IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-2346

IN THE MATTER OF	a Judgment of the Federal Magistrate's Court of Australia
BETWEEN	VUTHIRATT YOS Plaintiff
AND	SANGHARA HENG Defendant

Hearing: 26 November 2009
(On Papers)

Counsel: R J Buchanan for the Plaintiff

Judgment: 1 December 2009

JUDGMENT OF MILLER J

---

[1] On 24 November 2009 I made a freezing order, without notice, in relation to certain bank accounts of Mr Heng with ANZ National Bank Ltd and Westpac Bank Ltd ("the respondents") in New Zealand. These are my reasons.

[2] An order to the same effect was granted by the Federal Magistrates Court of Australia on 29 July 2009 against Mr Heng, who is the plaintiff's husband, and the respondents. The order was made pursuant to s 114(1) of the Family Law Act 1975, in support of a claim for an adjustment in property pursuant to s 79(4) of the same Act. Mr Heng is a New Zealand citizen, but he resides in Australia.

[3] The respondents, however, refused to comply with the order granted by the Federal Magistrates Court until such time as that order had been registered in New Zealand. An interim order of this nature cannot be registered under the Reciprocal Enforcement of Judgments Act 1934, and is unenforceable at common law. Nor are

judgments of the Federal Magistrates Court covered by the Act. The applicant had to apply to this Court for a freezing order in support of the substantive proceeding in Australia.

[4] The application is governed by Part 32 of the new High Court Rules, which has effected substantial changes to the law relating to freezing orders. In particular, the rules in Part 32 provide an express jurisdiction to make freestanding freezing orders in support of foreign proceedings. The changes appear to be the result of work undertaken by the Australasian Rules Harmonisation Committee, whose model rules were adopted in similar form in Australia.

[5] Before the new High Court Rules were introduced, it was generally accepted that a freezing order could not be brought independently of an underlying substantive proceeding within this Court's jurisdiction. This rule was authoritatively stated by the House of Lords in *Siskina v Distos Compania Naviera SA* [1979] AC 210, and was applied by McGechan J in *Sundance Spas NZ Ltd v Sundance Spas Inc* [2001] 1 NZLR 111. A corollary was that Courts were unwilling to assume in personam jurisdiction over a defendant outside New Zealand for the purpose of a freezing order, unless the plaintiff also instituted substantive proceedings against the defendant in New Zealand in respect of which the New Zealand Court had jurisdiction.

[6] A different approach had been adopted by Barker J in *Hunt v BP Exploration Company (Libya) Ltd* [1980] 1 NZLR 104, where the applicant applied to register a foreign judgment obtained in England in New Zealand, and sought a freezing order at the same time. The only connection of the case with New Zealand was that the defendant had assets within the country. Barker J was satisfied that it was appropriate to make a freezing order and noted that the applicant was in a stronger position than the average applicant because it had a judgment capable of being registered, as opposed to a mere prima facie case. In *Sundance Spas*, however, McGechan J held that the applicant had "the misfortune to be caught squarely by *The Siskina*", and that there was no valid underlying substantive proceeding to support the freezing order sought: at [26]-[27].

[7] The new rules have effectively reversed the rule in *The Siskina* that freezing orders are dependent on substantive proceedings being brought within the jurisdiction. Even before the introduction of the new harmonised rules, Courts in Australia recognised an inherent jurisdiction to make freezing orders over domestic assets in aid of substantive foreign proceedings. In *Davis v Turning Properties Pty Ltd* (2005) 222 ALR 676, the plaintiff had obtained a worldwide freezing order from the Supreme Court of the Bahamas, but had not filed substantive proceedings in the Bahamas or in Australia. When making a freestanding freezing order in respect of assets in New South Wales, Campbell J observed that:

> [35] [t]he administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration of justice in this state includes the enforcement in this state of rights established elsewhere.

[8] In accordance with that approach, r 32.5(1)(b) now expressly states that, subject to certain conditions set out in r 32.5(3), the Court may make a freezing order if an applicant has a good arguable case on an accrued or prospective cause of action that is justiciable in "another court". The definition of "another court" includes a foreign court: r 32.1. In order to enable such freestanding applications, freezing orders can now be granted by way of originating application under r 19.2(y). So the Court may make a freezing order in support of foreign substantive proceedings, as long as:

> (3) ...
>
> (a) there is sufficient prospect that the other court will give judgment in favour of the applicant; and
>
> (b) there is a sufficient prospect that the judgment will be registered in or enforced by the court; and
>
> (c) there is a real connecting link between the subject matter of the order sought and the territorial jurisdiction of the New Zealand court; and

(d) the order sought would not be inconsistent with interim relief granted by the other court.

[9] Although the order by the Federal Magistrates Court was granted pursuant to s 114(1) of the Family Law Act 1975, as opposed to a court rule equivalent to r 32.5, I am satisfied that the Court would not have granted the order if the applicant had not shown a good arguable substantive claim: see *M v DB* (2006) 36 Fam LR 454, where the Family Court confirmed that the principles relating to freezing orders were relevant to applications under s 114. On that basis, there is in my view sufficient prospect that the Australian Court will give judgment in favour of the applicant. There also appears to be no bar to the substantive judgment being registered or enforced in this country, and the order would of course not be inconsistent with interim relief granted by the Federal Magistrates Court, as it is in the same terms as the order made by that Court against the respondents. Put another way, there is no reason to suppose that the Australian Court would not welcome the assistance provided by the orders.

[10] Although not further specified in 32.5(3) itself, it seems that the requirement of a real connecting link between the subject matter of the order and the territorial jurisdiction of the Court is satisfied where the assets that are sought to be frozen are within New Zealand. For that reason, this requirement would be more difficult to satisfy in applications for worldwide freezing orders, or for freezing orders over assets overseas: see *Banco Nacional de Comercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2008] 1 WLR 1936 at [19]. I observe that this particular provision is absent from the Australian version of the rules.

[11] Of course, if a freezing order was to be made against Mr Heng, requiring service outside New Zealand, the Court would still need to satisfy itself that it has in personam jurisdiction over Mr Heng. Unlike the Australian rules, the new High Court Rules do not expressly provide that freezing order applications over assets within New Zealand allow the Court to exercise long-arm jurisdiction over foreign defendants. While r 6.27(d)(ii) states that an originating document may be served out of New Zealand without leave when the claim is for "interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside New

Zealand", r 7.81 expressly provides that such relief does not extend to a freezing order under Part 32. It follows that, because none of the jurisdictional limbs in r 6.27 is applicable to applications for freezing orders, a plaintiff would need to seek leave for service out of the jurisdiction under r 6.28. It appears that this difficulty may be remedied by the implementation of the Trans-Tasman Court Proceedings and Regulatory Enforcement Treaty.

[12] Fortunately, the present case does not require service out of the jurisdiction. Although the freezing order relates to a cause of action against Mr Heng, the order itself can simply be made against the respondent banks. Rule 32.4 states that the Court may make a freezing order against a respondent even if the respondent is not a party to the substantive proceeding. In addition, r 32.5(5) provides that the Court may make a freezing order against a third party if it is satisfied that:

> (a) there is a danger that a judgment or prospective judgment will be wholly or partly unsatisfied because—
>
> (i) the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor; or
>
> (ii) the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor ...

[13] In substance, r 32.5(5) appears to be based on the decision by the High Court of Australia in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, where a freezing order was made against a third party without joining the party as a defendant to the substantive proceeding. The plaintiff had brought copyright proceedings against a company, which subsequently paid out dividends to its shareholders. The shareholders in turn formed a new company, and the plaintiff sought freezing orders against both the shareholders and the new company. The High Court reasoned:

> [57] What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word "may", be appropriate, assuming the

> existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including "claims and expectancies", of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

The Court further considered that the standard of proof on an application of this nature was a "reasonably arguably case on legal as well as factual matters": at [68].

[14] It appears that, so far, the only New Zealand case in which r 32.5(5) was applied is *Monasterio v Bujak* HC CHCH CIV-2008-409-1901 21 August 2009, where French J was satisfied that it was appropriate to make disclosure orders ancillary to a freezing order in circumstances where the respondent, Mr Bujak, held an enduring power of attorney for his wife. The Court had jurisdiction over the substantive proceeding and, although the wife's whereabouts were unknown at the time, service had been effected by way of substituted service. It was therefore not a case like the present, which involves the Court's jurisdiction to make freezing orders against a third party in support of foreign proceedings over domestic assets.

[15] I am satisfied, however, that rr 32.4 and 32.5 supply such jurisdiction. It is of obvious importance that this Court be able to grant relief to facilitate, or to prevent frustration of, the prospective enforcement of foreign judgments by this Court. The order relates to domestic assets, and is sought against respondents within New Zealand. The respondents clearly qualify as third parties "in possession of, or in a position of control or influence concerning" the assets of Mr Heng. In these circumstances, it is immaterial whether this Court also has jurisdiction over Mr Heng.

[16] There was also clearly a danger that a prospective judgment by the Australian Court would be wholly or partly unsatisfied unless the order was made because according to the applicant, Mr Heng indicated on several occasions that he was going

to invest his money overseas, and the Federal Magistrate's Court saw fit to make a freezing order over the assets on that basis.

[17] For these reasons a freezing order was made prohibiting the respondent from paying Mr Heng any of the funds in specified bank accounts. Orders were further made prohibiting Mr Heng from receiving such proceeds. Having regard to the reasons given above, the latter orders, which are in any event superfluous, are discharged.

Miller J

Solicitors:
Buchanan Gray, Wellington for the Plaintiff