

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

**I TE KŌTI MATUA O AOTEAROA  
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CIV-2022-488-63  
[2022] NZHC 2242**

UNDER The Companies Act 1993

IN THE MATTER of the liquidation of Forex Technical Analyst  
Systems Ltd

BETWEEN GARRY CECIL WHIMP  
First Plaintiff

FOREX TECHNICAL ANALYST  
SYSTEMS LTD (IN LIQUIDATION)  
Second Plaintiff

AND KENNETH RODNEY PEEL DUGDALE  
and LINDA YVONNE DUGDALE and  
JOHN MURU WALTERS  
First Defendants

KENNETH RODNEY PEEL DUGDALE  
Second Defendant

Judgment: 2 September 2022  
(On the papers)

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**JUDGMENT OF BREWER J**

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*This judgment was delivered by me on 2 September 2022 at 5.20 pm  
pursuant to Rule 11.5 High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Crimson Legal (Auckland) for Plaintiffs

## **Introduction**

[1] This judgment determines a without notice interlocutory application for a freezing order. As I will come to, I will treat the application as one for an interlocutory injunction.

[2] The application was given to me this afternoon as List Judge for Whangarei. I record that a notice of proceeding and statement of claim have been filed and there is an undertaking as to damages, although the latter is of no substantive worth.

[3] The first plaintiff, Mr Whimp, is the liquidator of the second plaintiff, Forex Technical Analyst Systems Ltd (in liquidation).

[4] In addition to the without notice application for a freezing order, I have received and read Mr Whimp's affirmation dated 24 August 2022, the memorandum of counsel in support dated 29 August 2022 and the draft freezing order.

## **Background**

[5] In general terms, Mr Whimp's affirmation tells me that the second plaintiff carried on business as a construction company. It was being dunned by creditors. Its sole director and shareholder was Mr Dugdale, the second defendant.

[6] The second plaintiff, on 6 November 2020, entered into a building contract with Mr Dugdale and Mrs Dugdale as trustees of their family trust, Eternal Trust. The trustees are sued as first defendants. The contract was to build a dwelling on land owned by the trustees at 397 Cames Road, Mangawhai (the property). The agreed contract price was \$670,000 inclusive of GST.

[7] Subsequently, on or around 11 February 2021, Mr Dugdale caused the second plaintiff to enter into two loan agreements pursuant to which Mr Dugdale and the first defendants as trustees agreed to advance to the second plaintiff sums totalling \$580,740.

[8] The dwelling was completed by the company.

[9] The plaintiffs allege that the contract price was more than \$1m below proper value. The statement of claim advances three causes of action:

- (a) Provision of goods and services at undervalue in contravention of s 298 of the Companies Act 1993 against the first defendants;
- (b) Breach of director's duties against Mr Dugdale; and
- (c) Dishonest assistance of breach of fiduciary duties against the first defendants.

[10] It is alleged that only about \$66,000 have been paid by the first defendants to the second plaintiff in respect of the building contract, with the balance of the contract price being offset against the loans referred to at [7].

[11] The property is now on the market for sale.

[12] The freezing order sought is to restrain the sale or disposition of the property.

### **Discussion**

[13] In my view, this is properly an application for an interlocutory injunction. In practical terms there is little difference, but that is how I will treat the application.

[14] I am satisfied that there is a serious question to be tried. The plaintiffs have obtained expert advice as to the undervalue of the construction contract, and Mr Dugdale has sent at least one email recognising, but explaining, that there is an undervalue. Basic company law prohibits a director from using the assets of a company for direct or indirect benefit to self against the interests of the company.

[15] In my view, the balance of convenience favours the granting of an interlocutory injunction restraining the sale of the property. The competing interests are that of the plaintiffs in maintaining the asset from which compensatory damages can be obtained in the event of successful litigation and the defendants' interests in being able to freely

dispose of the property. The balance of convenience will be in favour of the plaintiffs if the interlocutory injunction can be challenged within a reasonable period.

[16] Clearly, in a situation such as this, damages would not be a reasonable alternative.

[17] I acknowledge that the undertaking as to damages is worthless. But this is one of those situations where the allegation is that the reason why the undertaking as to damages is worthless is because of unlawful actions taken by the respondents.

[18] Finally, looking at the assessment of overall justice, I see this as the Court taking a step to preserve a litigation position on the basis that it can be challenged readily in the event that there are matters unknown to the Court which would tip the balance of convenience the other way.

### **Decision**

[19] I make the following orders:

- (a) An order by way of interlocutory injunction prohibiting the sale or other disposition of the property at 397 Cames Road, Mangawhai, Identifier 901719, being Lot 2, Deposited Plan 539331, pending further order of the Court.
- (b) A further order prohibiting reducing the defendants' equity in the said property by pledging it as security by whatever means whatsoever, pending further order of the Court.

[20] Leave is reserved to the defendants to apply, on five days' notice, to vary or rescind these orders.

[21] Costs are reserved.

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Brewer J