IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

No. 04463 of 2010

BREAK FAST INVESTMENTS PTY LTD
(ACN 090 648 990) & ORS — Plaintiffs

v

GRAVITY VENTURES PTY LTD
(ACN 117 153 509) & ORS — Defendants

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| JUDGE: | VICKERY J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 26–27 February 2013 |
| DATE OF RULING: | 27 February 2013 |
| CASE MAY BE CITED AS: | Break Fast Investments Pty Ltd v Gravity Ventures Pty Ltd |
| MEDIUM NEUTRAL CITATION: | [2013] VSC 89 |

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PRACTICE AND PROCEDURE – Freezing order – Application for variation to pay funds held in a specified account in reduction of a pre-existing debt - Whether proposed variation in the interests of justice – Freezing order to be administered subject to the interests of justice and consistently with the purposes for which it was originally made – Application for the variation dismissed on the ground that it would not be interests of justice.

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Plaintiffs | Mr D Hyde | Foster Nicholson Jones Lawyers |
| For the Second Defendant | | JBT Lawyers |

HIS HONOUR:

**Background**

1 This is an urgent interlocutory application made by the Second Defendant, C & O Voukidis Pty Ltd ("C & O Voukidis"), to further vary the freezing order made by the Supreme Court of New South Wales on 12 July 2010 (the "Freezing Order") pursuant to the summons issued and dated 22 February 2013. The Freezing Order since it was first made has been the subject of a number of extensions and variations made by this Court following the transfer of the proceedings to this State.

2 C & O Voukidis sought to further vary the Freezing Order to the effect that the moneys held in the interest bearing account be paid to either the:

(1) Supreme Court of New South Wales in Proceeding No.2012/82867; or

(2) National Australia Bank in reduction of a specified NAB Portfolio Facility in the names of Christos and Olga Voukidis.

In the course of argument, Mr Bowers-Taylor, who appeared for C & O Voukidis made it clear that it was the second of these options that was primarily sought in the present application by C & O Voukidis.

*Paragraph 10(d) of the Freezing Order*

3 Paragraph 10(d) of the Freezing Order made on 12 July 2010 by the Supreme Court of New South Wales is pertinent. It provides as an exception to the order as follows:

> 10. This order does not prohibit you from:
>
> (d) in relation to matters not falling within (a), (b) or (c), dealing with or disposing of any of your assets in discharging obligations bona fide and properly incurred under a contract entered into before this order was made, provided that before doing so, you give the applicant, if possible, at least two working days written notice of the particulars of the obligation.
>
> [Emphasis by underlining added]

4 It was submitted by the Second Defendant that paragraph 10(d) of the Freezing Order applied. It submitted that monies of C & O Voukidis should be paid out of a frozen fund in order to discharge (or partly discharge) an obligation as to payment which the

company incurred under the Guarantee. It was further submitted that the Guarantee was a contract entered into by C & O Voukidis prior to the making of the Freezing Order.

*New South Wales Supreme Court Proceeding – National Australia Bank Limited v C & O Voukidis Pty Ltd & Ors No 2012/00082867*

5 Proceedings have been commenced in the Supreme Court of New South Wales. Proceeding No.2012/82867 involves claims made by the National Australia Bank Limited ("NAB") against C & O Voukidis, including Mrs Olga Voukidis ("Mrs Voukidis"), and Mr Nicholas Anastasopoulos seeking possession of properties.

6 These properties include a property situated at 37 Thompson Street, Drummoyne in New South Wales ("the Drummoyne Property"), pursuant to the terms of mortgages held by the NAB over them. The Drummoyne property is owned by Mrs Voukidis and is the family home of Mr Christos Voukidis ("Mr Voukidis") and Mrs Voukidis.

7 A summary judgment application is to be heard on 28 February 2013 in the Supreme Court of New South Wales, hence the urgency of the present application and its disposition.

*The Belmore Property*

8 Pursuant to one of the Freezing Order variations, following the sale of a property situated at 60 Belmore Street, Burwood, New South Wales (the "Belmore Property"), the balance of the proceeds of that sale were directed by the Court pursuant to a variation of the Freezing Order to be deposited into an interest bearing term deposit account, held by the NAB in the joint names of the NAB and C & O Voukidis (the "Term Deposit Account"). The balance of the proceeds deposited into the Term Deposit Account amounted to $1,354,057.17. Interest has since accrued on that principal sum.

9 The Belmore Property, according to the title search exhibited to the affidavit of Ms Clare Long, dated 25 February 2013 was owned by C & O Voukidis. The moneys

held in the Term Deposit Account, pursuant to the Freezing Order as varied, were therefore the company's moneys.

*The First Portfolio Facility*

10 On or about 14 December 2007, the NAB agreed to make available a portfolio facility to Mr and Mrs Voukidis with a limit of $2,450,000 (the "First Portfolio Facility"). The First Portfolio Facility was evidenced by a document entitled "NAB Portfolio Facility Agreement Details". The account number for the transaction was 751355427. It was executed by both Mr and Mrs Voukidis as the customers.

11 The First Portfolio Facility was supported by securities which included a guarantee to the limit of $2,450,000 given by C & O Voukidis (the "Guarantee"). The First Portfolio Facility did not have a designated end date, but was noted to be subject to annual review on 31 December 2008 and each anniversary of that date. It was also evidenced by a document entitled "NAB Portfolio Package Customer Agreement Incorporating the NAB Portfolio Facility Agreement Terms and Conditions". Part 2, section 5 of that document is entitled "Cancellation of the Facility and Annual Reviews" and is in the following terms:

> 5.1 We may cancel this facility at any time whether or not you are in breach of this agreement. Where the facility is cancelled:
>
> (a) we will give you notice of the cancellation as soon as practicable;
>
> (b) the portfolio limit and any sub account limit will reduce to zero; and
>
> (c) you must repay any unpaid balance in any linked subaccount and any other money owing under this agreement immediately.
>
> 5.2 If each of you agree, you may cancel the facility at any time by cancelling the portfolio limit or giving us notice. If you cancel the facility, you must immediately pay out any unpaid balance in any linked sub account and any other money owing under this agreement.
>
> 5.3 If any of you agree to cancel your Customer Agreement, we may cancel this facility and the provisions in this clause will apply.
>
> 5.4 We may conduct an annual review of your operation of the facility and your financial position. It will be conducted prior to or on the annual review date shown in the Details.

*The Second Portfolio Facility*

12 On or about 29 October 2010, a new arrangement was entered into between the NAB and Mr and Mrs Voukidis (the "Second Portfolio Facility").

13 The principal changes were:

(a) the introduction of a registered mortgage over the Drummoyne Property;

(b) a reduction in the limit of the facility from $2,450,000 to $1,840,000; and

(c) the release of the following securities with respect to the facility:

(i) the registered mortgage given over a property at 344 Elizabeth Drive, Vincentia, New South Wales (the "Vincentia Property"); and

(ii) the registered mortgage over a property at 5 Appian Way, Burwood, New South Wales (the "Appian Property").

14 The Second Portfolio Facility was given a new account number by the NAB, namely 751360306. It is to be noted that the Freezing Order in the present proceeding was made by the Supreme Court of New South Wales on 12 July 2010, some time before the Second Portfolio Facility came into operation.

**Leave for new argument**

15 Following the close of argument on the first day of the hearing, and indeed after the Court delivered a preliminary ruling, but before ordering costs, Counsel for the First Plaintiff, Break Fast Investments Pty Ltd ("Break Fast"), sought leave to raise new argument based on the material. Although this material had been provided to the solicitor for Break Fast in March 2012, I accept that new argument was only formulated by Counsel for the Break Fast during the luncheon adjournment.

16 In this respect, I refer to paragraph 7(e) of the affidavit of Philip Anthony Jones, sworn 26 February 2013, in which Mr Jones deposed that an email from JBT Lawyers, solicitors for C & O Voukidis, was sent to him on 22 February 2013 attaching a draft summons advising that the affidavit material in support of the proposed summons

would be provided on Monday 25 February 2013. A further email, he says, advised that C & O Voukidis would request the Court make the proposed summons, which was to be issued on Monday, returnable on Tuesday 26 February 2013.

17 At paragraphs 8 to 11 Mr Jones proceeds to say, and I accept, as follows:

> After receiving the email referred to in paragraph 6(e), late on Friday 22 February 2013, I spoke to various barristers' clerks which resulted in the engagement of Mr Declan Hyde of counsel for the purpose of opposing the proposed summons. Mr Hyde has not previously had any involvement in this proceeding, or the related proceeding commenced by Ambridge Investments Pty Ltd (in liquidation) (receiver appointed) against Theodore Baker and other parties.
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> On Sunday, 24 February 2013 I provided Mr Hyde with a copy of the proposed summons, the correspondence material referred to in paragraph 6 and the freezing orders which had been made in this proceeding.
>
> On the morning of Monday 25 February 2013, I sent an email at 8.40 am to the Associate to the Honourable Justice Vickery and to the Practice Court Coordinator asking that the proposed summons be made returnable on Wednesday, 27 February 2013, to allow Break Fast a reasonable opportunity to consider and respond to the affidavit material to be served by COV. Notwithstanding that email, I was advised by a responding email from the Practice Court Coordinator that the summons would be returnable before Vickery J at 9.30 am on 26 February 2013.
>
> I was in court on another matter on Monday 25 February 2013.

18 In recognition of:

(a) the late briefing of Counsel by Break Fast in a complex matter;

(b) the facts that Counsel for Break Fast applied for an adjournment at the outset of the application, which was refused,

(c) the fact that Counsel was not likely to have been fully on top of his brief;

(d) the urgency of the matter; and

(e) the potential for the new argument raised following the close of argument on the first day of the hearing to significantly affect the outcome of the present application,

I granted leave for new argument to be advanced on a second hearing day to be conducted on 27 February 2013, the day before the hearing of the foreshadowed summary application for possession of the Drummoyne Property in the Supreme Court of New South Wales.

19 The arguments which were presented on the second day included submissions on the exercise of the Court's discretion in consideration of applications of this kind and the manner of its exercise in this case.

**Variation of the Freezing Order**

20 It was submitted by Break Fast that the Freezing Order should not be varied, because:

(a) on its proper construction and on the facts, the exception contained in clause 10(d) of the Freezing Order did not apply; and

(b) the Court has an overall discretion in varying a freezing order and it should decline to exercise that discretion in the circumstances of this case.

*Expiration of the First Portfolio Facility*

21 It was submitted by Break Fast that the First Portfolio Facility expired on 30 June 2010, 12 days before the making of the Freezing Order. In this regard, a letter dated 15 September 2011 written to the NAB by solicitors for C & O Voukidis was relied upon (the "15 September 2011 Letter"). Paragraph 11 of that letter said:

> Our client would request that your client either reinstate, extend or issue new facilities in respect of the borrowings, which had expired on 30 June 2010 until at least the conclusion of Victorian Supreme Court Proceeding No. 4463/2010.
>
> [Emphasis by underlining added]

This was the only evidence referred to the Court to support the proposition that the First Portfolio Facility had in fact expired on 30 June 2010.

22 It was upon this foundation which Break Fast submitted that:

(i) there was no portfolio facility in existence at the time the Freezing Order was made on 12 July 2010; and

(ii) because of the expiry of the Fist Portfolio Facility on 30 June 2010, there was no debt due to the NAB on that facility, and thus there was nothing which could be guaranteed.

23 It followed, so it was put by Break Fast, that the exception in paragraph 10(d) of the Freezing Order could not apply, because the "obligation" of C & O Voukidis under the Guarantee was not entered into before the making of the Freezing Order on 12 July 2010, but after that time.

*The Validity of the Guarantee*

24 The validity of the Guarantee was also brought into question by Break Fast. The proposition was advanced that the expiry of the First Portfolio Facility resulted in extinguishing that facility and the liability of the primary debtors in those circumstances was discharged. In those circumstances, it was further put that the Guarantee also expired on 30 June 2010.

25 The consequence of this submission, if accepted, would be that at the time the Freezing Order was made by the New South Wales Supreme Court on 12 July 2010, there was no pre-existing liability or potential liability of C & O Voukidis to the NAB pursuant to the Guarantee.

26 The exception in paragraph 10(d) of the Freezing Order, it was submitted, could not therefore apply because the obligations reflected in the Second Portfolio Facility, which came into operation on or about 29 October 2010 and was the subject of the Guarantee, were not entered into before the Freezing Order was made.

*Conclusion as the Expiration of the First Portfolio Facility*

27 However, I find that in spite of the phrasing of the 15 September 2011 Letter, the First Portfolio Facility did not expire on 30 June 2010. This is made clear by the letter of offer of 29 October 2010 from the NAB to Mr and Mrs Voukidis (the "Letter of Offer"). The Letter of Offer amounted to a variation of a pre-existing facility and read as follows:

I'm writing to confirm our offer to change the securities in your agreement on the terms and conditions set out below. We'll let you know when these changes take effect ('effective date'), and the rest of your agreement will stay unchanged.

…

**The Proposed changes**

**Changes to your portfolio limit**

From the effective date, your new portfolio limit will become $1,840,000.

**Change in securities**

From the effective date, the securities for your NAB Portfolio Facility, described in the 'Securities' section of your NAB Portfolio Facility Agreement, will be changed as follows:

**New security to be provided**

On the effective date, NAB will take the following new security to cover the amount owing under your agreement:

- Registered mortgage over the property at 37 Thompson Street, Drummoyne, New South Wales 2047, described in Certificate of Title 1/122002.

**Existing security to be released**

On the effective date, the NAB will release the following security:

- Registered mortgage over the property at 344 Elizabeth Drive, Vincentia, New South Wales 2540 described in Certificate of Title 504/25251.

- Registered mortgage over the property at 5 Appian Way, Burwood, New South Wales 2134 described in Certificate of Title 37/166468.

**Existing security to continue**

Together with any additional securities described above, the following existing security continues to secure the amount owing under your agreement.

- a general consumer guarantee for ~~$2,450,000~~ $1.84m from C & O Voukidis Pty Ltd ATF The Voukidis Family No.2 Trust.

28 Further, the existing indebtedness under the original first portfolio facility continued. As at 1 October 2010, that indebtedness stood at $2,449,854.73. As at 29 October 2010, the indebtedness stood at $2,357,298.05. This was reduced to $1,840,000, following the implementation of the second portfolio facility agreement. The Guarantee provided by C & O Voukidis Pty Ltd under the first portfolio facility agreement continued in force and effect to operate under the second portfolio facility agreement. So much was also contemplated by the terms of the Guarantee.

29 Break Fast also submitted that C & O Voukidis was wholly discharged from its liability, pursuant to its Guarantee of 10 May 2006, relying on established principles of surety pursuant to which:

> [I]f a creditor holds a security for the enforcement of the principal obligation and the creditor destroys, releases or abandons the security, the guarantor will be released in equity to the extent that the value of the security has been impaired.[1]

30 However, this principle is governed by two exceptions, which are here applicable, namely:

(a) where the terms of the guarantee preserve the liability of the guarantor in the event of a variation of the principal contract, or its supporting securities;[2] and

(b) where the guarantor consented to the creditor's action in releasing or impairing the securities.[3]

31 For the second exception to operate, the guarantor must expressly or impliedly consent to the creditors dealing with the security. It has been held that it is not sufficient for the guarantor merely to have knowledge of such dealings,[4] but consent can be inferred.[5]

**Conclusions as to the terms of Guarantee and Consent**

32 The Guarantee given by C & O Voukidis to secure the First Portfolio Facility remained in place to secure the Second Portfolio Facility. The Guarantee was dated 10 May 2006 and was executed by Mr Voukidis as a director and secretary of C & O Voukidis and by Mrs Voukidis in her capacity as a director. This is evident from documents executed by Mr and Mrs Voukidis on behalf of the company. The date of the Guarantee indicates that it was entered into to support an earlier credit contract entered into prior to the First Portfolio Facility which was dated 14 December 2007.

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1 James O'Donovan & John C Phillips (eds), *Modern Contract of Guarantee* (3rd revised ed 1996) 400.
2 James O'Donovan & John C Phillips (eds), *Modern Contract of Guarantee* (3rd revised ed 1996) 412–148.
3 James O'Donovan & John C Phillips (eds), *Modern Contract of Guarantee* (3rd revised ed 1996) 418–419.
4 *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213, 220.
5 *Morguard Trust Co v Baden* (unreported, British Columbia CA, 31 May 1989) cited in James O'Donovan & John C Phillips (eds), *Modern Contract of Guarantee* (3rd revised ed 1996) 418.

33 Part D of the Guarantee specifies the extent to which the guarantor's obligations apply. Clause 8.1 provides as follows:

> You guarantee that the customer will pay the Bank all the amounts which the customer owes the bank at any time under the credit contract. You agree to pay the Bank any of those amounts in respect of which the customer is at any time in default, up to the basic liability as at the time the Bank demands that you pay them to the Bank.

34 Clause 8.2 then relevantly provides:

> Your obligations under this guarantee are not affected by anything that might otherwise affect them under the law relating to sureties, including
>
> …
>
> (b) the fact that the Bank gives up, releases in whole or in part, varies or exchanges, or fails to obtain, perfect, register or realise, or deals in any other way with any security, guarantee or indemnity or negotiable instrument; or
>
> …
>
> (d) the fact that the Bank varies, assigns, ends or replaces the credit contract, or extends its term (unless this guarantee is regulated by consumer credit legislation, in which case the Bank may not increase your liabilities under this guarantee, except in compliance with that legislation).

35 I am satisfied that the clauses 8.2(b) and (d) of the Guarantee had the effect of preserving the force and effect of the Guarantee in the face of the variation of the supporting securities.

36 Further, I am satisfied that C & O Voukidis consented to the variation relating to the securities.

37 My reasoning as to this element is as follows:

(a) Firstly, both creditors were officers of the company, Mr Voukidis being a director and secretary and Mrs Voukidis being a director. The Guarantee was also executed by those persons on behalf of the company. I infer that from these facts that the company not only had knowledge of the variation to the securities, but indeed consented to it.

(b) Secondly, reference is made to the affidavit of Mr Bowers-Taylor sworn 26 February 2013. At paragraph 16 of Mr Bowers-Taylor's affidavit he says:

> I am informed by Chris Voukidis, a director of the Second Defendant, and believe that the Second Defendant consented to the variation and reduction of the Portfolio Facility as set out in the NAB's letter of variation referred to in paragraph 14(b) hereof.

38 In the circumstances, the Guarantee subsists to bind the guarantor, C & O Voukidis, according to its terms and was in place to give rise to such a liability at the time of the making of the Freezing Order on 12 July 2010.

**Discretionary Factors**

39 It was also submitted by Break Fast that in the exercise of the Court's overall discretion in this case, the Court should decline the exercise of its discretion in Break Fast's favour.

40 The jurisdiction to grant a freezing order is not exercisable simply to preclude a party from dealing with his or her assets, or to prevent a person using assets to pay debts in the ordinary course of business, or to meet ordinary living expenses. Paragraph 10(d) of the Freezing Order reflected this position.

41 A freezing order is directed to other dispositions, which are intended to frustrate or have the necessary effect of frustrating a plaintiff in its attempt to seek a remedy at law. It is a tool to be used to advance the interests of justice. The ultimate question on such applications is whether, in all the circumstances, it is just and convenient to make such an order.

42 At the same time, it is recognised that making of a freezing order is a drastic remedy, which should not be lightly granted. Further, it needs to be recognised that a freezing order is not a means of providing security for a plaintiff's claim and does not confer on the plaintiff an interest in the assets, the subject of the injunction.

43 As to variations, a freezing order may be varied, on the application of the defendant, or indeed any other person who is affected by the making of the order. However, any

such variation that is made must not, in the ordinary course, conflict with the purpose for which the order was made in the first place. Secondly, a variation must also accord with the interests of justice. In this respect, reference is made to *MG Corrosion Consultants v Gilmour* where Barker J made the following observations:

> So far as the court's power to vary a freezing order is concerned, there can be little doubt about it. Similarly, it is also clear that having made a freezing order a court should not be quick to reverse it save for good reason and the dictates of justice.
>
> …
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> Ultimately, the grant or discharge or variation of an interlocutory injunction, including a freezing order will be dictated by what justice demands in the particular circumstances of the case.[6]

44 In the present case, the moneys held in the term deposit account by the NAB represent a large proposition of the assets in dispute in the principal proceeding. Break Fast claims an entitlement to trace some $5.3m in payments transferred, it says, illicitly by Mr Voukidis from Break Fast, without its consent and for his own use.

45 The evidence in the present case establishes that if the variation requested by the C & O Voukidis is granted, there is a substantial risk that any judgment obtained by Break Fast would be rendered nugatory due to the limited remaining assets held by the company. The effect of the variation, if ordered, would more than likely frustrate Break Fast in its attempt to seek a remedy at law.

46 The precarious financial position of the company, and those standing behind it, namely Mr and Mrs Voukidis, is underscored by the proceedings commenced in the New South Wales Supreme Court against both the company and Mrs Voukidis, seeking possession of various properties by the NAB.

47 It is to be noted that no alternative security is offered by C & O Voukidis in place of the moneys held in the NAB term deposit account.

48 As is made clear in the NAB Further Amended Statement of Claim, in Proceeding 2012/82867, defaults are alleged by the NAB in respect of five financial facilities

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6 *MG Corrosion Consultants v Gilmour* [2012] FCA 568 [14].

provided by the bank. It is alleged that approximately $6m is owed to the bank and that demands for payment have not been satisfied.

49 In this matter, a further important consideration arises, which bears upon the discretion. It cannot be overlooked that C & O Voukidis is in fact the operating vehicle of Mr and Mrs Voukidis. Together they comprise its directors and Mr Voukidis is also the secretary. They control the company. It is their alter ego. They personally will stand to benefit from the variation to the Freezing Order which is proposed. What is sought in the orders in the summons in this application is principally that the moneys in the term deposit account be paid to the NAB "in reduction of NAB portfolio facility in the names of Christos & Olga Voukidis Account No.751360306".

50 Further, there is no evidence, apart from what is alleged in the NAB Further Amended Statement of Claim, of any demand being made on C & O Voukidis by the NAB for payment under the Guarantee. This being a critical matter to establish the present indebtedness of C & O Voukidis under the Guarantee, direct evidence ought to have been adduced by C & O Voukidis if liability under the Guarantee was to be relied upon. Nevertheless, even if there was such direct evidence, I would have declined the variation sought to be made to the Freezing Order for the reasons referred to above.

**Conclusion**

51 In my opinion, the Freezing Order made by the Supreme Court of New South Wales on 12 July 2010, as further varied and extended by this Court, should not be varied as proposed by C & O Voukidis.

52 Having fully heard the arguments, I am persuaded that the summons of C & O Voukidis dated 22 February 2013 should be dismissed. To grant the orders sought would be inconsistent with the fundamental purpose and object of the Freezing Orders made in the first place.

53 As to the object and purpose of a freezing order, reference is made to *Allomak Limited v Allan* where Davies J made the following observation:

> The object of a freezing order is to prevent the frustration of a monetary judgment that the applicant for the order hopes to obtain or has obtained, by restraining the respondent from removing assets from the jurisdiction or dissipating them. It is not to create security for the claim for the applicant.5 The two preconditions of a freezing order are:
>
> (a) that the plaintiffs have an arguably good case; and
>
> (b) that there is a sufficient risk that, if the freezing orders were not made, the defendants will dissipate their assets and render any judgment wholly or partially ineffective.http://www.lexisnexis.com.ezproxy.lib.monash.edu.au/au/legal/ - 7#7[7]

54 The Freezing Order in this case was made for good reason and on a sound factual basis by the Supreme Court of New South Wales. In relation to paragraph 10(d) of the Freezing Order, the exception provided to the Freezing Order must be construed to yield and be subject to the interests of justice in its operation, in the light of the facts as they have subsequently unfolded in this case.

55 I am persuaded that it would be contrary to the interests of justice to make the orders sought in the summons and it will be dismissed with costs.

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7 *Allomak Limited v. Allan* [2010] VSC 187 [11].