

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

**I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE**

**CIV-2022-442-11
[2022] NZHC 828**

IN THE MATTER OF	The liquidation of DE & KM Gale Limited (in Liquidation)
BETWEEN	DE & KM Gale Limited (In Liquidation) Applicants
AND	Douglas Edward Gale and Kylie Marie Gale Respondents

Hearing: On the papers
Appearances: A Ho for the Applicant
Judgment: 27 April 2022

JUDGMENT OF PALMER J

Solicitors:
Crimson Legal, Auckland

What happened?

[1] Mr Garry Whimp is the liquidator of DE & KM Gale Ltd (in liquidation), the applicant. He has formed the view that Mr Douglas Gale and Mrs Kylie Gale, the director and shareholders of that company and the respondents, are jointly indebted to it for \$571,633.12 by way of an overdrawn current account, payable on demand. There is evidence the respondents were advised of their excessive drawings by their accountants.

[2] The respondents have not responded to a letter of demand. The applicant commenced these proceedings against, and served them on, the respondents. The applicant has sought summary judgment, which will be called at 11 am on 27 May 2022. The property of the respondents at 34 Rainbow Drive, Atawhai, Nelson, is the only asset of the respondents known to the applicant. The property is listed for sale with a real estate agent. The respondents made no response to a request for undertakings.

[3] The applicant applies without notice for a freezing order over the property. The liquidator is willing to cooperate with the applicants to facilitate the sale of the property, on the basis it is sold at fair market value and the proceeds, after payment of any secured debts, are paid into court or into a stakeholder's account pending determination of the proceeding, or by mutual agreement. The applicant provides an undertaking as to damages but acknowledges that it is not of substance as the applicant is in liquidation.

Freezing orders

[4] To make a freezing order, I must be satisfied the applicant has a good arguable case for substantive relief, there are assets to which the order can apply and there is a real risk of their dissipation.¹ I must weigh the overall interests of justice.

[5] I consider there is a good arguable case here, based on the evidence I have reviewed. The claim appears capable of tenable argument and is supported by

¹ *Shaw v Narain* [1992] 2 NZLR 544 (CA) at 548; High Court Rules 2016, r 32.5(4).

sufficient evidence. There are assets to which the order can apply. The listing of the property with a real estate agent, and failure to respond to a request for undertakings, indicates there is a real risk of their dissipation. The applicant's concern that the respondents may take more drastic action to sell the property if the application were made on notice appears reasonable on the basis of the evidence before me.

[6] An appropriate undertaking as to damages is usually required before a freezing order is granted. The undertaking here lacks substance due to the applicant's financial position. But, as in *Auckland Steel Fixers Ltd (in liq) v Watson*, the applicant's financial position has been caused by the actions of the respondents.² Under r 32.6(4) of the High Court Rules 2016, I consider that constitutes special circumstances justifying the undertaking given.

Result

[7] I grant the application for the freezing order as sought, on the basis that:

- (a) It expires at the end of 27 May 2022, when it can be reviewed at the call that day of the application for summary judgment.
- (b) It may be varied by consent of the applicant and respondents.
- (c) The respondents may apply to vary or discharge the order with two working days' notice.

Palmer J

² *Auckland Steel Fixers Ltd (in liq) v Watson* [2015] NZCA 274, [2018] NZAR 864 at [20].