IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-003749

BETWEEN	TOWER HEALTH & LIFE LIMITED Applicant
AND	DION DAVIS NUKUNUKU First Respondent
AND	ANTHEA MARIA GABRIEL Second Respondent
AND	ANITA LOUISE GABRIEL Third Respondent

Hearing: 8 July 2009

Appearances: J G H Hannan for the Plaintiff
B P Molloy for the Respondents

Judgment: 8 July 2009

[ORAL] JUDGMENT OF WYLIE J

Solicitors:
DLA Phillips Fox, P O Box 2791, Wellington 6140
Haigh Lyon, P O Box 119, Shortland Street, Auckland 1140

[1] On 3 July 2009, TOWER Health & Life Limited ("TOWER") filed proceedings against the first respondent, Mr Nukunuku, the second respondent, Anthea Gabriel, and the third respondent, Anita Gabriel. Anthea Gabriel is Mr Nukunuku's wife. Anita Gabriel is Anthea Gabriel's mother, and Mr Nukunuku's mother-in-law.

[2] Mr Nukunuku was formerly employed by TOWER. TOWER alleges that he lodged fraudulent claims against the insurance policies of a number of its policy holders, and against his own policy which was held by TOWER. It is asserted that the fraudulent claims were made for purported medical treatments which never occurred, and that Mr Nukunuku obtained cheques in respect of each fraudulent claim which were issued for reimbursement. It is asserted that not less than 30 cheques were fraudulently obtained by Mr Nukunuku. It is said that 28 cheques were banked into a bank account in the joint names of Mr Nukunuku, Anthea Gabriel, and Anita Gabriel and that two cheques were banked into an American Express card account in Mr Nukunuku's own name. It is said that the cheques fraudulently obtained and deposited into the respondents' joint bank account and Mr Nukunuku's American Express card account totalled $449,555.91.

[3] TOWER submits that some of the proceeds of the cheques were used to pay for improvements to a property at Hawea Road, Point Chevalier. That property is owned by the respondents as tenants in common in equal one third shares. It is said that during the period over which the fraudulent claims were made, improvements to the value of the Hawea Road totalled not less than $150,000.

[4] The causes of action alleged against the respondents are as follows:

a) against all respondents' – deceit. It is said that the second and third respondents were parties to, or in the alternative, conspirators to the deceit;

b) against the first respondent – breach of fiduciary duty and breach of fidelity;

c) against the second and third respondents – knowing receipt; and

d) against all respondents – an action for monies had and received.

[5] At the same time as it filed the statement of claim, TOWER sought a freezing order under r 32.2 of the High Court Rules, and an ancillary order requiring disclosure of assets under r 32.3. The application was accompanied by an affidavit by a Mr Carson, who is an investigations manager employed by TOWER.

[6] An order was made by Keane J on 3 July 2009 granting the freezing order and the ancillary order sought.

[7] The third respondent – Anita Gabriel – has applied to vary the freezing order. She seeks a variation to permit her to use funds covered by the order to pay for travel expenses not exceeding $18,000. She wishes to go overseas to support her son who is playing softball for New Zealand. She also wishes to visit Spain, Copenhagen and San Francisco, and anticipates that she will be away for 5½ weeks. She is scheduled to leave New Zealand on 13 July 2009. She has paid some $7,623.72 on account of her travel and accommodation costs. She estimates that she will need a further $18,000 to meet anticipated accommodation costs, other travel related costs, and any unexpected medical bills and other emergency costs incurred while she is overseas. She has filed an affidavit deposing that if the freezing order is not varied, she will be unable to travel.

[8] I start by observing that I have considerable sympathy for the third respondent. She committed to the holiday some time ago. It is understandable that she wishes to support her son when he is playing representative sport for this country. She also wishes to look after her grandchildren, who will also be at the tournament with their mother. I do not know whether or not the third respondent has travel insurance, but I suspect that there must be a possibility that she will lose the monies she has already paid on account of her holiday if she is unable to complete the trip.

[9] The application to vary the freezing order was filed today. Mr Hannan appearing for TOWER did not seek time to file any documents in response, and clearly urgency was required. Moreover, r 32.8(2) requires that any application to discharge or vary a freezing order must be treated as an urgent application by the Court. The parties were happy that it should be dealt with immediately. In terms of r 7.49, such application is generally to be heard by the Judge who has made the order in question. The rule however provides that another Judge may direct otherwise. In the circumstances, I have directed otherwise and I have dealt with the matter myself. There was no objection by either party to this course.

[10] I heard submissions from counsel this morning. In the course of submissions for TOWER, Mr Hannan pointed out that the third respondent has not filed a full list of her assets and liabilities, as required by the ancillary order. He acknowledged that the time within which she had to do so has not as yet expired.

[11] At my request, Mr Molloy appearing for the third respondent agreed to obtain an affidavit of the third respondent's assets and liabilities, and if possible, an affidavit of the second respondent's assets and liabilities as soon as possible, and to send them to the Court and to Mr Hannan as soon as reasonably practicable. I stood the matter down to 3.45pm this afternoon to enable this to occur.

[12] I have now received an affidavit for the third respondent. It discloses that Ms Gabriel has total assets valued at $1,071,310.67, and liabilities of $487,774.43.

[13] Ms Gabriel asserts that her net assets are therefore valued at $583,536.24. I note however that her assets include monies lent by her to Mr Nukunuku and her daughter in the sum of $74,999.99. Whether those monies are recoverable must be open to doubt. Further, in calculating her liabilities, she has allowed only a one third share in the mortgage secured over the Hawea Road property. The amount owing under that mortgage is $913,249.06, but Ms Gabriel, along with the first and second respondents, are jointly and severally liable under the mortgage for the total sum secured. I also note that the real estate referred to in the affidavit is not supported by current valuations. That is no criticism of either Ms Gabriel or Mr Molloy. The

document has been prepared at very short notice and I am grateful to them for preparing the same.

[14] The total amounts sought by TOWER in its statement of claim is $449,555.91, and the freezing order refers to that sum – paragraph 4. It is unclear from the affidavit filed whether there are surplus funds over and above that sum. If there are surplus funds, then strictly Ms Gabriel does not need to vary the order. The freezing order only prevents her utilising assets up to the value stated in the order.

[15] I raised this point with Mr Molloy. He has advised that understandably Ms Gabriel does not wish to be in of contempt of the Court order, and that therefore as a matter of caution she wishes to maintain her application to vary the order.

[16] Assuming that a variation is required, I note that the application is made under rr 32.8 and 7.49. Rule 7.49(6) provides as follows:

> The Judge may,—
>
> (a) if satisfied that the order or decision is wrong, vary or rescind the order or decision; or
>
> (b) on the Judge's own initiative or on the application of a party, transfer the application to the Court of Appeal.

[17] In support of the submission that the freezing order is wrong as against Ms Gabriel, Mr Molloy asserted that TOWER does not have a good arguable case for relief against her, that there is no real risk that her assets will be dissipated, and that the third respondent is significantly prejudiced by the imposition of the freezing order.

[18] Mr Molloy submitted that all TOWER can establish is that the third respondent is a one third owner of the property at Hawea Road. He asserts that the third respondent does not live at that property, and points out that she has stated in her affidavit in support of the application that she went on the title simply to help her daughter and son-in-law, and that she has enjoyed no benefit from her ownership of the property.

[19] Mr Hannan responded by noting that the majority of the cheques alleged to have been paid by TOWER to the respondents were banked into a bank account held jointly by all three respondents. He noted that the respondents are endeavouring to sell the property, and that the third respondent must have been a party to the decision to sell given that she is a one third owner. He referred to the annexures to Mr Carson's affidavit and noted that it appeared that the third respondent had gone onto the title of the property when the house was acquired in 2000, and that there is nothing to suggest that the third respondent does not enjoy a full legal interest in the same. He submitted that the evidence available suggests that money from the alleged fraud flowed into the joint bank account, and that part of those monies were used to improve the property. If that is the case, he submitted that there has been a benefit to the third respondent as an owner in terms of the increased value which will have accrued to the property. He noted that the third respondent has advanced no explanation in relation to the joint bank account, and that it is not asserted that she did not see statements in relation to the joint bank account. He submitted that on the face of it, there is at least some evidence suggesting that the third respondent had knowledge of the fraud, and that in any event, TOWER has a good arguable case for its cause of action based of knowing receipt.

[20] On the limited materials available to me, I accept that TOWER has a good arguable case against the third respondent based on knowing receipt of the monies said to have been appropriated from TOWER. It must be arguable that she either had actual knowledge, or wilfully shut her eyes to the obvious, or wilfully and recklessly failed to make enquiries which she should have made. I refer to *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41.

[21] Mr Molloy has also argued that there is nothing to suggest that the funds will be dissipated if the order is varied. I cannot accept that submission. If the order is varied as sought, the available funds will be dissipated to the extent of $18,000, or such sum less than $18,000 as the third respondent spends on her overseas trip. It seems to me inescapable that the quantum of available funds will be reduced.

[22] In the circumstances, I cannot be satisfied that the freezing order made by Keane J is wrong, and in my view it would be inappropriate to vary the same. I decline to do so.

[23] The costs of today's hearing are reserved.

Wylie J