IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-1201
[2014] NZHC 2075

BETWEEN	FAI MONEY LTD Plaintiff
AND	EDWARD ERROL JOHNSTON First Defendant
	GAVIN CRAWLEY AND RICHARD ANTHONY JOHNSTON Second Defendants
	SEABREEZE TRUSTEES LTD AND JOHNSTON ASSOCIATES TRUSTEES LTD Third Defendants

Hearing:	19 June 2014
Appearances:	B Gustafson for Plaintiff No appearance for First Defendant S I Perese for Second Defendants No appearance for Third Defendants
Judgment:	29 August 2014

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
29 August 2014 at 3.30 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Macky Roberton Ltd, Auckland
Walters Law, Auckland

[1] On 17 April 2014, Venning J granted an ex parte application for orders freezing assets owned by the second defendants. The application sought orders that the second defendants not dispose of, dissipate the existing equity in, or further encumber, by way of mortgage, lien or additional borrowings using existing securities the properties described in:

> Certificate of Title NA42C/75 (North Auckland Registry); and
>
> Certificate of Title 287849 (North Auckland Registry).

[2] Venning J's order was made until further order of the Court.

[3] The plaintiff now seeks continuation of the order, which the second defendants oppose. The first defendant is bankrupt, and the third defendants are in liquidation. The first and third defendants have taken no steps in the proceeding. Only the second defendants have appeared in opposition to the continuation of the orders.

[4] Before turning to the background and the issues, it is appropriate to explain the steps taken in the litigation to date.

Previous steps

[5] The claim was commenced in March 2012. No statements of defence were filed. Judgment was sealed on 14 August 2012, and bankruptcy notices were issued against the second defendants.

[6] However, on 18 February 2014, the judgment and the bankruptcy notices were set aside.[1] Associate Judge Christiansen held that the judgment had been irregularly obtained because an amended statement of claim had been filed and not served. The Judge considered that the second defendants had a possible defence to the claim, and that allegations made against them of dishonest and fraudulent

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1 *FAI Money Ltd v EE Johnston and Ors* [2014] NZHC 193.

behaviour could not properly be sustained without a further and better inquiry than was possible on the affidavits filed.

[7] Following the judgment of 18 February 2014, the plaintiff made the without notice application for freezing orders. Venning J accepted on the evidence before the Court that the plaintiff had a good arguable case and that the second defendants had assets to which the order could apply.[2] On balance, he was satisfied that there was a real risk of dissipation of assets by the second defendants if an interim order was not made.[3]

[8] The plaintiff's without notice application had been preceded by an on notice application for freezing orders, to which a notice of opposition was filed on 20 May 2014.[4] Although nothing turns on it I doubt that Mr Gustafson was correct when he filed his memorandum "seeking continuation of temporary orders". Rather, I think the position is that the application for freezing orders is now advanced on notice and it is that application which is now to be determined.

The facts

[9] The plaintiff is a finance company. The second defendants are the trustees of trusts called the Puketaha Trust and the Puketaha No.1 Trust. Until 20 February 2012, they were the registered proprietors (as trustees) of land at 35 Puketaha Road.

[10] In December 2009, the plaintiff loaned the sum of $300,000 to the first defendant, Mr Edward Johnston. The second defendants guaranteed the loan as the trustees of the Puketaha Trust and the Puketaha No.1 Trust. The second named second defendant, Mr Richard Johnston, is the first defendant's brother. Where necessary to avoid confusion I will refer to them as Edward Johnston and Richard Johnston.

[11] The first named second defendant, Gavin Crawley, is Edward Johnston's father-in-law.

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2 *FAI Money Ltd v Johnston* [2014] NZHC 827, at [8].
3 At [13].
4 On the same day the second defendants filed an amended statement of defence.

[12] There was a loan agreement, dated 23 December 2009. Under the loan agreement Edward Johnston was the Borrower, and the second defendants were the "Guarantor". The second defendants signed the agreement twice, as trustees respectively of the Puketaha and Puketaha No.1 Trusts. The second schedule contained a number of general terms and conditions. They included under the heading "Representations and Warranties" clause 7.1 which provided:

> 7.1 **General**: The Borrower and each Guarantor represent and warrant that:
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> (a) **Nature and Enforceability**: this Agreement and the Securities constitute the legal, valid and binding obligations of, and are enforceable against the Borrower and each Guarantor in accordance with their terms;
>
> (b) **Actions and Proceedings**: there are no pending or threatened actions or proceedings affecting the Borrower or any Guarantor before any court or other body which may adversely affect the Borrower's or any Guarantor's ability to perform and observe the Secured Obligations;
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> (c) **Financial Information**: the financial information most recently forwarded to FAI disclosing the financial condition of the Borrower and each Guarantor presents a true and fair view of the condition of the relevant parties at the date of that information, and there has been no substantial adverse change in that condition since the date of that information;
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> (d) **No Resulting Breach**: the execution delivery and performance of this Agreement and the Securities does not and will not contravene any legal, contractual or other restriction or obligation binding on the Borrower or any Guarantor; and
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> (e) **Requirements**: they have complied with all statutory, contractual and other legal requirements relating to the business or undertaking carried on by each of them, and have obtained all consents required to enable the performance and observance of the Secured Obligations and that all such consents continue to be of full effect.

[13] Another clause in the second schedule to the loan agreement was clause 14.4 which provided as follows:

> 14.4 **Trustees**: Where the Borrower or any Guarantor is or is described (in this Agreement or elsewhere) to be a trustee of a trust, each such party warrants that:

(a) **Authority**: they have the power to enter into this Agreement in their capacity as a trustee of the trust, and do so for the benefit of and for the purposes of the trust:

(b) **Capacity**: they enter into this Agreement both in their personal capacity and as a trustee of the trust:

(c) **Recourse**: (in addition to the charge created by this Agreement) FAI will have full recourse to their personal assets, subject only to any trustee limitation provision included in this Agreement or the Securities:

(d) **Negative Covenants**: they will not permit without the prior written consent of FAI:

(i) the terms and conditions of the trust to be varied in any way;

(ii) any of the trust's assets to be disposed of, transferred, distributed, loaned or advanced otherwise than in the normal course of the business of the trust;

(iii) the capital of the trust to be distributed to or on behalf of the beneficiaries of the trust; nor

(iv) the trust to be determined or (to the extent of their powers) new trustees to be appointed;

in each case during the currency of this Agreement:

(e) **Liability on Retirement**: each trustee will remain liable under this Agreement after they cease to be a trustee until released in writing by FAI;

(f) **Limitation of Trustee Liability**: Notwithstanding any trustee limitation provision included in this Agreement or the Securities, FAI will have recourse to the personal assets of any trustee entering into this Agreement where FAI is unable to recover any part of the Loan, any Fees and any interest (whether accrued or compounded) under this Agreement or the Securities as a result of any breach of trust by that trustee, solely or together with any person, any lack of capacity, power or authority of that trustee to enter into this Agreement or to incur any indebtedness for the Loan, any Fees and any interest (whether accrued or compounded), or any dishonesty of that trustee.

[14] The guarantee of the loan by the Puketaha Trust was recorded in the following documents, all of which were dated 21 December 2009:

(a) A Deed of Guarantee and Indemnity.

(b) Trustee's certificate.

(c) Acknowledgement by guarantor.

(d) Solicitors' certificate.

[15] The second defendants were described as the "Guarantor" under the Deed of Guarantee and Indemnity. By clause 6.1.1 of that Deed, they undertook to FAI as the Lender that they would:

> **6.1.1 Swanson Road Property**: not encumber in any way, including by way of a mortgage or other charge, the property situated at 35 Puketaha Road, Swanson as comprised of and described in Certificate of Title 164285;

[16] Clause 18 of the Deed of Guarantee and Indemnity was headed "Trustee Limitation" and provided as follows:

> **18.1.1 Limitation**: No Trustee will be liable to pay or satisfy any obligations or liabilities under this Deed other than out of the assets of the Puketaha Trust in respect of which that Trustee has entered into this Deed and in no circumstances will that Trustee be called upon or liable to satisfy any of those obligations or liabilities out of its personal assets.
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> **18.1.2 Enforcement**: The Lender may only enforce its rights against a Trustee to the extent of that Trustee's right of indemnity out of the assets held by it in respect of the Puketaha Trust and provided that, if a Trustee acts fraudulently, negligently, or in breach of trust with a result that:
>
> (a) that trustee's right of indemnity, exoneration or recoupment of the trust property of the Puketaha Trust;
>
> (b) the actual amount recoverable by that Trustee in exercise of those rights, is reduced in whole or in part or does not exist, then to the extent that such right or the amount so recoverable is reduced or does not exist, the Trustee may be personally liable.

[17] The guarantee of the loan by the Puketaha No.1 Trust was recorded in equivalent documents dated 23 December 2009 and again executed by the second defendants as the trustees of the Trust.

[18] In June 2011, Edward Johnston requested an extension of the time for repayment of the loan. FAI agreed to an extension on a basis that was recorded in

documents dated 4 August 2011. These documents included a further Deed relating to the loan agreement, an admission of claim, the trustees' certificate and a solicitors' certificate.

[19] The Deed relating to the loan agreement was again signed by Edward Johnston as the "Borrower" and by the second defendants as the "Guarantor". The Deed recorded that the loan balance owing under the original loan agreement as at 20 June 2011 was $386,267.96, and that interest continued to accrue on that sum in accordance with clause 5 of the loan agreement. The Deed contained provisions for repayments of principle in reduction of the amount owing and relevantly provided at clause 6.5:

> **6.5** **Limitation of Liabitility**: Gavin Crawley and Richard Anthony Johnston have entered into this Deed as independent trustees in that they have warranted to FAI they have no beneficial interest in the assets of the Trust and as such their liability under this Agreement is limited to the extent that the assets of the Trust of which it [sic] is a trustee (or assets that would be the assets of the Trust but for a breach of Trust by it or its dishonesty) are available to meet their liability under this Deed.

[20] The first and second defendants also signed an admission of claim, in which the same sum as referred to in the Deed was admitted as "jointly and severally due and owing to FAI Money Ltd from us". The obligation in respect of interest was also recorded. There was a provision equivalent to clause 6.5 of the Deed referring to the position of the second defendants.

[21] The plaintiff relies on an affidavit by Kerry Finnigan, a consultant to the plaintiff and responsible for its management and administration since 2009. Mr Finnigan said in his affidavit that prior to making the loan, FAI was advised by Edward Johnston that the Swanson property was unencumbered. That was confirmed in writing in a statement of assets and liabilities dated 24 April 2009, which was attached to Mr Finnigan's affidavit. The statement purported to record the assets and liabilities of both Edward Johnston and Wendy Ruth Johnston, his wife. Amongst the assets referred to under the heading "Real Estate" was the following entry:

The Puketaha Trusts

Property @ 35 Puketaha Road, Swanson (2 ¼ acres) $1,500,00.00

[22] Also included in the statement under the heading "Liabilities" was an entry in the following terms:

Property @ 35 Puketaha Road, Swanson NIL

[23] The total assets recorded in the schedule were valued at $20,015,500.00. The total liabilities were stated as $8,868,500.00. This gave a figure for "net assets (unencumbered)" of $11,147,000.00.

[24] The plaintiff wrote to Edward Johnston on 15 December 2009. Its letter was a "Letter of Offer" and recorded that the borrower would be Edward Johnston, and the guarantors would be the trustees of the Puketaha Trust. There were provisions recording that the loan was for the principal amount of $273,000, with a "Facility Fee" of $27,000 and an interest rate of 17.5 per cent per annum, with an additional eight per cent payable in case of default. The loan was to be subject to special conditions which included, as clause 8, the following:

> By signing and accepting this Letter of Offer, the trustees of the Puketaha Trust undertake not to encumber the property situated at 35 Puketaha Road, Swanson owned by the Trustees of the Puketaha Trust (Title Reference 164285 (North Auckland Registry) without the prior written consent of FAI.

[25] Special Condition 7 required provision of a current title search for that property.

[26] It was Mr Finnigan's evidence that on the basis of Edward Johnston's advice that the Swanson property was unencumbered, as reflected by the statement of assets and liabilities, that clause 6.1.1 was inserted into the Guarantees.[5] As can be seen, that clause contained an undertaking by the "Guarantor" that it would not encumber the property "in any way, including by way of a mortgage or other charge". By an e-mail dated 18 December 2009 the plaintiff's solicitor, Buddle Findlay, noted that clause 6.1.1 had been inserted:

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5 See [15] above.

> …to reinforce the undertaking given by the Guarantors under the Letter of Offer in relation to the property…

[27] It should also be noted that pursuant to clause 14.4(d) "each party" (i.e. both the first and second defendants) warranted that they would not permit without the prior written consent of the plaintiff:

> Any of the trust's assets to be disposed of, transferred, distributed, loaned or advanced otherwise than in the normal course of the business of the trust.

[28] That obligation was to apply during the currency of the Agreement.

[29] However, at the time of the loan, the property had already been mortgaged to Westpac. Mr Finnigan noted that the original priority limit under the mortgage, which was registered on 22 October 2004, was $720,000. A variation in 2007 increased that limit to $1,100,000. Consequently, when the plaintiff made its loan in 2009 a Westpac mortgage was registered on the title with a priority limit of $1,100,000. The plaintiff concedes that a copy of the relevant title was forwarded to its solicitors, Buddle Findlay in accordance with the condition of the loan that a copy of the title be provided. However, the existence of the Westpac mortgage was overlooked by both Buddle Findlay, and an in-house legal executive employed by FAI.

[30] In December 2011, Edward Johnston provided FAI with an updated statement of assets and liabilities showing a marked deterioration in his financial position. Assets were listed totalling $14,324,000. This included $950,000 in respect of the property at Puketaha Road. However, total liabilities were stated as $17,413,000 and under the heading "Real Estate", there was reference to the property at Puketaha Road as being encumbered in the sum of $3,700,000 to Westpac, $225,000 to a party referred to as "Reyland" and $80,000 to Dorchester.

[31] In an affidavit dated 1 October 2013, Richard Johnston said that:

> The property was offered to Westpac as collateral security for loans given by Westpac over properties owned by Lauregan Holdings Ltd and Lauregan Investments Ltd. This was well before the FAI loan. Both Lauregan entities were connected to the first defendant. I am personally unaware of any request from FAI asking about the nature and scope of the Westpac security.

[32] Clearly, the sum owed to Westpac in December 2011 was far in excess of the priority sum in the Westpac mortgage when the plaintiff made the loan.

[33] A caveat protecting the interests of the Reylands was lodged on 21 August 2012. The caveat, which was attached to Mr Finnigan's affidavit, stated that it was in respect of an interest as a mortgagee under an agreement to mortgage made between the registered proprietor as mortgagor and the caveator as a mortgagee dated on or about 1 June 2005. Consequently, at the time the plaintiff made the loan, not only had the property been mortgaged to Westpac, but there was an agreement to mortgage never disclosed to the plaintiff.

[34] Mr Finnigan also attached to his affidavit a search of a mortgage in favour of Dorchester Finance Ltd. On 9 March 2011 the second defendants granted a mortgage in favour or Dorchester Finance Ltd with a priority sum of $116,000 plus interest and costs. On 3 August 2011 a replacement mortgage was granted with a priority sum of $70,335.84. Clearly, those mortgages were both granted after the plaintiff's loan was made.

[35] Payments were not made as required under the loan agreement and a notice of demand was sent to each of the first and second defendants on 30 November 2011. The notice demanded payment in the sum of $410,499.13 on or before 4.00 pm on 2 December 2011. Then, on 13 December 2011 solicitors for the plaintiff wrote to both of the second defendants. The letter was in the following terms:

> We refer to our letter dated 30 November 2011, enclosing by way of service a Notice of Demand from FAI Money Limited in respect of Mr Edward Johnston.
>
> In this regard, clause 6.1.1 of the Deed of Guarantee and Indemnity given by both the Puketaha No.2 Trust and the Puketaha Trust, undertook at clause 6.1.1 "*not to encumber in anyway including by way of a mortgage or other charge, the property situated at 35 Puketaha Road, Swanson, as comprised and described in Certificate of Title 164285*". However, it appears in direct contravention of that undertaking, the Trustees have encumbered that property and we **enclose** Certificate of Title 164285 in that regard.
>
> My client regards this as a breach of the Deed for which the Trustees will be personally liable.
>
> Further, under clause 14.4, the Trustee gave a negative covenant that they would not permit any of the Trust's assets to be disposed of, transferred,

> distributed, loaned or advanced, otherwise in the normal course of the business of the Trust, nor for the capital of the Trust to be distributed to or on behalf of the beneficiaries of the Trust.
>
> As Trustees, you provided these covenants and will full knowledge of the same, acted in direct contravention of those covenants.
>
> Unless the amount demanded in the Notice of Demand is paid in full, my client intends to pursue you personally for any loss arising out of your breach of the covenant given in both the Loan Agreement and the Guarantee as a foresaid.

[36] Next, on 20 February 2012, the second defendant transferred the property to Seabreeze Trustees Ltd and Johnston Associates Trustees Ltd, in accordance with an agreement for sale and purchase dated 8 January 2011. The transfer was in fact signed by Edward Johnston, claiming to be the "transferor representative" and certified by him in that capacity. He also certified on behalf of the transferee. Seabreeze Trustess Ltd has it registered office at Johnston Associates Chartered Accountants Ltd which is Richard Johnston's accountancy practice. Johnston Associates Trustees Ltd is another company which has its registered office at the same address. Richard Johnston is the sole director of that company. Mr Logan Granger is a director of Johnston Associates Chartered Accounts Ltd.

[37] In a second affidavit sworn on 11 February 2014, Richard Johnston said:

> As I understand it the cause or trigger for the sale of 35 Puketaha Road was not the Reylands, or Dorchester Finance "obligations", but the default to Westpac leading to Westpac calling in a number of collateral mortgages over this and other properties.

[38] He made no attempt to distance the second defendants from the transaction and so I infer that it occurred with the second defendants' agreement.

[39] In that affidavit, Richard Johnston also explained that the mortgage to Dorchester Finance Ltd, was repaid directly by a trust, the Ulluru Trust, of whom the beneficiaries were Wendy Johnston and the children of Edward Johnston and her. Seabreeze Trustees Ltd and Johnston Associates Trustees Ltd, according to Richard Johnston, are the independent corporate trustees of Ulluru Trust. Richard Johnston confirmed that he was a director and shareholder of Johnston Associates Trustees Ltd, but said that he was not a shareholder or director of Seabreeze Trustees Ltd.

The Trust was settled on 1 February 2011. The purchaser under the agreement for sale and purchase, under which the property was transferred to the third defendants, was "Millbrook Road Developments Ltd and/or nominee". I infer that the third defendants were nominated.

[40] The sale price achieved on the sale of the property was $900,000. It was a sale by private treaty to a trust connected with Edward Johnston. There was evidently no payment of real estate agency fees and no evidence has been given that it was marketed so as to maximise the price obtained. As Mr Gustafson pointed out, the price for which the property was sold was $600,000 below its value claimed by Edward Johnston in his statement of assets and liabilities dated 24 April 2009.

[41] Of the net proceeds of sale, some $898,679 was used to repay debt to Westpac and so discharge the mortgage over the property. Presumably funds must have also been available from another source to meet the debt to Westpac but it is not clear what the source of funds was.

Approach

[42] It was common ground that in order for the freezing orders to be continued, the plaintiff must demonstrate that it has a good arguable case on its substantive claim, that there are assets to which the order can apply and that there is a real risk that the respondent will dissipate or dispose of those assets.

[43] The main issue in contention is whether the plaintiff has a good arguable case. Mr Perese did not dispute that there were assets to which the order can apply. Nor did he focus on the issue of the risk of dissipation.

The issues

[44] Mr Gustafson noted that the financial statement of 24 April 2009 contained misinformation about the financial position of the first and second defendants in as much as the Puketaha Road property did not have a net value of $1.5 million, the liabilities encumbering the property were not "nil": at least $3 million was owed to

Westpac and a claimed $225,000 to the Reylands. There was no record of any agreement to mortgage granted over the property to the Reylands.

[45] Under clause 7.1(c) of the loan agreement, the second defendants (together with the first defendant) warranted that the financial information that had been forwarded to FAI presented a true and fair view of the condition of the parties at the date of that information, and that there had been no substantial adverse change. Mr Gustafson submitted that the second defendants were in breach of that representation and warranty.

[46] Further, under clause 6.1.1 they under took not to encumber the property in any way including by way of mortgage. In breach of that obligation, even if the pre-existing mortgage to Westpac was set on one side, there had been an undisclosed agreement to mortgage in respect of the Reyland transaction.

[47] Mr Gustafson relied also on clause 14.4(d) and the warranty contained in sub-clause (ii) not to dispose of any of the trust's assets otherwise in the normal course of the business of the trust. He submitted that the circumstances surrounding the sale of the property to the third defendants were such that the sale could not have occurred in the "normal course of the business of the trust".

[48] The plaintiff also relies on the Deeds of Guarantee and Indemnity, dated 21 and 23 December 2009, in which the second defendants guaranteed payment of the loan and indemnified the plaintiff in respect of the loan. They undertook to the plaintiff that they would not encumber the property in any way, including by way of a mortgage or other charges. Although the second defendants' liability under the guarantee was limited to the assets of the Puketaha Trust and the Puketaha No.1 Trust, under clause 18.1.2 that limitation did not apply where the plaintiff could not recover its debt from the trust assets due to the "fraud or negligence" of the second defendants.

[49] Mr Gustafson submitted that there were circumstances here on which the Court could conclude that the second defendant had acted fraudulently or negligently and that, as a consequence of their actions, when the property was sold, nothing was

available to repay the plaintiff's debt. In all the circumstances, the plaintiff contends that there are strong arguable cases against both the first and second defendants.

[50] In response, Mr Perese submitted that the information contained in the statement of assets and liabilities related to Edward Johnston and his wife as at 24 April 2009. Further information was provided by Edward Johnston in December 2011. He argued that neither of those statements of financial position had been provided to the plaintiff by, or even on behalf of the second defendants. He contended that it would strain the ordinary meaning of clause 7.1(c) of the loan agreement to argue that the clause would put the second defendants in the position of warranting the information provided by the borrower. He argued that the plain meaning of clause 7.1(c) was that both the borrower and guarantor warranted "their own or their respective information".

[51] I consider Mr Perese's submission on this point is probably correct. I was not in fact referred to information that had been provided by the "Guarantors" as to their financial position. However, the wording of the clause is such that it seems to contemplate that such information had been provided. I think the better view is that the clause should be interpreted on the basis that the warranty given by the "Borrower" is a warranty in relation to the Borrower's financial position and that the warranty given by "each Guarantor" is a warranty in respect of that person's financial position. I will proceed on that basis for the purposes of the present application without formally deciding the issue.

[52] Another point emphasised by Mr Perese concerned the Westpac mortgage, the existence of which was disclosed on the title. The property was already the subject of a mortgage when the loan agreement was entered made. He submitted that the plaintiff must be taken to have known that there was a priority interest registered on the title in the sum of $1.1 million. Once again, I think there is force in this submission but for present purposes I do not need to determine the point.

[53] In my view, the plaintiff is on stronger ground with respect to the alleged breaches of the obligation not to dispose of the property in clause 14.4(d)(ii). The whole circumstances surrounding the sale of the property to the third defendants are

suspicious, as is the very low price obtained for the property and the apparent absence of any real attempt to market it. All this has to be seen in the context of the statement made by Edward Johnston that its value in April 2009 was $1.5 million. Mr Perese referred to the fact that the market was falling after April 2009, but in the absence of any valuation evidence, or other evidence indicating that the sales process that took place when the property was transferred to the third defendants was robust, the dramatic fall in the value of the property is essentially unexplained. It is not without significance that Richard Johnston made no real effort to explain why the purchase price was so low. Given the connections between all three defendants the absence of such explanation is telling.

[54] I accept, as Mr Perese pointed out, that the sale and purchase agreement was dated 8 January 2011, although the transaction did not in fact settle until 9 February 2012. However, I do not think that that advances the second defendant's position significantly. If, as must have been the case, the second defendants knew that there was an agreement for sale and purchase of the property, the question arises as to why they were prepared to enter into an agreement with the plaintiff in terms which included an obligation not to permit the sale of any of the Trusts' assets otherwise than in the normal course of the business of the Trust. It must have been obvious that the plaintiff was relying on the retention of the property as security for the loan. The fact that the second defendants were prepared to participate in the agreements made with the plaintiff in those circumstances in my view raises a real issue as to whether or not personal liability might arise as contemplated by clause 18.1.2 of the Deeds of Guarantee and Indemnity.

[55] Mr Perese also purported to rely on a defence of *volenti non fit injuria*, based on the fact that the Westpac mortgage had been disclosed by virtue of it being on the certificate of title. However, on the view I have taken about the circumstances surrounding the sale of the property, it is preferable not to determine that issue at this stage.

[56] In the circumstances, I have concluded that there is a good arguable case sufficient to justify making the freezing order. The fact that there are assets to which the order can apply is not in dispute. The circumstances surrounding the sale of the

property to the third defendants are such that there is a legitimate concern about the possibility of dissipation, given the absence of any undertakings by the second defendants.

[57] In the result I consider that the plaintiff is entitled to the freezing order sought pending trial of the plaintiff's claim.

Result

[58] I grant the application accordingly. The freezing order is to apply pending judgment in the substantive claim, or further order of the Court.

[59] The plaintiff is entitled to costs in accordance with category 2 band B.

[60] The Registrar should now set this matter down for a case management conference so appropriate directions may be made to bring the substantive proceeding to trial.