

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

CIV 2009-443-548

BETWEEN MY VIRTUAL HOME
INTERNATIONAL LTD (IN
RECEIVERSHIP)
Plaintiff

AND NGATI TAMA CUSTODIAN TRUSTEE
LTD
Defendant

CIV 2009-404-7584

AND BETWEEN NGATI TAMA CUSTODIAN TRUSTEE
LTD
Plaintiff

AND MY VIRTUAL HOME
INTERNATIONAL LTD (IN
RECEIVERSHIP)
Defendant

Hearing: 19 November 2009

Counsel: S R G Judd for My Virtual Home International Ltd
D M Hughes and T Cooley for Ngati Tama Custodian Trustee Ltd

Judgment: 19 November 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:

Webb Morice, PO Box 316, Pukekeohe
Kensington Swan, Private Bag 92101, Auckland

Counsel:

S R G Judd, PO Box 3320, Shortland Street, Auckland

Interim injunction application

[1] My Virtual Home International Ltd (in receivership) seeks an interim injunction to restrain Ngati Tama Custodian Trustee Ltd from taking any steps to dispose of assets of Creative Designer and Software Pty Ltd, pending further order of the Court. The intention is to prevent Ngati Tama from taking steps to sell, mortgage or otherwise dissipate such assets to external entities.

[2] The dispute between My Virtual Home and Ngati Tama is over the priority of charges each holds over the undertaking of Creative Designer and Software Pty Ltd. That company is an Australian company, with assets in Australia.

[3] The issue is urgent because the main asset of Creative Designer is software developed by it, to which it holds intellectual property rights. The plaintiff asserts an exclusive licence in relation to the use of that intellectual property.

[4] The application for interim injunction can be heard promptly. It is set down for hearing at 10am on 7 December 2009. One day has been allocated. I will make further timetabling orders in respect of that hearing shortly.

[5] The grounds of opposition are two-fold. First, there is a protest to jurisdiction alleging that the Australian Courts are *forum conveniens*. The second concerns the merits of the dispute. Ngati Tama asserts that it does have a prior charge over Creative Designer's property, justifying the appointment of a receiver and sale of its assets.

[6] The proceeding was brought before the Court for the first time yesterday. An order transferring it to this Court (from New Plymouth) was made on 17 November 2009 by Priestley J.

[7] I make timetabling orders yesterday but relisted the proceeding for today in case any issues arose with regard to any holding order required, pending determination of the interim injunction application. I also gave an opportunity for

Ngati Tama to determine whether, in addition to opposing the interim injunction, it wished to file a protest to jurisdiction and an application to dismiss the proceeding.

[8] A protest and an application of that type have since been filed. Basing my decision on Asher J's judgment in *Dale v Jeffrey* (High Court, Auckland, CIV 2007-404-2015, 24 April 2007), I hold that the filing of the relevant documents is not a submission to the jurisdiction of the Court. On that basis, both the protest and the interim injunction application can be dealt with contemporaneously.

[9] Mr Hughes, for Ngati Tama, has no instructions to consent to any holding order. Indeed, his instructions are actively to oppose which he has done.

[10] Nevertheless, I am satisfied that the issue regarding priority is seriously arguable and that the balance of convenience and interests of justice require a holding order to be put in place to enable the interim injunction application to be heard.

[11] I am aware that an undertaking as to damages has been given not only by the company in receivership but also another company Open Group Ltd, with which Ngati Tama entered into contractual relations in 2008. The terms of clauses 2.9 and 2.10 of that agreement indicate that \$AUD1,000,000 was to be advanced, on the basis that security was provided to Ngati Tama by Open Group. It seems to me, as Mr Judd submits, that that is, at least, evidence of some degree of comfort on the part of Ngati Tama in the ability of Open Group Ltd to meet ongoing debts, albeit an indication that is now more than one year old.

[12] The other factor that causes me concern is that Ngati Tama is described in its name as a "custodian trustee". There is no evidence to suggest it has assets, in its own right, meaning that the claim for damages, if My Virtual Home were successful, might not bear fruit. In addition, it appears that the cost to be incurred by Ngati Tama in further funding, pending the hearing on 7 December 2009, would be in the vicinity of \$40,000.

[13] Those are the factors, when balanced means that the interests of justice favour an order to hold the position meantime.

[14] I make an order restraining the defendant, any receiver appointed by the defendant over the undertaking of Creative Designer and Software Pty Ltd and any other agent of the defendant from taking any further steps to market, sell, mortgage or otherwise dispose of assets of Creative Designer and Software Pty Ltd to external parties. That order enures pending further of the Court.

[15] I make it clear that I would expect the Judge hearing the interim injunction application on 7 December 2009 to review whether that order should or should not continue.

[16] Additional timetabling orders are required to ensure the proceeding is procedurally ready for hearing. In addition to the orders made yesterday, I direct the plaintiff shall file and serve an application to set aside the protest to jurisdiction and any affidavits in support by midday on 23 November 2009. The evidence set out in any affidavit in support of the application to set aside the protest can be addressed by the defendant when it files evidence in opposition to the interim injunction application by 27 November 2009.

[17] Similarly, any reply evidence can be addressed at the same time that the plaintiff is obliged to file and serve affidavits in reply. I adjust the order requiring submissions, so that submissions are exchanged by 5pm on 4 December 2009.

[18] The costs of and incidental to the hearings yesterday and today are reserved.

Liquidation proceeding

[19] There is one other issue that requires attention. It relates to a separate proceeding in which Ngati Tama Custodian Trustee Ltd has sought to put My Virtual Home into liquidation. That proceeding has been filed under CIV 2009-404-1584. I make an order restraining Ngati Tama from advertising that proceeding, pending further order of the Court.

[20] The Registrar shall ensure that the liquidation proceeding is also before the Judge who deals with the application for interim injunction on 7 December 2009, so that the question of restraint of advertising can also be addressed that day.

[21] Costs in relation to the liquidation proceeding are also reserved.

P R Heath J