IN THE DISTRICT COURT
AT MANUKAU

I TE KŌTI-Ā-ROHE
KI MANUKAU

CIV-2020-092-004159
[2021] NZDC 2665

BETWEEN	JOEL DYLAN THRUPP NICOLA MARIE THRUPP Plaintiffs
AND	JOHN THRUPP First Defendant
AND	DEBORAH ANN THRUPP Second Defendant
AND	PAIGE CELESTE THRUPP Third Defendant
AND	SIMONE ANN THRUPP Fourth Defendant

Hearing: 11 December 2020

Appearances: A Gold for the Plaintiff

Judgment: 19 March 2021

RESERVED DECISION OF JUDGE J BERGSENG

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[1] On 11 December 2020 I granted an interlocutory application for an interim injunction on a without notice basis in favour of the plaintiffs.

[2] That order was that the defendants were to pay the sum of $44,387.02 being the proceeds of the sale of the property of 110 Isabella Drive, Pukekohe into a solicitor's trust account pending resolution of District Court proceedings. Alternatively, that the defendants are restrained from removing from New Zealand or

otherwise dealing with, or dissipating, or disposing of $44,387.02 received from the sale of the property unless and until security for this set sum is received.

[3] There is an undertaking from the plaintiffs to pay the respondents all loss or damaged caused to the marae indirectly or directly from these orders. Costs were reserved.

[4] A notice of discontinuance has since been filed, however I indicated that reasons for my decision were to follow. These are the reasons.

[5] At the same time as filing the interim injunction, the plaintiffs filed a statement of claim seeking judgment against the first and second defendants in sum of $44,387.02 alleging breach of contract relying on admissions made by the first and second defendants.

[6] There was a further cause of action against all defendants jointly alleging unjust enrichment.

[7] The first plaintiff is the son of the first and second defendants and the brother of the third and fourth defendants. The second named plaintiff is the first defendant's wife.

[8] The plaintiffs alleged that the defendants approached the plaintiffs regarding a house to be built at 110 Isabella Drive, Pukekohe. To complete the build, they needed approximately $40,000 from the plaintiffs.

[9] The terms of the loan agreement were that the plaintiffs would lend to the defendant's money needed to complete the construction of Isabella Drive. The funds advanced would be interest free and the loan repaid once construction was completed and a code compliance certificate issued, which would then enable the defendants to refinance the loan.

[10] Between about 30 April 2019 and 12 June 2019, the second defendant was in contact with the plaintiffs requesting that they pay on their behalf a number of

invoices. Payments were forthcoming from the plaintiffs to a total amount of $44,085.04.

[11] During this time the defendants also used the first name plaintiff's credit card incurring a further debt of $5,500.00.

[12] On about 5 August 2019, the defendants repaid $5,500 to the plaintiff and it has been acknowledged by the first and second defendants that the sum of $44,387.02 is owed.

[13] A refinancing was unable to be completed and the Isabella Drive property sold at auction on 26 October 2020.

[14] On 13 November 2020 counsel for the plaintiffs sought an undertaking from the defendants' conveyancers that the debt will be repaid on settlement.

[15] No undertaking was given.

[16] By correspondence from the first and second defendants' lawyers on 10 June 2020, it was acknowledged that $44,387 had been advanced on the basis that it would be interest-free and repayable once refinancing had been effected.

[17] The same correspondence sets out a number of other issues regarding efforts undertaken by the first defendant in relation to work on a property owned by the plaintiffs at 1/11 Nelson Street Papakura together with materials supplied. There is also reference to an additional sum of $10,000 which "John and Deborah gave Joel" for personal reasons.

[18] After the exchange of further correspondence, the plaintiffs were advised that the original lawyers were no longer instructed by the first and second defendants.

[19] On 20 November 2020 the first defendant wrote to the plaintiffs confirming that approximately $61,185.00 would be their net funds available after the sale had been completed. He indicated that he would receive a one quarter share of $15,296.25 and that he would release it to the first plaintiff on receipt of advice that this would be

in full and final settlement. The first defendant also intimated that the Isabella Drive property had been purchased with the assistance of the second, third and fourth defendants who would all have their contributions returned in priority over the plaintiffs as well as their 25% share in the profit.

[20] Rule 7.45 of the District Court Rule 2014 applies which provides:

> **7.45 Application for injunction**
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> (1) An application for an interlocutory injunction may be made by a party before or after the commencement of the hearing of a proceeding, whether or not an injunction is claimed in the party's statement of claim, counterclaim, or third party notice.
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> (2) The plaintiff may not make an application for an interlocutory injunction before the commencement of the proceeding except in case of urgency, and any injunction granted before the commencement of the proceeding—
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> (a) must provide for the commencement of the proceeding; and
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> (b) may be granted on any further terms that the Judge thinks just.
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> (3) An interlocutory injunction to which section 42(2) of the Act applies (restraining a party to a proceeding from removing from New Zealand, or otherwise dealing with, assets in New Zealand) must be in form 21.
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> (4) For the purposes of subclause (3),—
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> (a) an application for a Mareva injunction (freezing order) must be made by interlocutory application under rule 7.12:
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> (b) an applicant for a freezing order without notice to a respondent must fully and frankly disclose to the court all material facts, including—
>
> (i) any possible defences known to the applicant; and
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> (ii) information casting doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages:
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> (c) an applicant for a freezing order must file a signed undertaking that the applicant will comply with any order for the payment of damages to compensate the respondent for any damage sustained in consequence of the freezing order:
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> (d) the freezing order must not prohibit the respondent from dealing with the assets covered by the order for the purpose of—
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> (i) paying ordinary living expenses; or
>
> (ii) paying legal expenses related to the freezing order; or
>
> (iii) disposing of assets, or making payments, in the ordinary course of the respondent's business, including business expenses incurred in good faith:
>
> (e) unless there are special circumstances, the court must require the applicant for a freezing order to give appropriate undertakings, including an undertaking as to damages:
>
> (f) if the applicant has, or may later have, insufficient assets within New Zealand to discharge the obligation created by an

undertaking as to damages, the court may require the applicant to provide security for that obligation in a form and in an amount fixed by a Judge or, if the Judge so directs, the Registrar:

(g) a freezing order must reserve leave to the respondent to apply to the court to discharge or vary the freezing order on whatever period of notice to the applicant the court considers just:

(h) an application by the respondent to discharge or vary the freezing order must be treated as an urgent application by the court:

(i) a freezing order made without notice to the respondent must state that it is limited to a particular date, which should be as early as practicable after the freezing order is made:

(j) the respondent must be informed that on that date the respondent will have an opportunity to be heard by the court:

(k) on the date referred to in paragraph (i) the applicant has the onus of satisfying the court that the freezing order should be continued or renewed:

(l) the court may make any order as to costs it considers just in relation to an order referred to subclause (k):

(m) without limiting the generality of paragraph (l), an order as to costs includes an order as to the costs of any person affected by a freezing order.

(5) This subpart does not affect the jurisdiction of the court under any enactment to make an order freezing assets.

[21] The principles in relation to the application for injuncted relief are established. The often cited case of *Peters v Collinge* summarises the principle as follows:[1]

> On such applications the Courts do not attempt finally to determine the parties' rights. Instead the Courts customarily traverse a series of questions in turn. The first is whether the plaintiff has established a serious question to be tried. If so, the second is where the balance of convenience lies with particular reference to the adequacy of damages to either party if ultimately successful at trial. The third is whether the result is affected by a series of discretionary considerations including the relative strengths of the parties' cases, any undue delay by the plaintiff, tentative preference for status quo and the conduct of the parties. At the end of the exercise the Court must stand back from those details and ask whether the justice of the case lies.

Has the plaintiff established a serious question to be tried?

[22] The first plaintiff in support of the interlocutory application filed a detailed affidavit which provides a series of communications confirming that the money had been advanced. It has been confirmed by the first and second defendants' solicitors

[1] *Peters v Collinge* [1993] 2 NZLR 554 at 556-557.

that the money advanced was done so on an interest-free basis and was to be repaid on refinancing.

[23] The first defendant in his correspondence to the plaintiffs takes a different approach from his earlier lawyer's correspondence. He maintains that the money advanced by the plaintiffs was personal arrangement between the first plaintiff and himself and was not directly related to the Isabella Drive property.

[24] As noted, this is contrary to correspondence of 10 June 2020 to the plaintiffs' lawyers which was sent on behalf of the first and second defendants which acknowledges the debt of $44,387.02 at that stage the clients were in the process of refinancing. It was maintained that the debt was not due owing until the refinancing had been effected.

[25] There is therefore a serious question to be tried.

Where does the balance of convenience lie?

[26] The first defendant maintains that other than a 25% share in the profit from the sale, he will have no other funds. He also indicates that the profit from the sale of the property will be distributed on settlement amongst all of the defendants.

[27] The financial circumstances of the second defendant are unknown. She will also receive the same amount as the first defendant.

[28] In these circumstances while the money remains available, the balance of convenience clearly favours the granting of the injunction as it is unclear as to the adequacy of damages should the plaintiff ultimately be successful at trial.

Other considerations

[29] On the basis of the plaintiffs' case, given the acknowledgement through their lawyer that the debt is owed and due for repayment on refinancing, would tend to indicate that there is a reasonably strong case in the plaintiffs' hands.

[30] The plaintiffs have not delayed to any extent although by the time this matter came on for hearing, settlement had taken place on 9 December 2020 as far as the plaintiffs were aware.

[31] Considering all matters, I concluded that the justice of the case favoured the granting of the interim injunction, particularly, given that the defendants can apply to set aside the order on seven days notice.

J Bergseng
District Court Judge