

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

CIV-2008-488-000053

BETWEEN IGOR ALEXANDROVICH MIKITASOV
 Plaintiff

AND BERNARD JOHN COLLINS
 Defendant

Judgment: 23 December 2009 at 3:45 pm

JUDGMENT (5) OF COURTNEY J

This judgment was delivered by Justice Courtney
on 23 December 2009 at 3:45 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date.....

Solicitor: *Henderson Reeves Connell Rishworth, P O Box 11, Whangarei*
 Fax: (09) 438-6420 – J Browne

[1] The plaintiff, Mr Mikitasov, applies for a mandatory injunction requiring Sean Michael Collins and Angelina Gabriella Flego to effect the transfer of all remaining net proceeds from the sale of 123B Aotea Street, Orakei, Auckland, to an account nominated by the Registrar of the High Court. The application has been made *ex parte* because of concerns over the conduct exhibited by Sean Collins and Angelina Flego to date. I have dealt with the application on the papers and with a telephone conference with the plaintiff's solicitor, Mr Browne.

[2] On 7 December 2009 Mr Mikitasov obtained judgment for \$504,536.47 against the defendant, Bernard John Collins, by formal proof. Bernard John Collins is the father of Sean Michael Collins and to differentiate them I will from this point refer to them as Mr Collins senior and Mr Collins junior. Earlier in the year, out of concern for Mr Collins senior's deteriorating business affairs and the risk that he might dispose of assets, Mr Mikitasov had obtained a freezing order over a property in Paihia owned by Mr Collins senior. At that stage, Lang J, who made the freezing order, expressed concern about the circumstances in which the property at 123B Aotea Street had been acquired. It was unnecessary to pursue that matter further at the time. Now, however, a good deal more is known about the acquisition of 123B Aotea Street by Mr Collins junior and Ms Flego (who is Mr Collins senior's former partner). There are strong grounds for thinking that Mr Collins senior was the beneficial owner of the property and is entitled to the proceeds of its sale. Those proceeds have, however, been transferred to the UK by Mr Collins junior and Mr Mikitasov faces the very real prospect of being unable to enforce his judgment.

[3] Affidavits filed by Sean Collins and Angelina Flego show that they purchased 123B Aotea Street in 2008 in equal shares for \$820,000. The purchase was funded with a \$600,000 loan from Westpac with them contributing the balance equally. Sean Collins has said that he obtained his cash contribution from his father and that it represented commission owed to him by a company owned by Mr Collins senior. Angelina Flego deposed that she obtained her cash contribution from Bernard Collins in return for giving up any claim to an interest in their previous residence. There is no evidence, apart from their assertions, that this was the basis for the payments.

[4] On 7 October 2009 Ms Flego emailed a real estate agent saying:

Further to your meeting with Bernard this email confirms the following...please go ahead and sell the property so long as you are confident you can achieve a selling price of \$960.

[5] The property was listed for sale with an auction date of 4 November 2009. On 19 October Mr Mikitasov applied for an extension of an existing freezing order over Mr Collins' senior's assets to include a freezing order on 123B Aotea Street. On the same day the solicitors acting for Mr Collins junior and Ms Flego, Carson Fox, have recorded a telephone call from Mr Collins senior in their time records. Despite the auction date originally having been set for 4 November 2009, an auction was held on 21 October 2009 and the property sold for \$882,000. Ms Flego later explained this, saying that an offer had been received but they wanted to proceed to an auction anyway. The circumstances make this explanation implausible and no other evidence, such as an affidavit from the real estate agent, has been provided.

[6] The property was transferred from their ownership on 6 November 2009. Mr Collins junior's bank account was credited with his share of the proceeds, \$98,403.02. The same day \$98,414.48 was transferred from that account to a UK bank. On 9 November 2009 I made freezing orders in respect of the Aotea Street property (not being aware that the property had been sold).

[7] My order included a requirement that Mr Collins senior, Mr Collins junior and Ms Flego disclose details of the purchase of Aotea Street by 16 November 2009. Neither complied with the order on time. On 11 November 2009 Mr Collins senior was adjudged bankrupt on his own application and departed New Zealand.

[8] On 25 November 2009 I issued a restraining order in relation to the net proceeds of Aotea Street and also required Mr Collins junior and Ms Flego to file affidavits disclosing where the net proceeds were. On 30 November 2009 Mr Collins filed an affidavit in which he stated that of the \$129,000 net proceeds of sale \$92,000 was sent to the United Kingdom and a further \$25,000 spent on a motor vehicle. On 11 December 2009 Ms Flego filed an affidavit stating that she had given her net proceeds of sale to Mr Collins junior to invest in the UK (this was not mentioned by Mr Collins junior in his affidavit).

[9] Even on the evidence of Mr Collins junior and Ms Flego, it is clear that the equity in 123B Aotea Street was provided by Mr Collins senior. In the absence of any documentary evidence as to the basis on which he made payments to his son and to Ms Flego for the purpose of acquiring 123B Aotea Street I could not accept their assertions. Even if their assertions were correct, Mr Collins senior's subsequent bankruptcy raises doubts about the status of such payments.

[10] Proceeding therefore on the basis that Mr Collins is entitled to the proceeds of Aotea Street, I do have serious concerns about the proceeds being dissipated. The first is that Mr Collins junior and Ms Flego have, at the least, been economical with the truth about 123B Aotea Street. Given the relationship between Mr Collins senior, Mr Collins junior and Ms Flego, it is highly likely that Mr Collins junior and Ms Flego were aware of the application for a freezing order made in respect of 123B Aotea Street on 19 October 2009. The circumstances of the sale effected within only two days of that application being made, give rise to a strong inference that, not only did they know about the application, but they had actively accelerated the sale process in order to effect a sale in advance of any freezing order being made.

[11] Subsequent affidavits regarding the proceeds of sale, notwithstanding the terms of the Court orders requiring Mr Collins junior and Ms Flego to identify the whereabouts of the proceeds have been inadequate. In his affidavit 30 November 2009 Mr Collins junior is sparing with the detail and, in particular, claims not to have the account number of his UK account. This essential detail is one which he could easily have obtained for the purposes of making the affidavit. Similarly, he makes no mention of receiving Ms Flego's share of the proceeds and transferring it to the UK, even though he was well aware that the purpose of the order was to identify the whereabouts of the entire proceeds of sale.

[12] There are also grounds for concluding that the proceeds have been made available to Mr Collins senior. In his affidavit 30 November 2009 Mr Collins junior refers to purchasing a vehicle. The fact that the vehicle was purchased in the UK was not mentioned and only came to light because Mr Browne made further enquiries of Mr Collins junior's counsel. However, Mr Collins junior lives in New Zealand and there is no apparent reason, other than providing a vehicle for his father,

that Mr Collins junior should use the proceeds of the sale to buy a vehicle in the UK. Further, Mr Browne has twice asked whether anyone else holds a power of attorney over the UK bank account and for details of the bank account and statements, with no success.

[13] Looking at the events that have unfolded since mid-October 2009 I conclude that there is, on the evidence before me, a strong likelihood that Mr Collins senior is beneficially entitled to the proceeds of 123BAotea Street and that the sale of that property and transfer of the proceeds to the UK were undertaken specifically to avoid the effects of any freezing order that might be made. Although I have delivered a final judgment in the substantive proceeding in this case, the matter is still live for the purposes of enforcement and I consider that the circumstances fall within R 7.53 of the High Court Rules and are amenable to an interlocutory injunction. If it were the case, however, that R 7.53 did not apply because of the stage which this proceeding has reached, the inherent jurisdiction of the Court would permit me to make orders that ensure that the Court's process is not defeated through the respondents' efforts.

[14] I therefore make the following orders:

- a) Sean Michael Collins is to transfer all remaining net proceeds of sale of the property at 123B Aotea Street, Orakei (including the £40,000 held by Lloyd's TSB in Poole, UK or such part of it which remains and including any net proceeds of sale Angelina Gabriella Flego originally received over which he has control) to the Henderson Reeves Trust Account (Westpac, Whangarei branch 03-0497-0286461-02) by 5pm, 24 December 2009.
- b) Angelina Gabriella Flego is to transfer all remaining net proceeds of sale of the property at 123B Aotea Street, Orakei (including the \$120,000 referred to in paragraphs 9 and 10 of her affidavit dated 11 December 2009 or such part of it which remains) to Henderson Reeves Trust Account (Westpac, Whangarei branch 03-0497-0286461-02) by 5 pm, 24 December 2009.

- c) Henderson Reeves Connell Rishworth is to hold the transferred moneys referred to in (a) and (b) above and by 5 pm 22 January 2010 to transfer the same (plus all accrued interest) to an account as directed by the Registrar of the High Court where they will be held until further order of the High Court.
- d) Costs are reserved.

P Courtney J