

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

CIV-2009-404-006904

BETWEEN NUOBEI ZHENG
 Plaintiff

AND HONGLIN LI
 First Defendant

AND LI LIU
 Second Defendant

Hearing: 22 October 2009

Appearances: N S Tabb for Plaintiff
 No appearance for Defendants

Judgment: 27 October 2009 at 2:00 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 27 October 2009 at 2:00 pm
pursuant to R 11.5 High Court Rules

Registrar / Deputy Registrar
Date.....

Solicitors: *N S Tabb, P O Box 101972, North Shore City 0745
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Introduction

[1] Ms Zheng, the plaintiff, has applied for freezing orders pursuant to R 32.2 High Court Rules. The application first came before Asher J on 21 October 2009 on a without notice basis. He directed that the application be served that afternoon on the defendants' solicitor (Mr Gore of Ross Holmes Lawyers) with, at the least, a full set of papers being emailed to the defendants' solicitors. Asher J recorded in his minute that:

The defendants are expected to appear tomorrow and to have filed, at the very least, a short affidavit setting out their response to the allegations made, in particular, addressing the issue of dissipation of assets. The way forward will be a matter for the Duty Judge tomorrow but if no adequate steps to set out the position are taken by the defendants, the conclusion may be drawn that there is a proper basis for the plaintiff's suspicions.

[2] When Ms Tabb appeared before me on 22 October 2009 she produced a copy of a letter from her instructing solicitor to Mr Gore enclosing by way of service the notice of proceeding, statement of claim, notice of ex parte application for freezing orders, affidavit of the plaintiff in support, memorandum of counsel 20 October 2009 and Asher J's minute. The letter referred to a duplicate being enclosed and requested that Mr Gore sign and return the letter by fax or post. In addition, Ms Tabb produced a copy of an email to Mr Gore sent at 3:26 pm on 21 October 2009 enclosing the same documents. Endorsed on the hard copy of the email is a handwritten note from Ms Tabb's instructing solicitor of a telephone conversation with Mr Gore on 21 October 2009 recording that the defendants' position had not changed and that he was authorised to accept service.

[3] When the matter came before me on 22 October 2009 there was no appearance for the defendants and no papers had been filed. I made the freezing orders pursuant to R 32.2 High Court Rules as sought but, due to counsel's commitments in another court, I indicated that I would give my reasons in writing later.

Nature of substantive claim

[4] Ms Zheng's substantive claim arises from sale and purchase agreements entered into in September 2009 between Ms Zheng as purchaser and the first and second defendants (Mr Li and Ms Liu) and Ms Liu's brother (through his attorney, Ms Liu) as vendors. The ten properties that were the subject of the sale and purchase agreements were vacant sections located in a subdivision in Sunnyvale, Auckland. There were twelve other sections in the same subdivision that Ms Zheng also wished to purchase and she made offers to the various owners of those other sections as well. All twenty-two sale and purchase agreements contained a special condition inserted at Ms Zheng's insistence making the offers conditional upon her obtaining sufficient finance to complete the purchases and successfully acquiring all twenty-two sections within ten working days of acceptance of the offers.

[5] In her statement of claim Ms Zheng alleges that she made it known to Mr Li and Ms Liu of her intention to acquire and develop all twenty-two sections and to on-sell some of them. As it turned out Ms Zheng was unable to acquire the twelve other sections. Nevertheless, she decided to proceed in relation to the ten sections owned by the defendants. Her solicitor wrote to the defendants' solicitor on 29 September 2009 waiving the special condition and over the next several days the plaintiff entered into agreements with third parties for the on-sale of seven of the ten sections. These sales were achieved at a higher price than that to be paid by the plaintiff to the defendants.

[6] When the plaintiff's solicitor wrote requesting an extension of the finance condition in respect of the three sections that had not been on-sold the defendants' solicitor responded asserting that:

- a) The special condition had been incorrectly drafted and that the parties' intention was that the agreements would be conditional upon the plaintiff acquiring all ten sections owned by the defendants and Mr Liu rather than all twenty-two sections in the subdivision and was therefore inserted for the benefit of both vendors and purchaser and incapable of unilateral waiver;

- b) The defendants avoided the agreements in respect of the three remaining sections for non-fulfilment of the finance condition; and
- c) The defendants avoided the other seven agreements for non-fulfilment of the special condition.

[7] In her proceedings against the defendants Ms Zheng is seeking the profit that she would have made on the on-sale of the sections. These losses total approximately \$400,000.

[8] Ms Tabb submitted that there is no basis to suggest the reference in the condition to twenty-two sections was a typographical error as the defendants suggested and no merit in the assertion that the special condition had been included for the benefit of both vendors and purchaser. The nature of the condition meant that there was benefit only to the purchaser. Further, the condition was included in all twenty-two agreements, not just those between Ms Zheng and the defendants.

Application for freezing orders

[9] The plaintiff's concerns were aroused the day after the defendants purported to terminate the agreements when she discovered that they had listed their residential property at 101 Bushlands Park Drive, Albany for auction on 1 November 2009. The plaintiff also produced an advertisement from a Chinese newspaper on 3 October 2009 with the heading "Leaving New Zealand fire sale of all chattels no item will be left unsold" and giving the address as 101 Bushlands Park Drive, Albany and the name Ms Liu with the accompanying telephone numbers. The plaintiff's also deposes that she has "learnt through the grapevines" that Mr Li and Ms Liu have purchased plane tickets to return to China.

[10] In these circumstances the plaintiff has formed a view that Mr Li and Ms Liu are intending to dispose of their assets in New Zealand in an attempt to defeat her claims against them. I am satisfied that the plaintiff has a good arguable case on her substantive proceeding and that there is a risk of assets being dissipated. The defendants own several properties and whilst there is evidence of only one of the properties having been listed for sale at this stage, the short auction period coupled

with the advertisement in the Chinese newspaper indicating the defendants' intention to leave New Zealand creates a serious risk that they will continue to dissipate other assets.

[11] The application is for freezing orders in respect of ten properties owned by the defendants either alone or as joint tenants. These properties include their residential property at 101 Bushlands Park Drive, Albany and most of the sections that were the subject of the sale and purchase agreements. Although it may seem excessive to seek a freezing order in respect of so many properties against a claim of \$400,000, the information obtained by the plaintiff shows that the defendants' properties, apart from 101 Bushlands Park Drive, are heavily mortgaged. In each case the priority sum under the registered mortgage is well in excess of the rating valuation. The Sunnyvale sections have rating valuations between \$210,000 and \$220,000 with priority sums under the mortgages in each case between \$750,000 and \$975,000. Even the property at 101 Bushlands Park Drive, Albany, which has a rating valuation of \$570,000 as at 1 September 2008 has a priority sum under the mortgage of \$690,000. As a result, there are reasonable grounds for the plaintiff's concern to ensure that sufficient equity is available to meet a damages claim.

[12] The plaintiff has given an undertaking as to damages, referring to her ownership of shares having a value of about \$660,000 and her interest by way of relationship property in a property at Waitakere worth \$1.2m. The plaintiff also makes reference to a debt of about \$200,000 owed to her by a family trust, but without any details of the Trust's assets I do not place any weight on that aspect.

[13] The requirements for a freezing order under R 32 High Court Rules are satisfied and the terms of the orders I made were that:

- a) Pending further order of this Court, the First Defendant Honglin Li (together with his servants or agents or otherwise) be restrained from disposing or causing to be disposed or otherwise charging or dealing in any manner whatsoever with, or diminishing the value of, whether beneficially held or otherwise save to the extent that the aggregate

value of the asset exceeds the sum of \$392,000.00, the land and buildings registered in the name of the First Defendant being:

- i) The property at 19 Rosses Place, Pinehill, North Shore, Auckland which is more fully described in Certificate of Title NA136C/183, held as joint tenant with the Second Defendant.
- ii) The property at 101 Bushlands Park Drive, Albany, North Harbour, Auckland which is more fully described in Certificate of Title NA126A/942, held as joint tenant with the Second Defendant.
- iii) The property at 101 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308300.
- iv) The property at 105 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308295.
- v) The property at 109 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308301.
- vi) The property at 121 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308303, held as joint tenant with the Second Defendant.
- vii) The property at 125 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308311, held as joint tenant with the Second Defendant.
- viii) The property at 131 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308304, held as joint tenant with the Second Defendant.

- b) Pending further order of this Court, the Second Defendant Li Liu (together with her servants or agents or otherwise) be restrained from disposing or causing to be disposed or otherwise charging or dealing in any manner whatsoever with, or diminishing the value of, whether beneficially held or otherwise save to the extent that the aggregate value of the asset exceeds the sum of \$392,000.00, the land and buildings registered in the name of the Second Defendant being:
- i) The property at 19 Rosses Place, Pinehill, North Shore, Auckland which is more fully described in Certificate of Title NA136C/183, held as joint tenant with the First Defendant.
 - ii) The property at 101 Bushlands Park Drive, Albany, North Harbour, Auckland which is more fully described in Certificate of Title NA126A/942, held as joint tenant with the First Defendant.
 - iii) The property at 121 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308303, held as joint tenant with the First Defendant.
 - iv) The property at 123 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308306.
 - v) The property at 125 Rangview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308311, held as joint tenant with the First Defendant.
 - vi) The property at 129 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308305.

- vii) The property at 131 Rangeview Road, Sunnyvale, Waitakere, Auckland which is more fully described in Certificate of Title 308304, held as joint tenant with the First Defendant.

- c) Notice of these orders shall be given to the First and Second Defendants by service on their solicitor, Mr Terrance Gore of Ross Holmes Lawyers.

- d) Leave is reserved to any party or non-party adversely affected by these orders to apply to vary or discharge these orders.

P Courtney J