfellow a series of questions including his return date, how his team would be managed while he was away and who was in charge of his team while he was away.

[22] On 13 June 2022, Mr Goodfellow replied saying “Sorry, it seems there has been a mix up in comms” but said that he did tell Ms Clarke on 4 May that he was “pulling forward” his trip for personal reasons “and again a couple of weeks back” that he had said he needed any offshore recruitment requirements because he would be speaking to recruiters in London that week. He said that, as far as he was aware, “everyone was in the know”.

[23] Mr Goodfellow then annotated Mr Clarke’s email with comments in which he advised that:

- (a) his trip was not a break in terms of work except there would be “a couple of lighter weeks” when his partner was there;
- (b) his return date was 27 July;
- (c) his teams would be doing daily and thrice-weekly stand up meetings with him and working remotely as normal; and
- (d) it was business as normal for the team, including for him.

[24] On 14 June 2022, Mr Clark emailed Mr Goodfellow stating:

Thanks mate,

Definitely a miss on the coms. Not one of the leadership team knew.

Appreciate the update. Let's chat soon and look forward to seeing you in Dorset.

JK

[25] Also on 14 June 2022, Ms Clarke emailed Mr Goodfellow stating that he had not once told her of the dates of his travel and that he had not told anyone in the office of his plans other than his team, which was embarrassing. Ms Clarke also said Mr Goodfellow's behaviour was unprofessional and unacceptable, rude and disrespectful. Later that day, Ms Clarke sent a further email to Mr Goodfellow asking that he reduce his time spent on "corporate" to one day a week (eight hours) and advising that Du Val did not require Mr Goodfellow to recruit offshore for any team other than PropTech.

[26] From 12 June 2022 and for about the next four weeks, Mr Goodfellow had daily calls with Ashley Osborne, the Chief Executive Officer of Du Val Group International Ltd (Du Val International), and, from the week of 26 June, had meetings in the London offices of Du Val International. On 28 June 2022, Mr Clarke confirmed his willingness to participate in regular calls on PropTech involving himself, Ms Clarke, Mr Osborne, Mr Goodfellow and Gabrielle Byfield, Chief Marketing Officer of Du Val Group.

Servsync sends June invoice

[27] On 16 June 2022, Servsync sent to Mr Goodfellow's Du Val Group email address a further invoice for USD12,800 for design and coding services. The Servsync email was signed "Daniel" and said, "Can we please zoom to arrange next progress."⁴

Mr Goodfellow's employment with Du Val is terminated

[28] On 17 July 2022, following what Mr Goodfellow says was receipt of information of false rumours being spread to friends and family about him by the Clarkes, Mr Goodfellow texted Ms Clarke to inform her of extra marital affairs by Mr Clarke.

⁴ Mr Goodfellow says Daniel is Daniel Hui, who is an independent contractor resident in Hong Kong, and who he retained to undertake the data-scraping he says was authorised by Mr Clarke.

[29] On 19 July 2022, after unsuccessfully trying to telephone Mr Goodfellow, Mr Clarke emailed Mr Goodfellow advising that Du Val Group no longer required his services for any part of the organisation, including PropTech BVI Ltd.⁵ The email went on to state:

For the avoidance of doubt, You have abandoned your contract position as Du Val's CTO and no agreement has been reached regarding shareholding.

You are notified of termination of any working relationship with immediate effect.

[30] Mr Goodfellow replied:

Thanks for your email.

Share holding is as previously agreed.

...

All communications will now be legal.

[31] Mr Clarke replied:

There is no agreement and as you are aware nothing formalised or documented.

Servsync seeks payment of invoices

[32] On 23 July 2022, Servsync sent an email to Mr Goodfellow's Du Val Group address and to Saif Khan at Du Val Group.⁶ The email was headed "June invoice" and stated:

Stuart and Saif

This is month overdue. Please pay now as you said.

Work has been suspended and closure invoice soon.

Daniel

⁵ It appears that Du Val PropTech BVI was incorporated and registered in the British Virgin Islands by or on behalf of Du Val to own and control the PropTech platform.

⁶ According to the affidavit of Mr Rodrigues filed in support of the application, Mr Khan was an accounts payable clerk at Du Val Group but had ceased working at the company when the email arrived.

[33] Because neither Mr Goodfellow nor Mr Khan were still at Du Val Group, Fabiano Rodrigues, an Information Technology manager who had worked with Mr Goodfellow, replied to the email. He advised that Mr Goodfellow did not work at Du Val Group anymore.

[34] Between 27 July and 2 August 2022, Daniel and Mr Rodrigues exchanged emails in which Mr Rodrigues asked for information about the work Servsync had done for Du Val and Daniel sought payment of the June invoice and a further invoice he forwarded for USD 15,520.00 (the July invoice). They debated whether a contract existed between Servsync and Du Val, as asserted by Daniel. Daniel's position was endorsed by Mr Goodfellow, whom Daniel had included in the email exchanges. Mr Goodfellow also briefly described the nature of the work undertaken by Servsync.

[35] Mr Rodrigues said he was unable to discuss matters with Mr Goodfellow following the termination of his employment, but he continued to press Daniel to demonstrate what Servsync had done. Daniel forwarded an attachment showing what he described as research on data sources as a target. Mr Rodrigues asked Daniel to share the actual data that had been gathered. Daniel refused to do so until the June and July invoices were paid. The exchanges ended when Daniel stated, "No more time for talking. We will send enforcement to you."

[36] Also on 2 August 2022, Mr Rodrigues forwarded to the Clarkes emails he had found in Mr Goodfellow's Du Val email account which contained exchanges between Mr Goodfellow and BBCIncorp over the incorporation and registration of Servsync and the setting up of bank accounts in various countries.

Du Val calls in the police

[37] On 9 August 2022, Du Val lodged a complaint with the police about what they considered to be Mr Goodfellow's fraud and theft.

Du Val obtains freezing order in New Zealand

[38] On 12 August 2022, Du Val applied without notice for freezing orders over the worldwide assets of Servsync and Mr Goodfellow. Affidavits from Matthew Gin, the

Head of Finance for Du Val Group, and from Mr Rodrigues, and a memorandum from counsel for Du Val, were filed in support.

[39] Following a request by Lang J for evidence or submissions on whether Mr Goodfellow was still resident in New Zealand, on 25 August 2022, Matthew Hawkes, Senior Legal Counsel at Du Val Group, filed a further affidavit in support of the application. On 26 August 2022, counsel for Du Val filed another memorandum.

[40] Also on 26 August 2022, Du Val filed an amended application for a freezing order joining Red Cell Cyber as a party so as to make it subject to the order.

[41] On 29 August 2022, Lang J granted, on the requested amended terms, a freezing order over the assets of the Goodfellow entities and an ancillary order requiring Mr Goodfellow to file and serve an affidavit setting out the assets in the control of the Goodfellow entities and what had happened to the funds paid to Servsync.

[42] As is often the case with without notice applications that assert urgency, Lang J's minute contained no analysis of the application or the evidence filed in support. It is apparent the Judge relied on the documents that had been filed.

Du Val obtains interim freezing order in England and Wales

[43] On 12 September 2022, Du Val applied ex parte to the High Court of England and Wales for a freezing order against Mr Goodfellow. An interim order was made that day by Judge Russen KC and the application was set down for hearing on 27 September 2022.

Du Val files substantive proceeding in New Zealand

[44] On 20 September 2022, Du Val filed a statement of claim alleging:

- (a) three causes of action against Servsync for monies had and received, knowing receipt of funds procured by a breach by Mr Goodfellow of his fiduciary duties as CTO of Du Val Group, and deceit;

- (b) three causes of action against Mr Goodfellow for breach of fiduciary duty, deceit and dishonest accessory; and
- (c) one cause of action against Red Cell Cyber for breach of contract.

[45] In all causes of action, Du Val seek judgment in the sum of \$76,691.60 (the amount paid to Servsync) and interest, exemplary damages and costs.

Du Val obtains freezing order in England and Wales

[46] After hearing from counsel for Du Val and Mr Goodfellow, on 4 October 2022 Judge Russen continued the orders he had made on 12 September 2022. Under the orders, Mr Goodfellow must not:

- (a) remove from England and Wales or move, dispose of, deal with or diminish the value of the Servsync Funds, which are defined as “the sum of NZ\$76,691.60 (£40,345.64)” paid to Servsync, without giving 72 hours’ notice to solicitors for Du Val of the intended use of the funds; and
- (b) until the conclusion of the New Zealand proceedings, remove from England and Wales any of his assets which are in England and Wales up to the value of £117,987.16, including Mr Goodfellow’s property at St Catherines Crescent, Sherborne.⁷

Goodfellow entities file statement of defence and counterclaim

[47] On 6 December 2022, the Goodfellow entities filed a statement of defence to the Du Val statement of claim. They deny the essential allegations made in the causes of action and counterclaim for judgment in the sums of USD 12,800 and USD 15,520, being the amounts in the Servsync invoices sent to Du Val in June and July 2022, plus interest. Mr Goodfellow also seeks a declaration of the existence of his right to a 10 per cent shareholding in the PropTech platform and orders requiring the transfer of

⁷ In an affidavit sworn on 23 September 2022 in the context of the application for the English freezing order, Mr Goodfellow said that the property at St Catherines Crescent is the only significant asset that he owns.

that shareholding, or damages to the value of that shareholding, and an order for a process to determine that value.

Principles applicable to obtaining and to the discharge of a freezing order

[48] For convenience, I adopt the summary of the law on freezing orders set out by Jagose J in *Liu v Kang*:⁸

[4] Freezing orders may be ordered if I am satisfied, having regard to all the circumstances, there is a danger a prospective judgment in the plaintiffs' favour will be wholly or partly unsatisfied because the value of the defendants' assets are alienated from them in some manner.

[5] Freezing orders are “a valuable protective measure for those commencing civil proceedings”, for which the plaintiffs must show “a good arguable case on an accrued or prospective cause of action”. By “good arguable case” is meant establishment of “a sufficiently plausible foundation” such that “the cause of action is at least tenable”. ...

[6] As to the danger of alienation, I must be satisfied assets may be removed or dealt with in a way that may frustrate the prospective judgment; that there are “circumstances from which a ‘prudent, sensible commercial man, can properly infer a danger of default’” on adverse judgment.

[7] I then must consider where lies the balance of convenience, meaning if it bears harder on the plaintiffs to be without prospective recourse to the defendants' assets, or on the defendants to have their assets frozen, pending judgment in their respective favours.

(footnotes omitted)

[49] To this I add, that r 32.2(3) of the High Court Rules requires that an applicant for a freezing order without notice must fully and frankly disclose to the court all material facts, including any possible defences known to the applicant, and information casting doubt on the applicant’s ability to discharge the obligation created by the undertaking as to damages.

[50] The scope of the obligation to disclose and the effect of material non-disclosure were discussed in *Brink’s Mat Ltd v Elcombe*, a decision of the Court of Appeal of England and Wales to which both counsel referred.⁹ Paraphrasing the judgment of

⁸ *Liu v Kang* [2023] NZHC 1263.

⁹ *Brink’s Mat Ltd v Elcombe* [1988] 1 WLR 1350.

Ralph Gibson LJ and applying them to New Zealand's circumstances, the relevant principles are:¹⁰

- (a) The duty of disclosure is to make full and fair disclosure of all material facts.
- (b) The material facts are those that are material for the judge to know when dealing with the application. Materiality is to be decided by the court and not by the applicant or its legal advisers.
- (c) The applicant must make proper inquiries before making the application. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts that would have been known if proper inquiries had been made.
- (d) The extent of the inquiries which will be held to be proper and necessary must depend on all the circumstances of the case, including the nature of the case the applicant is making and the nature of the order sought and its probable effect on the defendant.
- (e) If material non-disclosure is established, the court will be astute to ensure that an applicant who obtains a without notice freezing order without making full disclosure is deprived of any advantage it may have derived from that breach of duty.
- (f) Whether the facts not disclosed are of sufficient materiality to justify or require immediate discharge of the freezing order without examination of the merits depends on the importance of the facts to the issues that were to be decided by the judge on the application. Whether non-disclosure was innocent, in the sense the facts were not known to the applicant or their relevance was not perceived, is an important consideration but is not decisive given the duty to make all proper inquiries and to give careful consideration to the case being presented.

¹⁰ At 1356–1357.

- (g) Not every omission will warrant the discharge of a freezing order. Despite proof of material non-disclosure that would justify the immediate discharge of a freezing order, the court has a discretion to continue the order or to make a new order on terms it considers appropriate.

The application for discharge of the freezing order

[51] The essence of the Goodfellow entities' application for discharge of the freezing order made by Lang J is that Du Val failed to disclose to the Court all material relevant to that application.

[52] That contention requires consideration of the following questions:

- (a) On what basis was the freezing order sought?
- (b) What material was disclosed to the Court?
- (c) Was there material non-disclosure by Du Val?
- (d) If so, should the Court discharge or vary the freezing order?

On what basis was the freezing order sought?

[53] In their amended application, Du Val alleged that:

- (a) after establishing Servsync, Mr Goodfellow purported to engage Servsync to provide services to Du Val in respect of an information technology project, represented to Du Val management that Servsync was an external resource and did not disclose that he was the sole director and shareholder of Servsync;
- (b) Mr Goodfellow failed to arrange for Servsync to conclude a written contract or to sign a non-disclosure agreement in accordance with Du Val policy for the engagement of third party suppliers;

- (c) between March and June 2022, Servsync rendered invoices to Mr Goodfellow who, in turn, represented to Du Val Management that the invoices were genuine and arranged for Du Val Management to pay the invoices totalling \$76,691.60;
- (d) on 20 July 2022, Mr Goodfellow, without any explanation or warning terminated the lease of his apartment in New Zealand and returned to the United Kingdom and his position as CTO was subsequently terminated;
- (e) following demands by Servsync for payment of outstanding invoices, they discovered that Servsync was a company owned and controlled by Mr Goodfellow; and
- (f) they have been unable to identify any work product produced by Servsync or any services provided.

[54] Under the heading “Assets and Risk of dissipation”, the amended application stated that there was a danger that any prospective judgment would be wholly or partly unsatisfied because:

- (a) Mr Goodfellow’s unexplained departure from Du Val and the termination of his apartment lease suggested it was unlikely that he would return to New Zealand; and
- (b) As sole director and shareholder of Servsync, Mr Goodfellow had or might divert funds through Servsync’s bank accounts.

[55] It is apparent that Du Val’s application was based on two key contentions that:

- (a) Mr Goodfellow, without Du Val’s knowledge, established Servsync and had been invoicing Du Val without providing anything of value to Du Val; and

- (b) Mr Goodfellow had cancelled the lease of his apartment and left New Zealand and Du Val without notice to Du Val.

What material was disclosed to the Court?

[56] The affidavits of Mr Gin, Mr Rodrigues and Mr Hawkes and the memoranda of Mr Lomas, counsel for Du Val, comprehensively addressed the first contention. No issue is taken with that aspect of the material other than the fact that Mr Goodfellow says Mr Clarke knew and approved of the establishment of Servsync.

[57] Mr Goodfellow's application for discharge relates principally to the second contention, on which the evidence and submissions were that:

- (a) Mr Goodfellow had left work on 20 July 2022 as normal. It was later discovered that he had terminated the lease for his apartment and had advised that he was returning to the United Kingdom and would not be returning to New Zealand.¹¹
- (b) The information regarding Mr Goodfellow's departure had been passed on to Ms Clarke by one of the property managers at the apartment building. This came as a surprise to Du Val's senior managers because there had been no communication from Mr Goodfellow confirming his travel dates.¹²
- (c) There had been concerns about Mr Goodfellow's work and "following his decision not to return" Mr Goodfellow had sent Ms Clarke a number of derogatory texts. Mr Goodfellow's contract with Du Val was subsequently terminated in July 2022.¹³

¹¹ Affidavit of Mr Gin, 11 August 2022; Affidavit of Mr Hawkes, 25 August 2022; and Memorandum of Counsel for Du Val, 12 August 2022. The error regarding Mr Goodfellow's departure date was made initially in Mr Gin's affidavit and was repeated in Mr Hawkes' affidavit and the memorandum of counsel. Mr Gin acknowledged in a subsequent affidavit that the date of 20 July 2022 was incorrect and should have been 12 June 2022. He explained how the error was made but said it made no material difference to his account.

¹² Affidavit of Mr Gin, 11 August 2022; Affidavit of Mr Hawkes, 25 August 2022; and Memorandum of Counsel for Du Val, 12 August 2022.

¹³ Affidavit of Mr Gin, 11 August 2022.

- (d) Mr Goodfellow's unexplained departure from Du Val suggested he might not return to New Zealand in the near future.¹⁴ Du Val had not tried to contact Mr Goodfellow to confirm this because they did not want to alert him to the fact that they were aware he was behind Servsync before seeking a freezing order.¹⁵
- (e) Earlier in 2022, Mr Goodfellow had advised several Du Val employees that he was planning to take a five-week holiday but did not provide any details around when that would be. It was not until Ms Clarke was advised that he had terminated his apartment lease that Du Val realised he was unlikely to return.¹⁶

Was there material non-disclosure by Du Val?

[58] Mr Grove, counsel for the Goodfellow entities, submitted that:

- (a) Contrary to the assertions of Du Val, Mr Goodfellow did not leave New Zealand without notice to Du Val and had not left New Zealand without an intention to return.
- (b) Du Val failed to disclose that:
 - (i) Mr Goodfellow had continued to work for Du Val in the United Kingdom, as he had arranged before his departure;
 - (ii) as Du Val knew, Mr Goodfellow's lease of his apartment had been for a fixed term of about six weeks;
 - (iii) Mr Goodfellow had been working on the PropTech platform on the basis that he would have a 10 per cent equity stake in the entity that owned the platform;

¹⁴ Affidavit of Mr Hawkes, 25 August 2022; and Memorandum of Counsel for Du Val, 12 August 2022.

¹⁵ Affidavit of Mr Hawkes, 25 August 2022.

¹⁶ Affidavit of Mr Hawkes, 25 August 2022.

- (iv) the PropTech platform had been publicly launched on 23 June 2022;
- (v) three weeks after the launch of the PropTech platform, Du Val purported to terminate Mr Goodfellow's engagement;
- (vi) immediately prior to the termination of Mr Goodfellow's engagement, Mr Goodfellow and the Clarkes had been in acrimonious personal disputes in which Mr Goodfellow had informed Ms Clarke extra-marital affairs in which he understood Mr Clarke had engaged; and
- (vii) Du Val itself had established Du Val PropTech BVI for the same reasons Mr Goodfellow had established Servsync; namely, to ring fence Du Val from any legal liability or reputational damage that might follow the data-mining operations that were to be conducted by Servsync.

[59] Mr Lomas, counsel for Du Val, said that:

- (a) The detail surrounding Mr Goodfellow's departure from New Zealand was immaterial to the proceeding. It was events that followed Du Val's internal investigation that formed the basis of the application.
- (b) Even if some in Du Val had been aware of Mr Goodfellow's travel plans, senior management, including the Clarkes, did not know of those plans when Mr Goodfellow left New Zealand.
- (c) Du Val accepted that Mr Goodfellow continued to work remotely when in the United Kingdom but said that that work was also immaterial to the application because Du Val uncovered the fraudulent activity only after Mr Goodfellow's engagement with Du Val had been terminated.
- (d) The Clarkes and other members of Du Val's senior management did not know of Mr Goodfellow's lease arrangements and, given that Du Val is

a significant property development organisation, could not be expected to be across the detail of individual leases.

- (e) Mr Goodfellow's lease arrangements were not discussed with senior management, including the Clarkes, and the discovery of the cancellation of the lease and Mr Goodfellow's sudden and unexpected departure came as a shock. In any event, the termination of the lease predated Du Val's investigation into Servsync and did not form the basis on which the application for a freezing order was made.
- (f) Du Val accepted that the relationship between the Clarkes and Mr Goodfellow had irretrievably broken down and that there was a dispute over Mr Goodfellow's right to a 10 per cent shareholding in the entity that owned the PropTech platform. However, the shareholding dispute was immaterial to the Freezing Order which was based on Du Val's internal investigation.

Discussion

[60] I accept few of the points made by Mr Lomas. It is plain that Du Val failed to disclose information that would have been regarded as material to the Judge considering the freezing order application. It is also plain that Du Val either deliberately, or by a conspicuous failure to make proper inquiries, has put information before the Judge that was demonstrably incorrect.

[61] Having regard to the summary of principles stated by Jagose J in *Liu v Kang*, I am satisfied that, at the time of their application for a freezing order, Du Val had established a good arguable case on a prospective cause of action. On the basis of the evidence of Mr Rodrigues, in particular, it is clearly arguable that Mr Goodfellow had misappropriated funds from Du Val by establishing Servsync without Du Val's knowledge and arranging for invoices to be submitted to Du Val for payment. While Mr Goodfellow disputes Mr Rodrigues's account of what occurred, the strength or otherwise of the respective positions will be determined at the substantive hearing.

[62] However, even if the allegations about Servsync are the reason for the substantive proceeding, I do not accept that the details of Mr Goodfellow's travel arrangements were not relevant to the application for a freezing order.

[63] It is plain from the terms of the application itself and from the affidavits of Mr Gin and Mr Hawkes, and from Mr Lomas's first memorandum, that the justification for seeking a freezing order rested principally on the contention that Mr Goodfellow had suddenly and unexpectedly terminated the lease on his apartment and left New Zealand without telling Du Val. In terms of Jagose J's summary, these were the considerations that gave rise to the danger that a judgment in Du Val's favour would be wholly or partly unsatisfied – as Du Val's own application stated.

[64] However, rather than lacking or being in error on a few details, the description of events given in the Du Val affidavits omitted key information that was known or ought to have been known to Du Val. It also conveyed to the Court the impression that Mr Goodfellow's departure for the United Kingdom was a complete surprise to most people in Du Val and that remained the position at the time the application for a freezing order was filed. It also conveyed the impression that Mr Goodfellow had terminated his relationship with Du Val. Both impressions were thoroughly incorrect, even without the embellishment added in some accounts; namely, that Mr Goodfellow had told the property manager he was not coming back to New Zealand.¹⁷ I am satisfied that Du Val either knew this description of events was wrong or it should have known if proper inquiries had been made.

[65] I consider that Du Val had a duty to disclose to the Court that, regardless of any initial surprise on the part of Ms Clarke over Mr Goodfellow's departure, by the time the application was filed:

- (a) The Clarkes had been aware that Mr Goodfellow had been planning to travel to the United Kingdom, even if they had not known his precise travel dates.

¹⁷ I doubt that this allegation is accurate. Leaving aside the hearsay issues, I note that Ms Clarke does not say, in her affidavit of 4 August 2023, that the property manager told her that Mr Goodfellow had told the manger he was not coming back to New Zealand.

That is clear from text messages exchanged by Mr Goodfellow and Ms Clarke in May 2022 when Ms Clarke had learned that Mr Goodfellow would not be moving to the Clarkes' new house.

- (b) Mr Goodfellow had not terminated his lease without notice to Du Val.

Whatever Ms Clarke's surprise when she learned on 11 June 2022 about Mr Goodfellow's departure and whatever the state of the Clarkes' knowledge of the details of Mr Goodfellow's lease, Du Val had ample opportunity, prior to filing the application for a freezing order on 12 August 2022, to ascertain the actual situation regarding the lease. The lease was with their business and all details would have been available to them. It is difficult to avoid the inference that some in Du Val either knew that the lease had terminated on its own terms or chose not to ask because it did not suit the case they wanted to make.

- (c) Mr Goodfellow had told Mr Clarke, on 13 June 2022, that he was returning to New Zealand on 27 July 2022 and had made arrangements to continue to work with Du Val for most of the time he was going to be in United Kingdom, that he and Mr Clarke had arranged to meet when Mr Clarke was going to be in Dorset, and Mr Clarke had agreed to participate in regular calls on PropTech with Mr Goodfellow and other senior managers.

Given that information, which was clearly available to Du Val when it filed the application for the freezing order, it was misleading to suggest to the Court that Mr Goodfellow's travel and work arrangements were unknown to Du Val. In that regard, I find it difficult to accept that information known to the Clarkes would not have been known or available to those who swore the affidavits, particularly Mr Gin and Mr Hawkes. Given that Du Val is very much the Clarkes' business and given that Mr Goodfellow had been the Clarkes' personal friend, it is almost inconceivable that those swearing the affidavits would not have consulted the Clarkes before completing their affidavits.

- (d) Mr Goodfellow's engagement with Du Val had been terminated by Mr Clarke and the circumstances leading up to and following the termination. These circumstances included Mr Goodfellow's text message to Ms Clarke, the terms of the termination email and the dispute over Mr Goodfellow's entitlement to 10 per cent of the PropTech ownership vehicle.

Irrespective of the fact that Mr Goodfellow's engagement had been terminated for reasons quite separate from the discovery of the alleged Servsync fraud, the fact that his engagement had been terminated, and the reasons for the termination were clearly relevant to an assessment of whether Mr Goodfellow may try to dispose of or dissipate assets before any judgment was delivered in the substantive proceeding.

The fact that Du Val chose to suppress this obviously relevant item of evidence considerably undermines their claim to having a genuine concern that Mr Goodfellow might seek to dispose of or dissipate his assets.

[66] The above analysis is more than sufficient to conclude that there was material and significant non-disclosure by Du Val when applying for the freezing order. It is unnecessary, therefore, to make any findings about the non-disclosure of the fact that the PropTech platform had been launched by the time the application had been filed or about the significance or otherwise of Du Val establishing Du Val PropTech BVI. While those matters may be of significance in the substantive dispute, I consider them to be of marginal relevance to the risk of disposal or dissipation of assets by Mr Goodfellow.

[67] However, there can be little doubt that the material that was not disclosed about Mr Goodfellow's travel and work arrangements in the United Kingdom and his termination from Du Val were highly relevant to the decision that the Judge had to make; namely, whether there was a danger that Mr Goodfellow would dispose of or dissipate assets. That danger was premised on the circumstances of Mr Goodfellow's departure from New Zealand and those circumstances were not presented accurately

to the Court. These were not only material omissions. The effect of those omissions was to misrepresent the actual position to the Court.

[68] I am satisfied that the omissions and misrepresentation were not inadvertent or the result of an inability to make proper inquiries. All of the omitted material was known to the Clarkes and, with reasonable diligence, should have been known to those who prepared the application and swore the affidavits filed in support of the application.

[69] There is a clear case, therefore, for discharging the freezing order.

Should the Court discharge or vary the freezing order?

[70] As discussed in *Brink's Mat*, it is not automatic that a freezing order will be discharged because of the omission of relevant material. In that case, Ralph Gibson LJ had no doubt that, had the omitted information been before the judge making the initial order, the order still would have been made.¹⁸ That is not the position here.

[71] I consider that, had the omitted information been before Lang J, he would have questioned whether a freezing order was appropriate given that:

- (a) some in Du Val knew before Mr Goodfellow departed for the United Kingdom, and the Clarkes knew shortly after Mr Goodfellow's arrival in the United Kingdom, that Mr Goodfellow had arranged to continue to work for Du Val while he was in the United Kingdom; and
- (b) it was Mr Clarke rather than Mr Goodfellow who terminated Mr Goodfellow's arrangement with Du Val.

[72] I consider the latter point to be of particular significance. It shows that the impetus for Mr Goodfellow staying in the United Kingdom, rather than returning to New Zealand and submitting to the jurisdiction of the New Zealand courts, came from actions taken by Du Val, rather than from any deliberate choice of Mr Goodfellow. In

¹⁸ *Brink's Mat Ltd v Elcombe*, above n 9, at 1357.

these circumstances, I consider that it is far from clear that Lang J would have made the freezing order had this information been available to him.

[73] More importantly, I do not consider this to be a case of simple omission of relevant material. For the reasons stated above, I consider has Du Val not only failed in its duty of disclosure but has misrepresented the position regarding Mr Goodfellow's travel and work arrangements with Du Val. I consider it likely that it has done so in order to subject Mr Goodfellow to the rigours of the freezing order rather than out of any genuine concern that Mr Goodfellow might dispose of or dissipate his assets.¹⁹ If that is so, it is an abuse of the court's processes.

[74] In these circumstances, I see no case for maintaining the freezing order over Mr Goodfellow's worldwide assets, irrespective of the merits of Du Val's claim against Mr Goodfellow or the merits of Mr Goodfellow's counterclaims against Du Val, including the claim for 10 per cent shareholding the in entity that owns the PropTech platform, which Mr Goodfellow says may be worth a considerable sum.²⁰

[75] Other considerations militating against maintaining the current order or substituting an alternate order are that:

- (a) Du Val's substantive claim is for \$76,691.60, with interest and costs. The scope of the current order is disproportionate to that claim, irrespective of Du Val's claims for exemplary damages. In that respect, the freezing order is not consistent with r 32.6(2) of the High Court Rules.
- (b) Mr Goodfellow has made a full declaration of his assets and liabilities. His primary asset is his property at St Catherines Crescent, Sherborne. It is a fixed asset that is likely to be worth considerably more than any

¹⁹ I reach this conclusion quite independently of the social media posts by Mr Clarke enclosed with the memorandum of 19 December 2023 from counsel for the Goodfellow interests.

²⁰ I acknowledge that there are obvious weaknesses and inconsistencies in Mr Goodfellow's account of what happened with Servsync. These include the fact that Servsync invoices were presented to Du Val by a person whom Mr Goodfellow claimed was an independent contractor, the fact that at least one of the payments by Du Val is still in the Servsync bank accounts and the question that has been raised as to whether Daniel is a real person.

judgment that Du Val will obtain in its substantive claim against Mr Goodfellow, even leaving aside Mr Goodfellow's counterclaims.

Result

[76] For all the above reasons, I discharge the freezing order made by Lang J on 29 August 2022.

Costs

[77] The Goodfellow entities are entitled to costs. Ordinarily, I would set these at a 2B basis and direct the Registrar to fix costs on that basis. However, if the Goodfellow entities wish to make submissions on costs, they may do so in a memorandum of no more than five pages filed and served by 19 April 2024.

[78] Any reply by Du Val shall be in a memorandum of no more than five pages filed and served by 10 May 2024.

G J van Bohemen J