

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP764/2015

CATCHWORDS

Domestic building, freezing order, alleged loans by the Owner to companies with which the Builder deals.

APPLICANT	Mr Mike Toner
FIRST RESPONDENT	Streaky Pty Ltd (ACN 111 542 360)
SECOND RESPONDENT	Raesty Pty Ltd (ACN 601 761 424)
THIRD RESPONDENT	CS Group Pty Ltd (ACN 126 069 010)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	22 June 2015
DATE OF ORDER	24 June 2015
CITATION	Toner v Streaky Pty Ltd (Building and Property) [2015] VCAT 863

ORDERS

- 1 The freezing order of 15 June 2015 is not continued, but is set aside, effective 2:00 p.m. today.
- 2 Costs are reserved with liberty to apply.
- 3 **I direct the Principal Registrar to send copies of these orders to the parties by email now.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr D. Harrison of Counsel
For First Respondent	Mr K.J. Naish of Counsel
For Second Respondent	Mr M. Schilling of Counsel
For Third Respondent	Mr K.J. Naish of Counsel

REASONS

- 1 These reasons and orders concern a freezing order made by me on 15 June 2015 with respect to the assets of each of the Respondents. The freezing order continues to apply until 2:00pm on 24 June 2015. The question is whether it should continue beyond that time, or whether it should be set aside.

HEARING OF 15 JUNE 2015

- 2 On 15 June 2015 the Applicant, Mr Toner filed his application and the proceeding came before me that afternoon to hear an ex parte application for a freezing order. Mr D Harrison of Counsel appeared Mr Toner. The Respondents were not notified of the hearing.
- 3 The application was for "Injunctive relief in the nature of a freezing order." It was supported by an affidavit of Mr Toner dated 14 June 2015.
- 4 Among other things, Mr Toner deposed in his affidavit that:
 - a He has known Mr Khai Edwards for 6 to 7 years. Mr Edwards is employed as a business development manager by the First Respondent, Streaky, and is the sole director of the Second Respondent, Raesty.
 - b Mr Toner owns a property at 19 Otter Street, Collingwood ("the Property").
 - c In about July 2014 Mr Toner told Mr Edwards he was planning to demolish an existing house at the Property, and rebuild.
 - d Mr Toner obtained three quotations for the work of demolition and rebuilding. Streaky's original quotation was the lowest priced at \$530,000. Mr Wayne Martin, a site manager employed by Streaky, emailed the quotation to Mr Toner. The quotation date was 15 August 2014.
 - e Mr Edwards asked Mr Toner if he was getting bank finance to build. He said he was not. Mr Edwards and Mr Martin asked him to pay \$250,000 "up front" and another \$250,000 in stages dictated by the building contract to enable the overall price to be reduced to \$500,000.
 - f Mr Edwards told Mr Toner that the up-front payment would be held in a separate account to finance the first half of the works.
 - g Mr Edwards told Mr Toner that loan contracts would be provided to secure the \$250,000 up-front amount and the contracts would be terminated once the first half of the works was complete.
 - h Mr Edwards asked Mr Toner to pay Raesty a further \$50,000 in respect of "the initial building contract stage payments".

- i The contract was signed between Mr Toner and Streaky on 7 November 2014. The contract price was \$250,000. Mr Clint Ebeyer signed for Streaky.
- j Mr Toner made the following payments:
- \$160,000 in cash to Mr Martin on 12 November 2014.
 - \$40,030 in cash to Mr Martin on 21 November 2014.
 - \$100,000 by bank transfer to Raesty on 26 November 2014.
- k On 12 and 21 November Mr Toner attended the Westpac Bank branch at Collingwood with Mr Martin, who deposited the cash payments into an account in the name of the Third Respondent, CS Group. Mr Martin told Mr Toner he was instructed to do this by Mr Edwards.
- l The directors of the respondents are:
- Streaky – Mr Clint Ebeyer
 - Raesty – Mr Edwards
 - CS Group – Joseph Ebeyer and Suzi Ebeyer. Joseph is the father of Clint.
- m After signing the building contract, Mr Martin asked Mr Toner to move out of the Property so that work could start. Mr Toner moved out in November 2014. Demolition started in early December 2014 but was not complete until March 2014[sic]. A demolition permit was not obtained until 19 February 2015.
- n On about 19 December 2014 Mr Edwards gave Mr Toner two documents concerning the loan contracts. One was for \$200,000 to CS Group. The other was for \$100,000 to Raesty. Mr Edwards told Mr Toner that CS Group was the "development arm of Streaky" and that Raesty was a company he set up to provide labour and sub-contracting services to Streaky.
- o From 2 April 2015 to 5 May 2015 Mr O'Halloran, site foreman at Raesty, sent e-mails regarding the works. No work of substance was undertaken in that period.
- p On 2 May 2015 Mr Edwards sent a text message saying "you have my word your safeguarded and your job will be done" [sic].
- q Between 3 May and 17 May 2015 Mr Toner tried to contact Mr Clint Ebeyer by telephone but was unsuccessful.
- r On 5 May 2015 Mr Toner received an e-mail from Mr Edwards to say that Mr Martin "had been fired from Streaky for alleged deceitful behaviour to Martin's advantage." Mr Edwards told Mr Toner that the project budgets were "in line".

s On 5 May 2015 after receiving the e-mail from Mr Edwards, Mr Toner contacted Mr Martin directly who told Mr Toner:

- Streaky was in financial difficulty.
- Mr Toner's \$300,000 had been spent to clear the debts of the business.
- Streaky had 10 jobs on the go with no capacity to pay tradespeople for their completion.

Mr Toner believed Mr Martin.

t On 5 May 2015 Mr Toner sent Mr Edwards a text message seeking evidence that his money was in an account as agreed. Mr Edwards replied "everything is set up correctly and by the book so your safeguarded" [sic].

u Mr Toner asked Mr Edwards to demonstrate the money was safe and on 6 May 2015 Mr Edwards sent Mr Toner a photograph of a computer screen showing a number of account balances including a CS Group account with a balance of \$320,127.53. Mr Edwards told Mr Toner that the money Mr Toner had paid to Raesty and CS Group was in the CS Group account.

v On 6 or 7 May 2015 Mr Martin told Mr Toner that CS Group had unsuccessfully tried to borrow \$300,000 from Mr Clint Ebeyer's sister to complete a job in Hawthorn.

w On 7 May 2015 Mr Edwards sent Mr Toner a text message saying he had received an e-mail stating that the base stage of the works would be complete during the week ending 22 May 2015.

x On 11 May 2015 Mr Edwards sent Mr Toner a text message to say that the works were being checked and excavations had started.

y On 15 May 2015 Mr Toner asked Mr Edwards for a bank statement showing that his money was in the CS Group account. On the same day Mr Edwards provided Mr Toner with a single page of a Westpac Business One statement in the name of CS Group which showed a closing balance of \$358,802.74. Mr Edwards confirmed that the money included Mr Toner's \$300,000 less any expenses for work to date.

z Mr Martin has since told Mr Toner that he was employed at Streaky during the period purportedly covered by the bank statement [22 March to 27 April 2015] and he was aware that CS Group had no funds in the bank at that time.

aa On 21 May 2015 Mr Edwards e-mailed Mr Toner a letter from Streaky, signed by Mr Clint Ebeyer unilaterally seeking to vary the building contract to:

- give liquidated damages of \$750 per week,

- amend the commencement date of the contract to 1 April 2015,
 - give the completion date as 7 January 2016,
 - reduce the contract price by \$10,000 (including GST).
- bb On 22 May 2015 Mr Edwards sent Mr Toner an e-mail with an updated schedule of works stating that contract had commenced on 1 April 2015 and that the job was one month ahead of schedule.
- cc On 23 May 2015 Mr Edwards e-mailed Mr Toner in his role as director of Raesty to say that he had paid Streaky \$37,500 in respect of the building contract and that \$12,500 was due to be paid to Streaky on completion of the next stage. He also advised that the remaining \$50,000 advanced to Raesty had been transferred to CS Group.
- dd On 23 May 2015 Mr Edwards sent Mr Toner a letter by e-mail which appears to have been signed by Suzi and Joseph Ebeyer.
- ee On 25 May 2015 Mr Martin told Mr Toner that Streaky owed approximately \$930,000 in unpaid income tax, payroll tax and superannuation. Mr Martin also said that Streaky owed creditors over \$1,000,000.
- ff On 26 May 2015 Mr Edwards sent Mr Toner an e-mail seeking a meeting to "go over the contract variations required to increase the warranty insurance limit."
- gg On 28 May 2015 Mr Toner met with Mr Edwards at his request. Mr Edwards asked Mr Toner to sign forms that would reflect items excluded from the original contract and now included by variation. Mr Edwards then said "as soon as they are provided to QBE to get insurance, they get torn up."
- hh Mr Edwards made excuses as to why the work had not progressed and stated the footings would be completed and inspected on 2 June 2015.
- ii Mr Edwards stated that the money advanced to CS Group and Raesty was not intended to pay for the first half of the works. Mr Toner replied that this was not the agreement.
- jj On 1, 3 and 6 June 2015 Mr Edwards sent Mr Toner e-mails reporting unexpected discoveries which further delayed the works.
- kk Since 3 June 2015 Mr Toner has received repeated requests from Mr Edwards to sign the contract variations presented to him on 28 May 2015.

5 Mr Toner concluded:

I am concerned that the purpose for which is the \$300,000 was provided, namely the building of a new home for me at the Otter Street property, appears to have been totally undermined. Other than demolishing my home, little if anything has been done at the site.

- 6 Mr Toner gave evidence that included a photograph of the Property showing that the previous building had been demolished, the soil appeared to be fairly flat but there was no sign of any work including excavation or set out. Mr Toner said no notices had been sent to him seeking extensions of time. He stated that the \$100,000 alleged loan to Raesty was for a period of three months and one day, it is overdue and no money has been repaid.
- 7 Mr Harrison submitted that the separate loan agreements were shams. He said it was possible that the whole purpose of the alleged loans had failed and that the money should be regarded as held on trust for the particular purpose of undertaking the building work – as described at paragraph 31 of the Points of Claim, *Quistclose*¹ trusts.
- 8 Mr Harrison referred me to paragraph 27 of the decision of Deputy President Aird in *Sirenes Pty Ltd v Inarc Architects & Ors* [2012] VCAT 1901 where she said (excluding references):

The principles to be applied when considering whether a freezing order should be granted were set out by Forrest J in *Zhen v Mo*[3] and repeated in *Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd*:

First, that a freezing order, by its very nature, is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a party's capacity to deal with his or her assets.

Second, the order is not designed to provide security for the applicant's claim. It is solely directed to preserving assets from being dissipated, thereby frustrating the court process.¹

Third, the applicant bears the onus both in satisfying the Court that the order should be continued and in satisfying the Court as to the amount which is to be the subject of the order.

Fourth, that an order can only be made on the basis of admissible evidence which supports the contentions made by the party seeking the order. Speculation and guesswork is no substitute for either the facts or inferences properly drawn from proved facts.

Fifth, that before such an order can be made it is necessary that the applicant establish –

- (a) an arguable case against the defendant; and
- (b) that there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the defendant's actions in either removing the assets or disposing or dealing with them so as to diminish their value.

Sixth, the balance of convenience must favour the granting of the freezing order.

¹ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567

Seventh, that there is no set process determining the exact nature of an order. The order will be framed according to the circumstances of the case.

Eighth, the applicant must establish with some precision the value of prospective judgment. The order should not unnecessarily tie up a party's assets and property.

Finally, there may be discretionary considerations which militate against the granting of a freezing order, such as delay in bringing the application on before the court or a lack of candour in the materials placed before the court.

- 9 Mr Harrison submitted that there was evidence that the Respondents had been untruthful about the work that had been undertaken on site and that the money paid by Mr Toner as loans appeared to have been used for other purposes.
- 10 I expressed concern that the building contract was with Streaky alone, and that the link between Mr Edwards and CS Group was tenuous. Mr Harrison referred me to exhibit MT 10 to the affidavit of Mr Toner showing the alleged Internet banking screenshot for CS Group and exhibit MT 15 which includes the alleged Westpac Business One electronic statement for 22 March 2015 to 27 April 2015. I was satisfied that Mr Edwards had the apparent authority of CS Group to send these documents to Mr Toner.
- 11 Mr Harrison agreed that if the loan agreements between Mr Toner and Raesty, and Mr Toner and CS Group were genuine, the link would be weak. He submitted that if they are truly shams the case is stronger.
- 12 I was satisfied that there was an arguable case against each of the Respondents, including that the sums had been paid to finance Mr Toner's project alone. I was satisfied that there was an arguable case and that money had been transferred or spent by the Respondents without either repayment to Mr Toner, or any visible work at the Property with the exception of demolition of the previous house and clearing the site.
- 13 I made the freezing order and made directions for Mr Toner to file and serve Points of Claim and any further affidavits, and for the Respondents to file and serve affidavits in reply. I adjourned the hearing to a further hearing, at 2:15pm on 22 June 2015.

POINTS OF CLAIM

- 14 The Points of Claim of 17 June 2015 include pleadings as follows:
 6. In or around August – September 2014... Edwards and... Martin for and on behalf of the respondent [sic] told Toner that if Toner paid:
 - (a) \$250,000 upfront, and
 - (b) a further \$250,000 in stages as required by a building contract,

then:

- (c) the overall price for building a new home at the property would be reduced to \$500,000, and
- (d) the \$250,000 up front payments would be held in a separate account and would be used to finance the first half of the building works.

...

- 7. In or around August – September 2014 Edwards and Martin for and on behalf of the respondents also asked Toner to pay Raesty the additional sum of \$50,000 upfront in respect of the initial building contract stage payments.

...

- 8. On or about 7 November 2014, Toner and Streaky entered into a contract to demolish the existing house at the property and build a new one.

...

- 10. Subsequently Toner made the following payments totalling \$300,030 to one or more of the respondents:

...

- 11. On or about 19 December 2014 Edwards for and on behalf of the respondents gave Toner:
 - (a) a purported loan agreement to Raesty in the amount of \$100,000 for the period of three months and one day, and
 - (b) a purported loan agreement to CS Group in the amount of \$200,000 for the period of two years and one day,in respect of the \$300,000 advanced by him as referred to in the preceding paragraph

...

- 13. The loan agreements are a sham.

PARTICULARS

The loan agreements appear to be loan agreements when in reality, they are a way of documenting and justifying the up-front payments of \$300,000 made by Toner. They were a way for the respondents to cover up the fact that in reality, they were receiving payments under the building contract in excess of the stage payments permitted by sections 11 and 40 of the [*Domestic Building Act*1995]

...

- 23. The respondents have had and retained the benefit of the payments of \$300,000.
- 24. In the premises, the respondents have been enriched by the sum of \$300,000.

...

28. Further and in the alternative, the \$300,000 paid was advanced with mutual intention of the applicant and the respondents that it should not become part of the assets of any of the respondents but should be used exclusively for the purpose of the building contract.

PARTICULARS

The intentions of the applicant and the respondents is to be inferred from:

- (a) the entry into the building contract,
 - (b) the wording of the building contract,
 - (c) the entry into the sham loan agreements, and
 - (d) the statements referred to in paragraphs 6 and 7 hereof...
29. The purpose of the building contract has failed.

PARTICULARS

- (a) Other than demolish Toner's home, Streaky has not undertaken any building work at the property.
 - (b) Streaky will be unable to complete the building contract within the time allowed for in the building contract.
 - (c) Toner has by these points of claim exercised his rights under s11(3) of the Act to terminate the building contract.
30. In the premises, there is implied a stipulation that the \$300,000 paid will be repaid to the applicant.

...

31. In the premises, the respondents hold the \$300,000 paid on trust for the applicant.

PARTICULARS

The trust is a trust of the kind referred to in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

FURTHER AFFIDAVITS

- 15 Mr Toner filed an affidavit by Mr Martin dated 17 June 2015. Streaky and CS Group filed an affidavit by Mr Clint Ebeyer dated 21 June 2015 and Raesty filed two affidavits by Mr Edwards dated 22 June 2015 and an affidavit by Mr Germano of 22 June 2015.

Mr Martin's affidavit

- 16 Mr Martin's affidavit confirmed Mr Toner's where there are references to Mr Martin. The affidavits are so similar that the same error appears with respect to the statement about demolition of the home. Both say that the

demolition commenced in December 2014 and was completed in March 2014.

17 Mr Martin also deposed in his affidavit that:

- i He has known Mr Edwards and Mr Clint Ebeyer for approximately 15 months. He is aware that Mr Edwards is employed as the business development manager by Streaky and Mr Ebeyer is the sole director of Streaky.
- ii He worked as a construction manager at Streaky between 24 March 2014 and 4 May 2015.
- iii Mr Martin and Mr Edwards told Mr Toner that if he paid \$250,000 up front and another \$250,000 in stages dictated by the building contract the overall price for the work would be reduced to \$500,000. Mr Edwards told Mr Toner that the up-front payment would be held in a separate account and would be used to finance the first half of the works. Mr Edwards also told Mr Toner that Mr Toner would receive loan contracts providing security in respect of the up-front payment. The security would terminate once the first half of the works was complete.
- iv Mr Martin confirmed that he received \$160,000 in cash from Mr Toner on 12 November 2014 and \$40,030 in cash from Mr Toner on 21 November 2014.
- v On 12 November and 21 November 2014 Mr Martin paid those sums into the account of CS Group on the instruction of Mr Edwards.
- vi No works were performed at the Property from late February 2015 to early May 2015. Streaky had not obtained appropriate warranty insurance as required under the building contract.
- vii In early May 2015 Mr Martin was concerned about the financial stability of Streaky including repaying money loaned by Mr Martin of \$433,754.33. Mr Martin wrote to Mr Clint Ebeyer and Mr Edwards resigning his employment with Streaky and seeking to formalise the loan.
- viii Mr Martin confirmed that he told Mr Toner on 5 May 2015 of Streaky's alleged financial difficulties and added that he had not been fired.

18 Mr Martin concluded:

I am aware that Edwards, Clint Ebeyer, Streaky and CS Group had entered into similar loan arrangements with numerous other individuals to purportedly obtain up front funds for the purposes of building contracts, and that those funds have been used for other purposes.

Mr Edwards' affidavit

19 Mr Edwards deposed in his affidavit among other things that:

- He is the sole director of Raesty.
- He has been employed by Streaky since 2009, and since 2014 has undertaken business development and project management for Streaky and Streaky Design Pty Ltd.
- Raesty was incorporated in late 2014 to supply labour and materials to Streaky and Streaky Design.
- Raesty has 10 full-time employees and 2 casual staff.
- On 26 November 2014 Raesty received \$100,000 to be held in its name from Mr Toner ("Toner Loan Funds").
- It was Mr Edwards' understanding that the Toner Loan Funds were available for Raesty's normal business expenses.
- He denies that he told Mr Toner in late 2014 that payments made upfront would be held in a separate account or that Mr Toner would be provided with security for the loan.
- The Raesty Loan Funds [sic] were immediately applied to pay "AW Developments" being amounts of \$41,000 and \$58,296.
- AW Developments is entirely controlled by Mr Martin. It supplied labour and materials to Raesty for Streaky projects, as did another entity associated with Mr Martin, AWM Builders Pty Ltd.
- Mr Edwards was aware that payments of \$160,000 and \$40,030 were deposited into the CS Group's bank account on 12 and 21 November 2014.
- Mr Edwards does not recall directing or instructing Mr Martin to deposit those funds.
- Delays at the Property occurred while Mr Martin was overseeing the project.
- In December 2014 and January 2015 Mr Edwards and Mr Clint Ebeyer became aware that Mr Martin's projects were incomplete and taking too long.
- In March 2015 "certain financial irregularities came to light".
- Mr Clint Ebeyer and Mr Edwards became aware that AW Developments and AWM Builders had invoiced both Streaky and Raesty for the same work.
- Mr Edwards tried to meet with Mr Martin on several occasions to discuss the irregularities.

- In late April 2015 Mr Martin was on leave and on the day he was due to return, Mr Edwards and Mr Clint Ebeyer received his letter of resignation.
- Mr Martin's failure to obtain a building permit caused delays to the project.
- Further difficulties came to light including the need to re-engineer the footings, protection works notices, protrusion of the neighbours footings into the property and issues concerning a blocked and cracked sewerage pipe.
- On 12 June 2015 Mr Edwards sent two e-mails to Mr Toner advising that the engineer said the final sign off on the project would occur that day and the surveyor would schedule the commencement of digging. Mr Edwards also advised that the concrete had been paid for and was ready to proceed. Later the same day Mr Edwards sent Mr Toner an e-mail attaching the completed certificate of compliance and structural designs for the Project.
- The freezing order has had a detrimental effect on Raesty's capacity to meet its obligations and undertake normal trading activities including paying employees' wages. Further, Raesty was expecting a payment of approximate \$40,000 from Streaky during the week commencing 15 June 2015.
- A creditor of Raesty is Therenderman.com.au Pty Ltd. Raesty attempted to pay its invoice by bank transfer but was unable to do so and it has threatened to wind up Raesty.

20 Mr Edwards' second affidavit of 22 June 2015 said relevantly:

I do not respond to every allegation made in the Toner and Martin affidavits. However, the absence of a response to any matter should not be taken as an admission of the allegation.

Affidavit of Mr Germano

- 21 Mr Angelo Germano is a solicitor at the firm of Kalus Kenny Intalex, solicitors for Raesty. Subject to the supervision of a partner of the firm, he has conduct of the proceeding.
- 22 Mr Germano's affidavit concerned the difficulties Raesty has had getting payment for their creditors. In consequence, orders were made on 22 June 2015 clarifying the obligations of banks.

Affidavit of Clint Lee Ebeyer

23 Mr Ebeyer deposed in his affidavit among other things that:

- He is a director of Streaky.
- His affidavit responds in part to the affidavits of Mr Toner and Mr Martin, but he does not respond to every allegation.

- Streaky is a construction company and enters agreements with clients to build homes and complete renovations. However, it does not hold significant assets or employ construction workers.
- Raesty provides labour for Streaky's projects and invoices Streaky.
- Mr Martin was employed by Raesty as a construction manager and chose which subcontractors to use and raised invoices to Raesty or Streaky (sometimes both) for work undertaken by those subcontractors.
- Mr Martin was able to approve any invoice or authorise payment on an invoice made out to Streaky or Raesty.
- Mr Ebeyer was aware that AW Developments invoiced Streaky or Raesty or both for work undertaken on Streaky jobs. Mr Ebeyer also said that Mr Martin had told him that AW Developments was his company.
- The name is inaccurate. The ABN number on the invoice is for "The Trustee for AW Developments Trust".
- Mr Ebeyer knew that Mr Edwards knew Mr Toner before the contract was entered.
- In November 2014 Streaky had some "cash flow challenges". At the time the building contract was entered into, Mr Martin negotiated a loan with Mr Toner and Mr Edwards organised the documentation.
- Mr Ebeyer confirmed that \$200,000 had been paid to CS Group. He said this was consistent with the arrangement Streaky had entered with Mr Toner.
- Much of the money was paid out to entities controlled by Mr Martin for the invoiced subcontract work.
- Mr Ebeyer said that Mr Martin resigned on or about 4 May 2015.
- Mr Ebeyer and Mr Edwards discovered that Mr Martin had not paid the building permit for the works at the Property and Mr Martin had not taken any action to arrange the permit.
- CS Group is not an asset-holding company and does not trade. Its assets are a loan of \$200,000 to Streaky and bank balance of \$9.03.
- The current bank balance of Streaky is \$7,764.44.

Discussion of evidence

24 Regardless of the eventual outcome of this proceeding, it is clear that Mr Toner has been poorly advised or careless for his own financial security when entering the contracts with the Respondents. He appears to have entered a building contract which, on his evidence, does not accurately reflect the relationship with the builder, Streaky. Mr Toner has not explained why he would sign a contract for \$250,000 when he believed the contract sum was \$500,000.

- 25 Further, on the face of the documents signed, Mr Toner has apparently made loans to Raesty and CS Group which do not entitle him to interest, do not say how they are to be paid back to him (or on to Streaky) and do not give him effective security.
- 26 Mr Clint Ebeyer's affidavit also causes significant concern. Of Mr Martin, he stated:
8. Wayne Martin was employed by Raesty as a construction manager working on the project which Streaky used Raesty to provide labour. Mr Martin had significant control over the building operations conducted for Streaky. Among other things, Mr Martin chose which subcontractors to use, and raised invoices to Raesty or Streaky (or sometimes, both) for work undertaken by those subcontractors.
 9. Mr Martin was, as construction manager, also able to approve any invoice and authorise payment on an invoice made out to Streaky or Raesty. [Emphasis added]
- 27 These two paragraphs demonstrate that the directors of Streaky and Raesty claim that they put Mr Martin into a position where he could give Streaky and Raesty subcontracts to his own companies or businesses, and then authorise payment to them.
- 28 At paragraph 10 of his affidavit, Mr Ebeyer stated that Mr Martin told him that AW Developments was Mr Martin's company. He did not say when Mr Martin told him this.
- 29 The business practices of Streaky in allowing Mr Martin to be in such a obvious position of conflict of interest are yet to be explained.
- 30 Based on Mr Edwards' affidavit, the business practices of Raesty appear to be no better. According to Mr Edwards affidavit, Mr Martin was in a position to pay his businesses from Raesty funds, apparently without any supervision or objection by Mr Edwards as director of Raesty between the date of alleged payment on 26 November 2014 and around Mr Martin's departure in early May 2015.
- 31 I do not make findings about the accuracy of the competing affidavits, but point out that if they are accurate they point to extraordinary carelessness on the part of the deponents. I note that the affidavits of Mr Martin and Mr Edwards make allegations about each other that, if accurate, are inconsistent with an innocent explanation.
- 32 The major factual difference between the parties is that Mr Toner claims the loans were exclusively for his project, whereas the Respondents claim they were general unsecured loans to Raesty and CS Group.

HEARING OF 22 JUNE 2015.

33 At the second hearing, on 22 June 2015, Mr Toner was again represented by Mr Harrison. Streaky and CS Group were represented by Mr K.J. Naish of Counsel and Raesty was represented by Ms M Schilling of Counsel.

Opportunity for the Respondents to object to me

34 At the commencement of the hearing I noted that it was not ideal for me to conduct a further hearing to continue or set aside the freezing order as I had conducted the earlier hearing in the absence of the respondents. I explained that there was no other member available to hear the matter at that time and asked counsel for the respondents whether they had an objection. Mr Naish expressed some reservations but gave consent and no reservations were raised by Ms Schilling.

35 I asked Mr Naish and Ms Schilling to inform me immediately if they thought that their clients were being disadvantaged.

36 Both expressed concern that there had been insufficient time to obtain a transcript of the hearing on 15 June 2015 and that they had not received an outline of argument from Mr Harrison.

Submissions by the Respondents

37 Paragraph 2 of Streaky and CS Group's written submissions is:

[They] resist the continuation of the [freezing] order [over their assets] for three principal reasons:

- (a) there is no evidence of the concealment or removing assets or disposing or dealing with them so as to diminish their value;
- (b) the balance of convenience does not favour the granting of the freezing order; and
- (c) there has been a lack of complete candour in the materials placed before the Tribunal in granting the order.

38 Paragraph 1 of Raesty's written submissions is similar. It opposes the continuance of the freezing order against it on the grounds that:

- (a) the Applicant has failed to establish a risk of dissipation;
- (b) the Tribunal should decline to exercise its discretion to continue the orders in light of:
 - i. material non-disclosures by the Applicant in the making of the ex parte application; and
 - ii. delay in making the application; and
- (c) the balance of convenience does not favour the continuance of the orders.

Elements for a freezing order

- 39 I accept the submission of Ms Schilling that it is premature to make findings of fact on issues such as whether the alleged loans are shams, and of Mr Naish, that it is premature to decide whether the loans create *Quistclose* trusts.

Substantial issue to be tried

- 40 All parties agree that there are a number of substantial issues to be tried.

Evidence of dissipation of assets

- 41 There is no evidence of a general dissipation of assets. The only possible dissipation of assets which could justify continuance of the freezing order is of the amounts loaned to Raesty and CS Group by Mr Toner, if those loans were to be isolated from the general funds of the borrowers, such as by virtue of a *Quistclose* trust.
- 42 The assets that attracted my attention on 15 June 2015 were the loan funds. I was satisfied that it was arguable that there were accounts from which Streaky could draw to finance Mr Toner's project before the stages were invoiced. I reject Mr Edwards' statement at paragraph 17 of his affidavit that:
- From Streaky or CS Group's perspective, there would be no point in entering into an agreement for that purpose because it would make no difference to the cash flow situation.
- 43 The contention that the loans were entities from which the contract was to be paid is supported by some of the subsequent text messages from Mr Edwards to Mr Toner, assuring Mr Toner that the money was in the bank. Of particular concern in this respect is the Westpac Business One electronic statement for 22 March 2015 to 27 April 2015 showing a balance of \$358,802.74. Mr Toner alleges this statement was sent to him by Mr Edwards.
- 44 As pointed out to me on 22 June, this statement, which is exhibited to Mr Toner's affidavit as MT15 has, in the bottom right corner "Statement No. 36". Statements from the same bank account were exhibited by Mr Edwards at CLE3 and CLE5. The former is a statement for 21 October 2014 to 21 November 2014. In the bottom right corner is "Statement No. 59." Six months, and six statement numbers later, the statement for 21 April 2015 to 21 May 2015 is "Statement No. 65".
- 45 It is hard to avoid the conclusion that someone has been less than candid concerning Statement 36, which, by date, falls between 59 and 65. However, it is not a matter for this interlocutory proceeding to determine that issue, and if there has been dishonesty, I am not in a position to do more than speculate who might have been responsible for it. As Forrest J said in *Zhen v Mo*, this is not a matter for speculation.

- 46 Further, I note Mr Naish's submission that evidence of subsequent discussions is weak (or irrelevant) evidence to support an interpretation of an earlier agreement.
- 47 Against the contention that the loans were to be preserved for this project are:
- The parties' failure to document the alleged arrangement.
 - Payments by Mr Toner made to parties other than Streaky, including an additional \$50,000 paid to Raesty.
- 48 Because it is premature to find that there was a particular asset to be preserved – the loans – it follows that I cannot find that there has been dissipation.
- 49 This is sufficient to support my decision not to continue the freezing order, and to set it aside. However I make the following observations:

Balance of convenience

- 50 I accept the evidence of the Respondents that the freezing order has disrupted their businesses. I cannot be satisfied that the balance of convenience favours Mr Toner.

Discretionary matters

Alleged delay in seeking a freezing order

- 51 Raesty's written submissions allege that Mr Toner became aware that the loan funds had been used to pay its operating costs on 5 May 2015, but it did not seek a freezing order until six weeks later.
- 52 As I said during the hearing, I do not consider that Mr Toner's alleged delay is unreasonable in circumstances where he alleges that he sought, and was given, reassurance as to his finances on a number of occasions.

Alleged lack of candour by the Applicant

- 53 Raesty referred to an alleged lack of candour by Mr Martin, who stated at paragraph 19 of his affidavit that:

The plaintiff's money... had been spent to clear other debts of the business... I know this to be true as it was common knowledge among the employees of Streaky at the time I resigned.

- 54 Raesty correctly states that Mr Martin has failed to disclose an important piece of information if its information is accurate that the payments to AW Developments and to AWM Builders Pty Ltd are to entities associated with Mr Martin. In those circumstances, substantial amounts of money would have been paid to Mr Martin's own companies or businesses. Nevertheless, Mr Martin's affidavit was not before me at the time the orders of 15 June 2015 were made.

- 55 The Respondents have pointed to Mr Toner's apparent failure to refer to emails from Mr Edwards on the Friday before the hearing on Monday 15 June 2015. I cannot be satisfied that Mr Toner was aware of those emails and do not take this matter into account.
- 56 Further, although Mr Edwards' e-mail of 12 June 2015 indicates that "as soon as we have the go ahead we will be straight into it", the "go ahead" that he appears to be referring to is a compliance certificate under regulation 1507 which supports a building permit, but is not the building permit. Mr Edwards did not mention a building permit in his affidavit and none was exhibited to his affidavit. It is surprising that Mr Edwards would suggest that Streaky could be "straight into it" if there is no building permit.
- 57 I also remark that there are a few items in Mr Toner's affidavit that appear to misinterpret the documents he received.
- 58 Streaky and CS Group submitted that Mr Toner alleged that he was sent an e-mail stating that Mr Martin was fired when this was inaccurate. The e-mail referred to is exhibit MT8 to Mr Toner's affidavit. It commences:
- We have recently had a change in our team at streaky with Wayne Martin departing effective immediately.
- It is true that Mr Edwards did not say Mr Martin had been fired, but he did not say that Mr Martin had resigned either. The overall impression of the email was that Mr Martin had left under a cloud.
- 59 I also note that at paragraph 28 Mr Toner states:
- On 11 May 2015 Edwards told me via text message that the set out on the works was being checked and excavations had started.
- The message, exhibited at MT14 states:
- Set out getting checked ASAP and excavations started.
- 60 The exhibits are capable of the interpretations given to them by Mr Toner, but, with respect to paragraph 28, it would be surprising if excavation started before the set out had been checked – another interpretation is that both were still to happen "ASAP".

CONCLUSION

- 61 Because I am not satisfied that there is evidence of actual or intended dissipation, I decline to extend the freezing order. I set it aside, effective 2:00pm on 24 June 2015.

COSTS

- 62 At the request of the parties, I reserve costs with liberty to apply.

SENIOR MEMBER M. LOTHIAN