IN THE DISTRICT COURT
AT WAITAKERE

I TE KŌTI-Ā-ROHE
KI WAITĀKERE

CIV-2021-090-000530
[2021] NZDC 19037

BETWEEN	CHOICEKIDS CHILDCARE LIMITED Plaintiff
AND	PETER MICHAEL GORDON BROWN First Defendant
AND	TERESA JUDITH ABBOTT-BROWN Second Defendant
AND	HEYMATEY LIMITED Third Defendant

Hearing: 3 August 2021

Appearances: B A Keown and Z E L Farquhar for the Plaintiff
K M Wakelin for the Defendant

Judgment: 24 September 2021

RESERVED JUDGMENT OF JUDGE AA SINCLAIR
[on application for summary judgment]

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[1] Choicekids Childcare Limited ("Choicekids") sues the defendants in conversion and unjust enrichment and has made an application for summary judgment.

[2] Choicekids alleges that it was the owner of an Audi Q7 motor vehicle ("the Vehicle") which had been in the possession of the first defendant, Peter Brown. Despite demand being made, the Vehicle was not returned to Choicekids. Instead, it was registered by Mr Brown in his own name, and then reregistered in the name of the second defendant, Teresa Brown (Mr Brown's wife) trading as Heymatey Ltd, the third defendant, before being sold.

[3] Under the first cause of action for conversion, Choicekids claims judgment for $80,000 being the value of the Vehicle at the date of conversion,[1] exemplary damages, interest pursuant to s 10 of the Interest on Money Claims Act 2016, and costs.

[4] Under the second cause of action for unjust enrichment, Choicekids seeks judgment for $107,451.84 comprising $80,000 being the value of the Vehicle, $27,451.84 being the value of the defendants' unauthorised use of the Vehicle as at 16 March 2021 (with that amount increasing by $2,884.77 for every subsequent month that the defendants remained in possession of the Vehicle), interest and costs.

[5] The defendants deny the claim and say that Mr Brown took ownership of the Vehicle as part of an exit agreement with Choicekids. In addition, Mr Brown says that the proceeding is a nullity because he remains a director of Choicekids and has not authorised the issuance of this proceeding.

Claim for Summary Judgment

[6] Choicekids was incorporated in November 2011. Mr Brown and Mr Paul Davys were appointed directors and shareholders of the company.

[7] In the following years, Mr Brown and Mr Davys opened a number of childcare centres in Auckland with each centre being owned by a separate company. Choicekids (previously Choice Management Limited) operated as the management company.

Mr Davys' Evidence

[8] Mr Davys says that the Vehicle was purchased from Continental Cars Autos on or about 7 July 2016. The full amount of the purchase price of $141,293 was funded by a loan from the Bank of New Zealand. The loan provided for repayment of the principal sum together with interest by way of monthly instalments.

[9] The Vehicle was registered to Choicekids and a personalised number plate (CKIDS 8) was purchased.

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[1] The statement of claim was issued before Choicekids had knowledge of the sale of the Vehicle.

[10] The Vehicle replaced the company car which Mr Brown was driving at the time and Mr Brown continued to have use of the Vehicle over the following years. Mr Davys says that in November 2019, it was agreed that Mr Brown would resign as a director of Choicekids. He informed Mr Brown at the time that his resignation meant that it would be necessary for Mr Brown to return the Vehicle.

[11] Mr Brown expressed an interest in working for Choicekids in a different capacity and it was agreed to explore the possibility of Mr Brown contracting his services to the company. On that basis, Mr Brown continued to hold the Vehicle over the Christmas period.

[12] Mr Davys says that in early February 2020, he met with Mr Brown at the offices of Choicekids. By that time, he had received advice that there would not be any accounting or tax issues for Choicekids in relation to the Vehicle if Mr Brown was to work in a contracting role for the company. It was agreed to explore this possibility further. While these discussions were ongoing, Mr Davys told Mr Brown he could continue to use the Vehicle.

[13] Lockdown followed, and in May 2020 Mr Brown advised that he was no longer interested in working for Choicekids in any capacity. Mr Davys says that he advised Mr Brown that he would have to return the Vehicle by the end of May 2020 at the latest. Mr Brown had agreed to this arrangement but did not return the Vehicle.

[14] Between June and July 2020 Mr Davys says that he rang Mr Brown on at least two occasions asking that the Vehicle be returned. Despite agreeing to do so, Mr Brown did not return the Vehicle, and in August 2020 he stopped taking Mr Davys' calls.[2]

[15] Mr Davys says that he decided to give Mr Brown the opportunity to return the Vehicle of his own accord. However, when this did not happen, he put his demands

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[2] In his affidavit in reply, Mr Davys states that on 25 September 2020, the compliance manager for Choicekids texted Mr Brown asking that he return the Vehicle to Choicekids' premises as the company was valuing its fleet of vehicles. Mr Brown agreed to do this, and the valuation was subsequently completed.

for the return of the Vehicle in writing. Mr Davys emailed Mr Brown on 26 November 2020 informing Mr Brown that if he did not return the Vehicle that day he would be reporting it as stolen. He went on to state: "I am selling this car to repay company debt and your (sic) in possession of it".

[16] Mr Davys emailed again on 30 November 2021 reiterating that the Vehicle was the property of Choicekids and that Mr Brown had been driving it without authorisation. At the direction of Mr Davys, the compliance manager sent a further email on the same day to make arrangements to collect the Vehicle.

[17] Mr Brown did not respond to any of the emails.

[18] On 1 December 2020, the compliance manager reported the Vehicle as stolen to the Police. It was Mr Davys' understanding that Mr Brown subsequently advised the police that the recovery of the Vehicle was a civil matter.

[19] Mr Davys says that he became aware that on or about 29 October 2020, the Motor Vehicle Register was altered so that it showed Mr Brown as the registered person of the Vehicle. In addition, on or about 30 October 2020, the number plate was changed from Choicekids' personalised number plate to a standard plate. The Motor Vehicle Register was changed again on or about 24 November 2020 to show Mr Brown's wife trading as Heymatey Limited as the registered person.[3] These changes were made without the knowledge or approval of Mr Davys.

[20] On 23 December 2020, Bell Gully, solicitors for Choicekids, wrote to Grove Darlow acting for Mr Brown, demanding the return of the Vehicle and payment of $15,000 for the unauthorized benefit received from its use.

[21] Grove Darlow replied on 22 January 2021 stating that the proposition that the Vehicle was owned by Choicekids was not correct.

[22] This Proceeding was subsequently issued against the three named defendants.

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[3] Heymatey Limited is a company in which Mr and Mrs Brown are shareholders and Mrs Brown is director.

Mr Brown's Evidence

[23] Mr Brown filed a lengthy affidavit in which he comments on the history of Choicekids and his dealings with Mr Davys.

[24] In summary, Mr Brown says that by around 2016 the childcare business had grown substantially. He was concerned about the mounting debt and associated financial pressure and was reluctant to see it grow any further. Mr Davys was keen to keep growing the business and discussions followed around the transfer of Mr Brown's shares and payment of an income to Mr Brown. On 1 April 2016, Mr Davys sent an email to Mr Brown setting out "as a start point" alternative proposals to apply if Mr Brown remained working in the business, decided to retire or passed away. Mr Brown says that following this email, an agreement was reached whereby he would be paid a total of $556,000 per annum together with 3 company cars for himself, his daughter and granddaughter. Mr Davys did not honour this agreement.

[25] On 1 July 2016, Mr Brown signed a share transfer transferring 45% of his shares in Choicekids to Mr Davys resulting in his own shareholding being reduced to 5%. The share transfer records a consideration of $2,715,759. Mr Brown says that this amount has never been paid to him.

[26] In 2017, Mr Brown says that his shareholding in each of the other Choicekids companies was reduced to 5%. However, in 2018, it was realised that there were unintended tax consequences and that the transactions could also jeopardise bank lending. The original shareholdings were reinstated. This did not relate to Choicekids and Mr Brown's shareholding in that company remained at 5%. Mr Brown says that in April 2019, Mr Davys altered the share registers reducing Mr Brown's shareholding back to 5% in the other Choicekids companies without Mr Brown's consent.

[27] When Choicekids first started trading, Mr Brown's role had been to look after maintenance, running events, administrative support, organising party hire, looking for new childcare centre sites, liaising with building contractors, meetings on site to ensure construction of the new centres was progressing to plan and reporting back to Mr Davys. By 2018, Mr Brown says that he was mostly working with the admin team.

He states: "Effectively, Paul treated me as his assistant, asking me to do various tasks for him, both personally and for the Choicekids business".

[28] Mr Brown details a difficult relationship with Mr Davys. He says that in 2018, Mr Davys informed him that the business was in financial difficulty and could no longer afford to pay him. Mr Brown would have to leave but he would have to work for no payment until a replacement could be found to cover his role.

[29] Mr Davys directed that Mr Brown be put back on the payroll with a salary of $85,000 in April 2019. However, in August 2019 he directed that Mr Brown again be removed from the payroll. Mr Brown says that despite this, he continued to work for Choicekids on a full-time basis until Christmas 2019.

[30] A notice recording Mr Brown's resignation as a director of Choicekids was filed with the Companies Office on 24 November 2019. Mr Brown says that this was done without his knowledge or consent. On the same day, Mr Davys sent an email to Mr Brown stating:

> …, just letting you know the companies register is getting updated to remove you as a director. Not personal mate, it's best for you and only means you don't have to sign those f….documents in the future!

[31] It is Mr Brown's evidence that in or around November or early December 2019, he had a meeting with Mr Davys to discuss his leaving arrangements. Mr Brown states:

> During this meeting, we reached an agreement, by which Choicekids was to pay me $150,000 per year, less $40,000 contribution towards the salary of my replacement. This was essentially an "exit package", with sums being paid as a dividend, in recognition of my continued 5% shareholding. I was not happy with the $40,000 deduction, but I agreed to it because I did not feel that I had any other choice. As part of the exit agreement, Paul acknowledged that the car ie the Audi Q7 at issue in this proceeding) was mine, and the company would continue to pay the fuel and credit cards, and the phone.

[32] Mr Brown says that a further meeting was held in early February 2020. At that meeting, Mr Davys stated that the business could only afford to pay him $36,000 (at a rate of $3,000 per month). There was no further discussion about, or change in, the arrangement concerning the Vehicle, fuel and credit cards and phone. Although Mr

Brown did not accept or agree to the variation, he says that he "subsequently received monthly dividend payments of $3,000 each between May and September 2020."

[33] During the February meeting, Mr Brown says that Mr Davys had also offered that if Mr Brown came back to work as a contractor, Choicekids would pay him a further $3,000 per month. Mr Brown worked in this capacity for about a month around February/March 2020.

[34] Mr Brown says that it was not unusual in the Choicekids' business to give away a car. Indeed, a car had been given to Mr Davys' mother and another to Mr Brown's daughter. Mr Davys had also given away an Audi RS 5 to a friend replacing it with two Mercedes cars for himself.

[35] In April 2020, Mr Brown says that Mr Davys had accused him of "ripping off" Choicekids because there were a couple of transactions on his credit card. Mr Brown says that he considered the card was his as part of his exit arrangement. However, he cut up the card and told Mr Davys to cancel it "because I felt there was no point in having it since Paul had once again reneged on the agreement that I could keep it".

[36] Mr Brown states that after Mr Davys had made the allegation, he had reviewed Choicekids' bank statements and discovered that from April 2019 to July 2020, Mr Davys had withdrawn over $2 million from the company's account at a time when Mr Davys was saying that Choicekids had no money to pay him. Mr Brown says that these included a number of transactions which he identified as not being legitimate company expenditure.

[37] A final meeting was held between Mr Davys and Mr Brown in September 2020. Mr Brown says that he had driven the Vehicle to Mr Davys' house. Mr Davys did not make any request at that time for the return of the Vehicle.

[38] With regard to the change of registration of the Vehicle, Mr Brown states:

> No one else used the car aside from me, throughout the time I had possession, and subsequently ownership, of it. I changed registration to my wife's name in case something happened to me before matters were resolved with Paul and Choicekids. My health is not the best and I was worried that the added stress

> of the ongoing arguments with Paul would cause further health problems. I hadn't changed it before then because with all the other things going on during this time, including Covid-19, the issues with exiting the business and being released from the guarantee, I simply did not think about who the registered owner of my car was.

[39] The Vehicle was listed for sale through Trade Me in November 2020 and subsequently sold in February 2021 for $65,000.

Mr Davys' Reply

[40] Mr Davys denies that there was ever any agreement with Mr Brown in 2016 or in 2019 on the terms stated by Mr Brown or at all.

[41] Mr Davys produced an email sent by Mr Brown to the accountant for Choicekids on 12 November 2019 asking about payment of his dividend. The accountant attached an "indicative dividend statement" for the period from 1 April 2019 to 30 November 2019 and advised Mr Brown that the actual payment of the dividend would not happen until April/May in each year.

[42] An indicative dividend of $16,864 before deductions was recorded as being payable to Mr Brown for this period. Mr Davys noted that an annual amount of $45,000 was recorded as being deductible from the dividend as a contribution towards the hiring of an executive assistant who had begun work in September 2020 "given I was effectively running the business on my own".

[43] Mr Davys says there was no agreement to pay Mr Brown's fuel and credit cards or phone account. Rather, the indicative dividend statement notes that the accountant was waiting on fuel card statements and phone statements to allocate these costs. There was no reference in the statement to Mr Brown being given the Vehicle. Mr Davys says that an outright gift of the Vehicle would have been completely at odds with Mr Brown's position that Choicekids had agreed to pay for his fuel.

[44] Mr Davys observed that an actual dividend of $150,000 for a 5% shareholding would equate to an annual dividend of $3 million for all shareholders and Choicekids "never had that kind of money".

[45] Mr Davys says that Choicekids has never paid any of the benefits claimed by Mr Brown, and Mr Brown has never taken any steps to enforce either the 2016 or 2019 agreements. Moreover, there was no reason why Choicekids would give away a company car to a departing director "who was not contributing at all to the business" particularly where Choicekids was still paying off the loan that financed the Vehicle purchase.

Summary Judgment: Legal Principles

[46] Rule 12.2(1) of the District Court Rules 2014 provides:

> The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[47] The proper approach to be taken to a plaintiff's application for summary judgment was considered by the Court of Appeal in *Krukziener v Hanover Finance Ltd*, where the Court said[4]:

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as, for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Young v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[48] Summary judgment will be denied if it appears to the Court on the hearing of the application that there is an issue worthy of trial.[5]

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[4] *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].
[5] At [27].

An Arguable Defence?

[49] Mr Brown contends that at a meeting in late November/early December 2019 with Mr Davys an agreement was reached whereby he would be paid $150,000 per year by Choicekids less $40,000 contribution towards the salary of his replacement. Further, the Vehicle was to be Mr Brown's and Choicekids would continue to pay his fuel and credit cards, and phone. Mr Davys denies that there was ever any such agreement and says that the Vehicle was the property of Choicekids.

[50] Mr Brown has not produced any contemporaneous documentation supporting this alleged agreement. Mr Davys produced the indicative dividend statement. However, this related to the financial period up to 30 November 2019 and Mr Brown contends that the agreement was made in late November/early December2019.

[51] Notably, the dividend statement records monthly deductions of $45,000 per annum for the executive assistant's salary. Mr Brown says that he had reluctantly agreed to a deduction of $40,000 towards this salary as part of his exit package. Mr Davys does not explain on what basis Choicekids could charge this expense to Mr Brown as a 5% shareholder in the absence of any agreement with Mr Brown to do so.

[52] The alleged exit payment is a sizable amount. However, the sums set out in Mr Davys' email of 1 April 2016 were also large. In addition, company cars and fuel allowances were also part of the 2016 proposals put forward by Mr Davys (although notably not on a retirement from the business).

[53] Mr Brown refers to "sums being paid as a dividend in recognition of my continued 5% shareholding". Mr Davys says on that analysis, the net profit of Choicekids would have to be $3 million to produce such a dividend. It is unclear on the affidavit evidence what Mr Brown meant by "payment as a dividend". The accountant advised that dividends are paid out at the end of the financial year. Under the alleged variation in February 2020, Mr Brown says that he subsequently received "monthly dividend payments" of $3,000 each. No financial accounts were produced for Choicekids. However, it is Mr Brown's evidence on an analysis of the company's bank transactions, that amounts totalling over $2 million had been withdrawn from the account in the period from April 2019 to July 2020.

[54] It is Mr Brown's evidence that cars had been given away by Choicekids and he refers to three such gifts. Mr Davys says that Choicekids did not give away cars for free but did not specifically address this assertion.

[55] Mr Davys says that he and Mr Brown agreed that Mr Brown would resign as a director before he filed the notice of resignation on 24 November 2019, and advised Mr Brown at that time that he would have to return the Vehicle. The subsequent email sent to Mr Brown does not reflect any such prior discussion.

[56] I am not satisfied on the affidavit evidence that the defendants have no defence to the summary judgment claim. I do not consider that the defence relied on by the defendants inherently lacks credibility. There are clear conflicts of evidence between Mr Brown and Mr Davys which cannot be resolved on the affidavit evidence. Likewise, issues of credibility arise. In these circumstances, I consider that there is need for discovery and inspection to be completed (which on the affidavit evidence I would not expect to be particularly extensive) and most importantly, that there be an opportunity to cross examine both Mr Davys and Mr Brown at a substantive hearing.

Other Defences

[57] Mr Brown also alleges that this proceeding is a nullity. He says that he has never ceased to act as a director of Choicekids and did not agree to this proceeding being issued. In view of the position I have reached above, I have not referred to the evidence in relation to this allegation which I consider should be canvassed at the substantive hearing when Mr Davys and Mr Brown are able to be cross examined.

Result

[58] The summary judgment application is dismissed.

[59] Costs on the application are reserved to be determined after the substantive hearing. I do not consider that this is a case where costs should be fixed immediately[6]

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[6] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403, (1990) 3 PRNZ 695 (CA); and *Mason v Dodd* [2020] NZHC 2005 at [8] – [10].

it would appear that Mr Brown did not set out his defence in any prior correspondence with the solicitors for Choicekids. Accordingly, the company was not in a position where it should have been clear that there was an arguable defence.

[60] The defendants are directed to file and serve their statement(s) of defence within 10 working days after the date of this judgment.

[61] The Registrar is directed to allocate a case management conference for the purpose of giving directions and fixing the mode of trial for this proceeding on the first available date 10 working days after the date for the filing of the statement(s) of defence. A joint memorandum or separate memoranda are to be filed and served in accordance with Rule 7.2(4) of the District Court Rules 2014.

A A Sinclair
District Court Judge