IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2020-004-000494
[2020] NZDC 18284

BETWEEN   DELYS ANN TANSLEY
                 Applicant

AND   MARK CLAYTON LENNOX TAYLOR
                 First Respondent

AND   KYM MARIE ZWART
                 Second Respondent

AND   SHARON KILPATRICK
                 Third Respondent

Hearing: On the papers

Appearances: A R Nicholls for Applicant
               R O Parmenter for Second and Third Respondents

Judgment: 14 September 2020

DECISION AS TO COSTS OF JUDGE G M HARRISON

[1]   In my decision of 28 August 2020 I discharged a freezing order obtained ex parte by Ms Tansley on 12 May 2020 against a bank account operated by a family trust of which the first respondent was a beneficiary.

[2]   I accepted the submissions of the second and third respondents, being trustees that the first respondent Mr Taylor, who took no part in the application, had no vested interest in the family trust that could be the subject of a freezing order.

[3]   The trustees now apply for indemnity costs. Rule 7.46 District Court Rules 2014 provides that an applicant for an interlocutory injunction, which includes a

freezing order, must file an undertaking as to damages to compensate the other party for any damage sustained through the injunction.

[4] An undertaking as to damages was filed by Ms Tansley.

[5] To similar effect is Rule 32.2(5) High Court Rules 2016. That rule requires an applicant for a freezing order to file a signed undertaking to pay damages to compensate the respondent for any damage sustained in consequence of the freezing order.

[6] I see no material difference between the two rules. The commentary on the High Court Rules in McGechan on Procedure at HR32.4.02(b) provides:

> Normally, an applicant is obliged to indemnify any third party for any cost reasonably incurred by the third party: r 32.2(5) and r 32.6(4). The New Zealand Rule explicitly requires that any third party who might be detrimentally affected should be identified in the application and the applicant must usually undertake to notify third parties. …

[7] That is a clear statement that costs incurred by a third party such as the trustees in this case, if the freezing order is not sustained when challenged, fall within the undertaking as to damages.

[8] In this case Ms Tansley seeks interest of $246,224.92 on a loan she made to Mr Taylor to support his businesses. In her affidavit of 12 May 2020, in support of the application for a freezing order she said at paragraph 9:

> 9. I have been reliably informed that the trustees of the Alderman Trust are planning to imminently distribute the funds of that trust. I am advised they are meeting on 12 May 2020 for this purpose.

[9] The source of that supposedly reliable information passed to Ms Tansley has never been disclosed. Indeed, the affidavit of Mr T J Goulding, a solicitor of Auckland, who is one of the trustees confirmed that some monies had been advanced to Mr Taylor over a period of approximately seven months but he deposed that as of 12 December 2019 there had not been any further distribution and no decision of the trustees had been made to distribute any further funds to Mr Taylor, so at the present

time he has no vested interest in the trust but any advances made to him are done so at the discretion of the trustees.

[10]   Mr Goulding went further and said "we are stopping the loans/advances to Taylor, in the interim". (para 13).

[11]   Consequently, it is apparent that the trustees were not considering any imminent distribution of the trust funds. At best discretionary advances were made from time to time and presently no advances are being made.

[12]   In those circumstances it was not appropriate to make the freezing order.

[13]   The trustees have incurred the costs of counsel instructed to seek cancellation of the freezing order. I see no reason why the other beneficiaries of the trust should have to bear some of the trustees' costs in instructing counsel.

[14]   Consequently, and in reliance on HR32.4.02 I award indemnity costs in favour of the respondent trustees in the sum of $15,927.50.

G M Harrison
District Court Judge