IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-359
[2024] NZHC 429

BETWEEN	HABITAT HOTELS & APARTMENTS LIMITED Applicant
AND	BANK OF NEW ZEALAND First Respondent
	HAMILTON MOVERS LIMITED Second Respondent

Counsel: JEM Lethbridge and MF Mabbett for Applicant

Judgment: 4 March 2024
(On the papers)

JUDGMENT OF WOOLFORD J
(On application for orders ancillary to prospective freezing orders)

This judgment was delivered by me on Monday, 4 March 2024 at 12:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Martelli McKegg, Auckland

[1] In this proceeding, the applicant has filed a without notice application for orders ancillary to prospective freezing orders.

Background

[2] The applicant mistakenly paid funds intended for a third party into the bank account of the second respondent. Despite the second respondent accepting that it had received $69,582.48 by way of mistaken payment from the applicant, they will now not repay the funds or provide verification in writing of where the funds are held.

[3] Initially, the second respondent said that they would preserve the funds but would only repay it by formal channels. However, when the applicant's bank requested the funds through the formal Direct Credit Recovery (DRC) system, the second respondent refused to refund them. The first respondent is the second respondent's bank and is named as a party for the purposes of the disclosure orders only.

Applicant's position

[4] The applicant submits that it has good arguable case against the second respondent in unjust enrichment and money had and received, arising from a mistaken payment by the applicant to the second respondent. While this is not a case in which dishonesty can be alleged against the second respondent for receiving the funds, it is plainly dishonest to now refuse to repay them.

[5] The second respondent has repaid the sum of $19,582.48 but is still retaining $50,000. The applicant's particular concern is that, in the period in which the second respondent has prevaricated (and used an excuse about needing to go through official channels), it may well have dissipated the remainder of the funds.

[6] In those circumstances, while not deceit or embezzlement, the requirements for a freezing order are nonetheless met. In any event, the applicant only seeks an ancillary order, to first establish if the funds are left with the second respondent or where they have gone. The Court of Appeal has confirmed that jurisdiction exists to

order an ancillary order in support of a prospective freezing order (even where no application is extant).[1]

Discussion

[7] I am satisfied that the applicant has a good arguable case on an accrued cause of action and a prospective freezing order that is justiciable in the Court.

[8] The Court has also considered the application for ancillary orders to a prospective freezing order. The Court is satisfied, having regard to all the circumstances disclosed by affidavit evidence filed in support of the application, that the order is just to elicit information relating to assets relevant to the prospective freezing order, to determine whether the freezing order should be made and appointing a receiver of the assets that are the subject of any prospective freezing order.

[9] I therefore make the ancillary orders as set out in Annexure One of this judgment.

[10] The second respondent may cause these orders to cease to have effect if it provides security by paying the sum of $50,000 into Court or makes provision for security in that sum by some other method agreed with the applicant's solicitors.

[11] Service is to be effected on the second respondent by way of email to the email address of sales@hamiltonmover.co.nz, given the urgency of the orders sought. Save as otherwise provided in the orders, the costs of and incidental to the application are to be paid by the second respondent (with quantum to be determined by memorandum following compliance with the orders).

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1 *Dotcom v Twentieth Century Fox Film Corporation* [2014] NZCA 509 at [15].

[12] Finally, I am satisfied the orders should be made without notice to any other party on the grounds that requiring the applicant to proceed on notice would cause undue delay or prejudice to it and that the interests of justice require the application to be determined without serving the notice of the application.

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Woolford J