

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

CIV-2002-404-001944

BETWEEN HERALD VICTOR DE ALWIS & ORS
 Plaintiff

AND LUVIT FOODS INTERNATIONAL
 LIMITED & ORS
 Defendants

Hearing: 15 October 2009

Appearances: K M Wakelin for Plaintiffs
 E Orlov for Defendants

Judgment: 19 October 2009 at 4:00 pm

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 19 October 2009 at 4.00 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date.....

Solicitors: *Meredith Connell, P O Box 2213, Auckland*
 Fax: (09) 336-7629 – K Wakelin
 Botany Law, P O Box 64106, Auckland
 Fax: (09) 250-4438

Counsel: *E Orlov, P O Box 8333, Symonds Street, Auckland 1150*
 Fax: (09) 303-2018

[1] This proceeding has its origins in a summary judgment entered against Mrs Chean's husband in 2007. The same plaintiffs subsequently obtained judgment against Mrs Chean substantially on the basis that she was estopped from challenging findings made in the judgment against Mr Chean. Mrs Chean has appealed the judgment against her. In addition, she and Mr Chean have recently applied to set aside the original judgment against Mr Chean.

[2] Since August 2007 there has been an asset preservation order in place in relation to the proceeds of a property sale that would otherwise have been disbursed to Mrs Chean. In June 2009 that order was varied to allow her \$1,205 per week to cover living expenses. Mrs Chean now applies to vary the order further so as to provide funds to cover legal fees for the conduct of the setting aside application. Her main ground for doing so is that her legal aid application in relation to the setting aside proceedings has been declined and she has no funds with which to conduct that application.

[3] The plaintiffs oppose the application to vary the asset preservation order on the basis that:

- One may draw the inference from the declinature of legal aid that the Legal Services Agency regards the application as unmeritorious. Mr Orlov's response to this is that the advice from the Legal Services Agency is privileged and, in any event, it would be improper to draw any inference as to the merits of the application.
- The funds that are the subject of the asset preservation order represent the only means with which the judgment against Mrs Chean can be satisfied and the variation sought will reduce an already depleted fund (since June 2009 a total of approximately \$20,000 has been removed pursuant to the variation of the order).
- The application to set aside the judgment against Mr Chean was not filed until July 2009, more than two years after the entry of the judgment and there is a significant risk that further delay and the

consequent erosion of funds will render the plaintiffs' judgment nugatory.

- The exact amount sought to be released through the variation of the order has not been articulated and expenditure not properly justified.
- The variation will effectively fund Mr Chean's legal costs, he being the party against whom the judgment was issued. However Mr Chean is an undischarged bankrupt with no interest in the preserved funds.

[4] Mrs Chean's affidavit in support of the application does not disclose any change in circumstances other than the LSA's declinature of her legal aid application. Mr Chean has provided an affidavit in support of Mrs Chean's application. He deposes that he lost the opportunity to defend the case because he declared himself bankrupt on the advice of his former lawyer to the effect that doing so would have no effect on Mrs Chean. He also has unsuccessfully applied for legal aid to fund the setting aside application.

[5] Mr and Mrs Chean's counsel, Mr Orlov, has filed a memorandum indicating that he cannot afford to continue his involvement in the case on a deferred fee basis. However, Mr Orlov does not provide any indication as to the expected cost of preparing for the setting aside application. Nor, apart from the assertion by Mr Chean that he did not defend the earlier proceedings as a result of inadequate advice by his lawyer, is there any indication as to the grounds on which the setting aside application might be argued. In particular, there is no outline as to the nature of any defence that Mr Chean might have advanced had he chosen to defend the proceeding.

[6] Mr and Mrs Chean have both known since 2007 when the present proceedings were commenced against Mrs Chean that Mr Chean's hope that declaring himself bankrupt would protect his wife was unfounded. Yet it has taken more than two years to take any step towards setting aside the judgment. Further, Mr Chean has a remedy against his former lawyer if the advice asserted was in fact given and that it was negligent.

[7] However, I approach this matter on the basis that the Court of Appeal gave Mrs Chean leave to reinstate her appeal against the judgment against her, an indication that, on the face of it, the appeal was not necessarily hopeless. The default judgment against Mr Chean is an important plank of the case against Mrs Chean and it is understandable that the judgment would be scrutinised. When Winkelmann J varied the asset preservation order in June 2009 she did so in the knowledge that Mrs Chean intended to make a further application for legal aid in relation to “some necessary aspects of the overall litigation”. Although not identified, I assume that the setting aside application was envisaged at that stage.

[8] By a narrow margin I am prepared to vary the asset preservation order. However, there is absolutely no indication from Mr Orlov as to what the probable cost would be. In the circumstances, I accept the submission contained in Ms Wakelin’s memorandum that the variation be granted by reference to the guidelines for civil legal aid costs, Schedule 3 of the High Court Rules and the proceeds of crime authorities relating to the variation of restraining orders for the allowance of reasonable costs. Her calculation suggests a range of between \$3,360 (being the LSA guidelines) and \$7,360 (being Schedule 3 2B High Court Rules). Given that both Mr Orlov’s and Mrs Chean’s hope was that the application would be funded by legal aid it seems most appropriate to adopt the LSA guideline. I therefore vary the asset preservation order to allow a payment of up to \$3,360 for legal costs connected with the application to set aside the judgment against Mr Chean.

P Courtney J