IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-8082

UNDER	THE SECURITIES ACT 1978 AND PART 18 OF THE HIGH COURT RULES 2009
IN THE MATTER OF	AN APPLICATION UNDER SECTION 65A OF THE SECURITIES ACT 1978
BETWEEN	THE SECURITIES COMMISSION Plaintiff
AND	MARK STEPHEN HOTCHIN First Defendant
AND	KA NO 3 TRUSTEE LIMITED Second Defendant
AND	KA NO 4 TRUSTEE LIMITED Third Defendant
AND	TONY JOHN THOMAS Fourth Defendant

Hearing:	21 December 2010
Counsel:	P Courtney for plaintiff R B Stewart QC & N Gedye for first defendant J Long & J Wach for second, third and fourth defendants
Judgment:	21 December 2010

ORAL JUDGMENT OF WINKELMANN J

Crown Law, Wellington
Lee Salmon Long, Auckland

Counsel:
Bruce Stewart QC, Auckland

[1] This is the first call, on an inter parties basis, of the Security Commission's (the Commission's) application for interim orders. On 9 December 2010 the Commission made application for orders under s 60G & H of the Securities Act 1978, the intended effect of which was to prevent assets of Mr Hotchin being dealt with in such a way as to remove them from the jurisdiction or reduce their value. The basis of the application was that an investigation was underway into possible breaches of the Securities Act in connection with the issue of securities by the Hanover group of companies, and in particular, in connection with statements made in prospectuses.

[1] On that same day I made orders on an ex parte basis (without hearing from any of the defendants) broadly in terms that the Commission sought. I made orders against Mr Hotchin and against the second, third and fourth defendants. The second and third defendants are the corporate trustees of trusts which the Commission claims hold assets in which Mr Hotchin has some sort of beneficial interest. The fourth defendant, Mr Thomas, is the sole director and shareholder of the corporate trustees of the second and third defendant.

[2] The assets the subject of the interim orders are only those assets of Mr Hotchin and the second and third defendants situated in New Zealand.

[3] Although Mr Hotchin has applied to vary the interim preservation orders, the second, third and fourth defendants have taken the pragmatic approach that they will comply with the orders of the Court at this point, but without prejudice to any application that they may make at a later stage.

Issues for determination

[4] The issues for determination are:

(a) The appropriate amount of living expenses to be paid to Mr Hotchin out of the frozen assets. Mr Hotchin initially applied to amend the level of living expenses payable from the assets, but that application has been withdrawn for reasons I will come to shortly.

(b) Whether bills totalling approximately $160,000 can be paid out of the assets subject to the preservation orders.

(c) Whether two cars of significant value are permitted to be transferred to Australia to Mr and Mrs Hotchin on conditions which would preserve the effectiveness of the charging orders.

(d) Whether personal effects are permitted to be shipped to Australia to Mr and Mrs Hotchin.

(e) Whether the Commission must disclose to Mr Hotchin a report prepared by Mr Crichton, an investigating accountant.

[5] There was also initially issue taken by Mr Hotchin as to the jurisdiction of this Court to make the orders made on 9 December requiring him to make full disclosure of his assets and liabilities. However, Mr Hotchin has amended his position, taking the pragmatic approach that he will comply with those Court orders and make full disclosure of his assets and liabilities. Indeed, to date, partial disclosure has been made and that disclosure forms the evidential basis for these applications.

[6] I comment that in my view Mr Hotchin was correct not to pursue this point. The Court clearly has jurisdiction to make such orders, either under the provisions of the Securities Act (s 65C authorises the making of ancillary orders to ensure compliance with orders made under the Act) or pursuant to its inherent jurisdiction to ensure the effectiveness of its own orders. The Court has an inherent jurisdiction to make such orders necessary to ensure the effectiveness of its own orders. The disclosure orders clearly fall within that category as it is difficult to see how the preservation orders could be monitored or enforced without information as to the nature and location of the assets subject to it.

Factual background

[7] To give some background to the present proceedings. On 9 December 2010 the Commission made application for orders to preserve assets which, on its case,

Mr Hotchin has an interest in on the grounds that it was undertaking an investigation into potential breaches of the Securities Act by the following companies and their directors:

(a) Hanover Finance Ltd, (which was struck off the companies register on 13 August 2010).

(b) Hanover Capital Ltd, (which was struck off the companies register on 31 March 2010).

(c) United Finance, (which was struck off the companies register on 30 August 2010).

[8] Mr Hotchin was a director of these companies at the times the subject of the investigation. Prospectuses had been issued by Hanover Finance Ltd on 7 December 2007 and 31 March 2008, Hanover Capital Ltd on 7 December 2007 and 31 March 2008, and by United Finance Ltd on 7 December 2007 and 31 March 2008.

[9] Section 60G and s 60H of the Securities Act create the relevant jurisdiction. Those sections provide:

> **60G When Court may prohibit payment or transfer of money, securities, or other property**
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> (1) This section applies if—
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> (a) an investigation is being carried out under this Act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act; or
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> (b) a prosecution has begun against a person for a contravention of this Act; or
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> (c) a civil proceeding has begun against a person under this Act.
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> (2) The Court may, on application by the Commission or by an aggrieved person, make 1 or more of the orders listed in section 60H if the Court considers it necessary or desirable to do so for the purpose of protecting the interests of an aggrieved person.
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> (3) In this section and section 60H,—

aggrieved person means any person to whom a relevant person is liable

liable means liable, or may be or become liable, to pay money (whether in respect of a debt, by way of damages or compensation, or otherwise) or to account for securities or other property

relevant person means a person referred to in subsection (1).

60H What orders may be made

(1) The orders that may be made under section 60G are—

(a) an order prohibiting the relevant person from transferring, charging, or otherwise dealing with money, securities, or other property held or controlled by the relevant person:

(b) an order prohibiting a person who is indebted to the relevant person or to an associated person of the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed:

(c) an order prohibiting a person holding money, securities, or other property, on behalf of the relevant person, or on behalf of an associated person of the relevant person, from paying all or any of the money, or transferring, or otherwise parting with possession of, the securities or other property, to, or to another person at the direction or request of, the person on whose behalf the money, securities, or other property, is or are held:

(d) an order prohibiting the taking or sending out of New Zealand by a person of money of the relevant person or of an associated person of the relevant person:

(e) an order prohibiting the taking, sending, or transfer by a person of securities or other property of the relevant person, or of an associated person of the relevant person from a place in New Zealand to a place outside New Zealand (including the transfer of securities from a register in New Zealand to a register outside New Zealand):

(f) an order requiring the relevant person, or any person holding money, securities, or other property on behalf of the relevant person or an associated person of the relevant person, to pay or transfer money, securities, or other property to a specified person to be held on trust pending determination of the investigation, prosecution, or civil proceeding:

(g) an order appointing,—

(i) if the relevant person is a natural person, a receiver or trustee, having any powers that the Court orders, of the property or of part of the property of that person; or

(ii) if the relevant person is a body corporate, a receiver or receiver and manager, having any powers that the Court orders, of the property or of part of the property of that person:

(h) if the relevant person is a natural person, an order requiring that person to deliver up to the Court his or her passport and any other documents that the Court thinks fit:

(i) if the relevant person is a natural person, an order prohibiting that person from leaving New Zealand, without the consent of the Court.

(2) A reference in subsection (1)(e) or (g) to property of a person includes a reference to property that the person holds otherwise than as sole beneficial owner, for example,—

(a) as trustee for, as nominee for, or otherwise on behalf of or on account of, another person; or

(b) in a fiduciary capacity.

(3) An order may be expressed to operate for a specified period or until the order is discharged by a further order under this section.

[10] The Commission's application was based upon s 60G(1)(a). The evidence the Commission provided in support of its application included an affidavit from a solicitor employed by the Commission, Ms Blenkarne. Ms Blenkarne deposed that the Commission reasonably apprehended possible civil proceedings arising from representations contained in prospectuses of those companies, and associated extension certificates (whereby certificates were issued by the directors which had the effect of extending the life of the prospectuses).

[11] Ms Blenkarne gave detail of some of the reasons for continuing the investigation in relation to each of the prospectuses (which I do not set out here). She deposed that the Commission apprehended a real possibility of commencing proceedings against Mr Hotchin in his capacity as a director who signed the offer documents on the basis that statements within those documents were untrue.

[12] Evidence was provided of the nature of the investigation being undertaken. Mr Crichton, an investigating accountant, filed an affidavit in which he referred to the fact that he had been authorised and approved by the Commission to undertake an inspection under s 67A of the Securities Act of Hanover Finance Ltd, United Finance Ltd and Hanover Capital Ltd, current and former officers, employees of the

companies, or any other person associated with the companies. In his affidavit he stated the exact scope of the investigation he was required to undertake. He then described the amounts which had been invested under these prospectuses, providing details as follows: a net amount of $5.2 million invested in United Finance, a net amount of $21.5 million invested in term deposits in Hanover Finance and a net amount of $5.6 million invested in core deposits in Hanover Finance. The relevant dates for the purposes of this calculation were between 7 December 2007 and 23 July 2008.

[13] The existence of the Commission's investigation was only one ground on which the application for preservation orders was made, the other ground being a risk of dissipation of Mr Hotchin's New Zealand based assets. This "risk" was founded upon the fact that properties which, on the Commission's case, Mr Hotchin had an interest in had either been sold or were for sale, and that Mr Hotchin and his wife appeared to be making their home on a long term basis outside of New Zealand.

[14] After consideration of the evidence provided in support of the application, I made ex-parte orders but required that the matter be called before me on the following Tuesday (14 December 2010). When the proceeding was called counsel were in agreement that some minor amendment to the ex parte orders be made, and that this application should be heard today to resolve the issues of the appropriate level of living expenses, the Court's jurisdiction to compel disclosure of assets and liabilities, and whether the Commission should be required to disclose Mr Crichton's report.

[15] I have previously outlined the applications Mr Hotchin today maintains. He has also said that he intends to apply for recision of the existing asset preservation orders on the basis that there is no substance to the Commission's fears that he is dissipating assets or that they are at risk of dissipation and that the Commission has no prospect of succeeding in any civil or criminal proceeding against him. Those applications are to be heard on 14 February 2011. He has said that should the Court not rescind any existing orders, he will also apply for payment of a substantial tax liability out of the assets the subject of the preservation orders, and for a mechanism to be settled upon to allow payment of legal expenses on an on-going basis.

[16] In support of his applications for hearing today Mr Hotchin has filed an affidavit by Mr Roger Wallis, a partner at Chapman Tripp who gives details of the history of the Commission's investigation and provides evidence that Hanover Finance and related companies has been fully cooperative to date. Mr Hotchin has filed two affidavits. The first shows his assets and liabilities, both inside and outside the jurisdiction, and the second deals with his living expenses. Mr Hotchin has qualified both affidavits to the effect that he has had only limited time to provide the information and therefore it may not be complete. His counsel says that Mr Hotchin also wanted to provide an affidavit from his accountants, Ernst & Young but they have declined to assist because they are owed money by Mr Hotchin. From my understanding of the situation those outstanding fees do not arise simply by reason of the asset preservation orders - some have been outstanding for some time.

[17] The affidavit as to assets and liabilities discloses that Mr Hotchin has chattels of significant value within the jurisdiction in the form of vehicles, furniture, art and boats other than the sum of $30,000 held in a bank account. His other assets within the jurisdiction are of more uncertain value. He does describe one debt owed to him of $1.6 million by Okahu Capital Ltd, but notes that that money was borrowed by him from KA 2 Trust and that he expects the Trust will off-set that liability against what he owes the Trust. He says therefore the sum is not recoverable. Mr Stewart however seeks to qualify that. He says that he understands that the position may not be quite as stated in the affidavit and that the confusion is explicable by the urgency with which the affidavit was prepared. He believes the $1.6 million may be available to Mr Hotchin to meet liabilities.

[18] Mr Hotchin lists liabilities which exceed by some margin the value of the assets listed. As to his overseas assets he shows an amount of AU$240,000 in a joint account with his wife, and an amount of a few thousand pounds in an English bank account.

[19] He details weekly outgoings of approximately six and a half thousand dollars, including support that he provides for his parents-in-law and an amount provided to his ex-wife. He lists unpaid bills which include an account payable for work done

on a house which he has now sold, provisional tax, amounts payable to Ernst & Young, an amount payable on his Visa card and solicitor's fees.

Jurisdiction to make preservation orders

[20] The appropriate starting point for consideration of the application is the nature of the jurisdiction that has been exercised in this case. I have already referred to sections 60G and 60H. Similar legislation exists in the Australian jurisdiction and the Commission referred me to a number of decisions of the Federal Court of Australia in which asset preservation orders have been made. The provision which equates to s 60H is s 1323 of the Australian Corporations Act 2001. In *Re Richstar Enterprises Pty Ltd, Australian Securities Investment Commission v Carey (No 3)*[1] a decision of the Federal Court of Australia. French J, speaking of the jurisdiction to make such orders said:[2]

> [T]he orders can be made before a liability is established and indeed before the evidence necessary to establish liability has been collected.

And later:[3]

> It follows, and has been accepted, that there is no requirement on the part of ASIC to demonstrate a prima facie case of liability on the part of the relevant person or that the person's assets have been or are about to be dissipated.

[21] There is clear recognition in the decided cases that this is an extraordinary remedy to be exercised with caution. The Court is being asked to limit the ability of the defendants to deal with assets to which they have legal and/or beneficial title in advance of the Commission issuing proceedings, and indeed in this case, in advance of the Commission putting forward evidence to make out a good, arguable case against Mr Hotchin for either civil or criminal liability. The application must proceed on the basis that these are Mr Hotchin's and the Trust's assets. Nevertheless the legislation reflects a recognition on the part of Parliament that there is a strong public interest in the preservation of assets where the Commission is bona fide investigating suspected breaches of the securities legislation and where there is a risk

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1 *Re Richstar Enterprises Pty Ltd, Australian Securities Investment Commission v Carey (No 3)* [2006] FCA 443.

2 At [25].

3 At [26].

of assets available to meet potential claims flowing being dissipated. These applications in relation to the variation of the orders therefore fall to be considered in that context. The discretion created is broad but it must be exercised in a principled manner. The restraint imposed should be proportionate to the nature of the issues investigated and the risk of dissipation.

Applications by Mr Hotchin

Two motor vehicles

[22] This application concerns the proposed transfer of a Mercedes and a Porsche Cayenne to Australia. The list of Mr Hotchin's assets includes the Porsche, but Mr Stewart tells me that the car is Mrs Hotchin's. Although it is registered in Mr Hotchin's name, it is in reality her car. She uses it to transport her children. The list of assets discloses that these two vehicles have a substantial value. Mr Hotchin proposes that he be permitted to transport them to Australia paying the cost of that transportation from assets outside New Zealand that are not subject to the preservation orders.

[23] Mr Hotchin proposes to provide a personal undertaking that the cars will not be dealt with in any way which diminishes the value of the assets, including that they will not be charged or sold. He also proposes consenting to orders that pending further order of the Court (and without prejudice to his argument that the Court should not have issued the preservation orders in this case) the preservation orders extend to those cars although they are outside the jurisdiction. Mr Stewart contends that this will be a sufficient basis for the Court to be confident that those two cars will be preserved for the benefit of the aggrieved persons should any liability ever be brought home against Mr Hotchin.

[24] The Commission opposes this variation. It says that there is no effective mechanism whereby such consent orders and undertakings could be enforced, and that attempted enforcement would be expensive and difficult.

[25] This application for variation is by no means clear cut. These assets are the assets of Mr Hotchin (on his affidavit), and Mr Hotchin is making attempts to ensure that they remain assets subject to the asset preservation orders. Nevertheless, I consider there is some force in what the Commission says. The undertakings would be difficult to enforce since the Court's jurisdiction to make asset preservation orders outside its jurisdiction, except on a consent basis, is by no means clear cut. I have also weighed the fact that Mrs Hotchin claims ownership of one of the vehicles. Although Mr Stewart has suggested that she also give a personal undertaking, she is not a party to this litigation and that is a further complicating factor.

[26] I also weigh that, on Mr Hotchin's statement of assets and liabilities, these cars represent a significant proportion of his assets in New Zealand. That position may of course change when he files his supplementary evidence in that regard. On that basis I have determined to decline the application for variation in respect of the cars. I note that the Hotchins' are currently making use of rental cars in Australia so this does not seem likely to cause them undue hardship.

Payment of bills

[27] Mr Hotchin seeks orders that bills totalling approximately NZ$160,000 be paid out of the $30,000 cash sum in New Zealand and also out of the debt owed to him by Okahu Capital Ltd of $1.6 million. I have already referred to the fact that his affidavit notes that amount is likely not payable, and to Mr Stewart's qualification of that statement.

[28] Mr Stewart for Mr Hotchin confronts the fact that Mr Hotchin's statement of assets and liabilities discloses that he presently has sufficient assets outside the jurisdiction to make payment of those bills. However, he says that half of the AU$240,000 shown in the Australian account is Mrs Hotchin's. He also says that with his half of this money Mr Hotchin intends to pay living expenses and that this is the basis upon which the foreshadowed application for variation to the existing amount of living expenses allowed in the orders has been abandoned.

[29] The Commission opposes the application on the grounds that there is sufficient money in the Australian account to make payment of these bills.

[30] I am persuaded by the Commission's arguments. In applications of this kind the Court is concerned to allow the person subject to the asset preservation order ordinary living expenses only. The Australian account is more than sufficient to achieve this, the amount therein being capable of paying both the outstanding accounts and also living expenses. Mr Stewart's argument that half that amount is Mrs Hotchin's may have some superficial attraction, but the difficulty with it is that Mrs Hotchin, it must be assumed, also bears some responsibility to make payment of living expenses for the family. Moreover, at least some of the accounts listed by Mr Hotchin are accounts of a family type nature (such as the account relating to the Bridgewater Road property and the Visa account). There seems to be no reason why those accounts should not be paid out of Mrs Hotchin's share of the fund as well. Accordingly the application is declined in relation to the listed accounts.

Personal items

[31] Mr Hotchin wishes to arrange for personal belongings such as clothes, photographs and other personal and household items to be shipped from New Zealand to Australia. He says that the family has been on the move recently and have been living out of suitcases. They now wish to have their personal belongings. A removal firm had been arranged to pack up household effects, but that arrangement was cancelled because of the preservation orders.

[32] The Commission does not oppose the orders being varied to allow personal and household items to be shipped to Australia, but seeks to prevent the movement of furniture, art and jewellery shown in the assets and liabilities as having a substantial value.

[33] Given the value disclosed of these items and given the fact that this matter is set down for fuller argument on February 14, I prefer to defer decision in relation to the furniture, art and jewellery until that time. But I accept without hesitation that

the family should have access to all other household and personal items and I will vary the order to that effect.

Disclosure of report prepared by Mr Crichton

[34] The final issue is whether the Commission is obliged to disclose the report prepared by Mr Crichton and referred to in his affidavit filed in support of the application for interim orders.

[35] Mr Stewart for Mr Hotchin argues that the matters that Mr Crichton lists as matters which the Commission has asked him to investigate are the very matters which are set out in Ms Blenkarne's affidavit to provide some detail of the civil proceedings which the Commission says it "apprehends a real possibility of commencing". Mr Stewart submits that it is an unavoidable inference that that part of Ms Blenkarne's affidavit has been taken from Mr Crichton's report. Ms Blenkarne is a practising solicitor who does not present as a person with specialist expertise in the investigation and analysis of financial and accounting matters and she does not claim that paragraph as her own work.

[36] Mr Stewart also submits that at the hearing of the application to rescind the preservation orders, the strength of the Commission's case will be relevant to the exercise of the Court's discretion. A further potential issue will be whether the requisite disclosure was made by the Commission in seeking ex-parte orders. The Crichton report will be of direct relevance because it may disclose that the Commission was aware of exculpatory matters which it did not reveal to the Court. Moreover, if criminal charges are laid the report will need to be produced in its entirety under the Criminal Disclosure Act 2008. Finally, Mr Stewart submits that if a litigant quotes selectively from a report then fairness requires that the report be disclosed.

[37] Ms Courtney for the Commission clarifies that Ms Blenkarne's affidavit does not derive the material Mr Stewart refers to from Mr Crichton's report, and that it simply sets out the Commission's analysis of some of the material that it collected.

[38] I consider that there was nothing unfair in Mr Crichton referring to his report in his affidavit without disclosing it. Mr Crichton mad e no reference to the substance or nature of his conclusions or recommendations contained in his draft report. That material was not offered in any sense to support the Commission's application. Ms Blenkarne also did not refer to it. Mr Stewart is quite correct that when this application is called on 14 February for argument, the strength of the Commission's case will be at issue, but the Commission will not be able to rely upon Mr Crichton's report to bolster it unless it makes disclosure of that report.

[39] I have also given consideration to the point that Mr Stewart makes that the report will inevitably be discoverable under the Criminal Disclosure Act 2008. Whether or not that is the case if criminal proceedings are commenced, that regime does not presently apply.[4] Of some relevance is s 6 of the Official Information Act 1982, referred to by the Commission, which sets out conclusive reasons for withholding information in the face of a request for official information. These include at (c) that there is a good reason for withholding official information if making that information available would likely:

> to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

[40] Were application to be made under the Official Information Act, the Commission could avail itself of this provision. At this point I do not see any basis upon which I could or should compel the Commission to disclose the report in light of my conclusion that it has not made use of it in an unfair manner in the Commission's application, and in light of s 6 of the Official Information Act.

14 & 15 February hearing

[41] In relation to the hearing of the application to rescind or vary existing preservation orders I direct that to be set down for hearing on 14 & 15 February 2011, and make the following timetable orders:

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[4] The Act applies only to criminal proceedings that have been commenced: see Criminal Disclosure Act 2008, s 4.

(a) Any applications to rescind or vary existing orders and affidavits in support of those applications are to be filed and served by 5.00 pm, 28 January 2011.

(b) The Commission's notice of opposition and any further affidavits are to be filed and served by 5.00 pm, 4 February 2011.

(c) Any reply affidavits are to be filed by 5.00 pm, 8 February 2011, together with submissions by the defendants in support of the applications.

(d) The Commission's submissions are to be filed and served not later than midday 11 February 2011.

Winkelmann J