

14/9

NZLR
X

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.803/84

1105

BETWEEN MINERAL RESOURCES (NZ)
LIMITED a duly
incorporated company
having its registered
office at Newmarket,
Auckland, and carrying
on business inter alia
as a mining company

Plaintiff

AND JOHN PHILIP BARBARICH
of Auckland, Businessman

First Defendant

AND KING COUNTRY COAL
LIMITED a duly
incorporated company
having its registered
office at Auckland and
not yet carrying on but
proposing to carry on
business as a coal
mining company

Second Defendant

Hearing: 27 August 1984

Counsel: G P Curry and P G Skelton for plaintiff
Mrs Briar Wilson for 1st Defendant
A B Lawson for 2nd Defendant

Judgment: 30 August 1984

JUDGMENT OF HENRY J.

On 8 August 1984, following a hearing of a
defended motion, Hillyer J. granted the Plaintiff (Mineral
Resources) an interim injunction in the following terms :

"Restraining the defendant from entering
further into or acting, directly or
indirectly, with a view to furthering the

mining venture in respect of the Benneydale Coal Mining licences until and unless he has given to the plaintiff in writing a 14 day right of refusal in respect of that venture and given all relevant information such as will enable the plaintiff to make a reasonable decision whether it or any of its associated companies wish to become involved with or invest in that venture."

The Defendant referred to therein is the First Defendant (Mr Barbarich), the Second Defendant (King Country) subsequently being added to these proceedings. The relevant facts are set out in the judgment of Hillyer J. and need not be repeated in any detail. The substance of Mineral Resources' case is that in entering into an agreement to purchase on behalf of a company then to be formed and relating to what is described as the Benneydale mining interests, Mr Barbarich was in breach of an agreement (known as the "retirement agreement") between himself and Mineral Resources, and was also in breach of his fiduciary duty and his duties of good faith and fidelity to Mineral Resources.

The agreement to purchase is dated 29 June 1984; King Country was registered on 26 July 1984; Mr Barbarich ceased to hold office as a director of Mineral Resources as from 27 July 1984; King Country adopted the agreement to purchase on 2 August 1984.

King Country is not a party to any agreement with Mineral Resources, nor has it any legal

relationship with that company. The two bases upon which the substantive relief in the action is sought against King Country are, first, that it is and at all material times was simply the "alter ego" of Mr Barbarich; and secondly, that it knowingly participated in a breach of trust by Mr Barbarich, that breach of trust being the diversion by him of the opportunity for requisition by Mineral Resources of the Benneydale Mining interests. It is common ground that the present motion falls to be decided by the application of the established principles governing the grant of interim injunctions, namely, by enquiry whether there is a serious issue or issues to be tried, and if so, then determining whether the balance of convenience favours the grant or refusal of the relief sought.

I will deal first with the contention that King Country is for present purposes the "alter ego" of Mr Barbarich. The Court will "lift the corporate veil" when a company is in reality a mere sham or cloak for the business activities of its promoter. Authority for this exception to the general principle treating a company as a separate legal entity is found, for example, in Gifford Motor Company Limited v Horne [1933] 1 Ch.935, and in Jones v Lipman [1962] 1 All ER 442; see also Gower: Modern Company Law (4th edn) p.126; and Morison's Company Law (4th edn) Vol.2, para.20.11. In my view, the evidence before the Court establishes that the allegation made in

this respect does raise a serious issue to be tried. The following factors are relevant to this finding :

- (a) The agreement was negotiated by Mr Barbarich.
- (b) In it Mr Barbarich undertook "personal liability".
- (c) Mr Barbarich advised the vendor that he, Mr Barbarich, would personally guarantee any arrangement entered into by King Country in respect of the Benneydale mining interests and would stand behind the company.
- (d) Mr Barbarich is governing director of and a 50% shareholder in John Philip Consultants Limited, which it is proposed will act as agent for and give advice to King Country.
- (e) Mr Barbarich was instrumental in the formation of King Country.
- (f) King Country has as its only directors and shareholders Mr Barbarich's immediate family.
- (g) King Country has a present capital of \$100.00, and a proposed capital of \$100,000.00. There is no evidence of its ability to finance a \$1,500,000.00 purchase, the

inference being open that it will be dependent on Mr Barbarich or his interests to do so.

(h) Despite the clear allegation made, there is no express evidence from Mr Barbarich to refute the substance of that allegation.

It is the combination of the above factors which is important, and they are not in my view outweighed by the limited material in Mr Peter Barbarich's affidavit relating to the shareholding of King Country, its directorate, and his stated intention that those persons will run the company for their own benefit and independently of anyone else. What the true position will emerge as being must await determination at the substantive hearing, and I of course make no concluded finding at this stage. There is undoubtedly a volume of relevant evidence still to be adduced and which will require assessment and evaluation, but I am clear that a sufficient foundation has been laid by Mineral Resources on this point for the purposes of the present motion.

For King country, Mr Lawson did not argue that in the event of my making the above finding there was not sufficient evidence of a breach of the retirement agreement by Mr Barbarich. This was a proper concession. It must I think be arguable (in the sense

that term is used in proceedings such as these) that Mr Barbarich's actions were in breach of clause 3.2 of his agreement with Mineral Resources. That clause provides :

"3.2 J P B also covenants that while under retainer to M R should he desire to enter into any other mining or prospecting venture, that he - "J P B" - will give in writing to M R a 14 day right of refusal, together with all relevant information such that a decision can be reasonably made.

If, within 14 days of being so offered involvement or investment in such a venture and receiving the relevant information, M R or its associated companies do not advise J P B in writing of their intentions to proceed with that venture, J P B may proceed on whatever basis he wishes without further obligations to M R."

The intention of the clause was to prohibit or restrict his right to enter into a mining or prospecting venture without first offering the opportunity to Mineral Resources to take up that venture. The purchase of the Benneydale mining interests could well come within that prohibition or restriction.

I am also of the view that it is arguable that Mr Barbarich was in breach of his fiduciary duty in divesting the opportunity of acquiring the Benneydale mining interests from Mineral Resources to King Country.

This action was carried out whilst he was still a director of Mineral Resources, and the principle enunciated in Canada Aero Service Limited v O'Malley (1973) 40 DLR (3rd) 371 could well be applicable. However, I think in the circumstances that any such duty would be limited so as to take into account Mr Barbarich's rights arising under Clause 3.2 of the retirement agreement if the so-called first refusal was not taken up by Mineral Resources.

On the other hand, I do not think there was any breach of good faith and fidelity as an employee of Mineral Resources in respect of any actions of Mr Barbarich following his retirement and resignation as Managing Director. Reliance for this submission was placed on Clause 2.1 of the retirement agreement, which states :

"2.1 M R will enter into a written contract with J P B as a consultant for a period of two years, with a further one year right of renewal by M R to retain J P B as a consultant to the Board of Directors and any "Special Projects" the Board may desire him to attend to, for 40 days per annum at a retainer of 27,500 dollars divided into 15,000 dollars consultancy fees and 12,500 dollars expenses which shall be incurred at the discretion of the Consultant but which shall include all general (i.e. non-specific) disbursements including local travel and phone expenses. The Consultant shall be entitled to refund of other disbursements to the extent they are authorized by the company in advance."

The appointment as consultant did not create an employer/employee relationship and in my view his position was more in the nature of an independent contractor, and obligations to Mineral Resources would only arise in respect of any particular matters upon which he was in fact consulted, there being no general appointment made. There is no suggestion that Mr Barbarich was consulted in relation to the Benneydale business, and accordingly I do not consider his consultancy status cast any duties on him which could be said to have been breached.. There is nothing in the evidence to indicate the breach of any express terms of his consultancy, and I do not see room to imply any terms into that which would be relevant to the present issues.

It may also be arguable that King Country knowingly participated in the breach of fiduciary duty by Mr Barbarich to which I have referred, but it is not necessary to examine this contention in detail. Any liability on the part of King Country in this regard would in any event also need to be considered in the light of the rights contained in clause 3.2 of the agreement to which I have already referred.

I turn therefore to the balance of convenience. Mr Lawson did not contend that the balance favoured the refusal of an injunction. Damages would

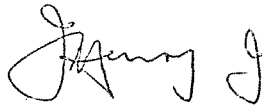
not be an adequate remedy to Mineral Resources if an injunction were refused and it was held ultimately to be entitled to the relief sought. Not only would the assessment be difficult, but there is no evidence that King Country could pay any damages assessed. On the other hand, damages would be an adequate remedy for King Country if it ultimately is successful, particularly having regard to the limited nature of the relief now sought against it by Mineral Resources. There is nothing in the other relevant circumstances which should persuade me against granting injunctive relief. In the course of the hearing Mr Curry indicated that he sought relief only along the lines of the second part of the motion. Certain amendments to that part, I think, are required to give certainty to the terms of any prohibition and to ensure that the relief is confined to protect the right which it is alleged is being infringed.

There will accordingly be an order in the following terms, namely, restraining the Second Defendant, until the further order of the Court, from taking any steps to assign mortgage or charge its interest in the purchase of the coal-mine business at Benneydale and associated licences owned by Hughes Brothers Benneydale Coalmine Company Limited and/or Joseph Hughes until and unless :

(a) The First Defendant has given to the Plaintiff in writing a 14 day right of refusal in respect of that purchase and given all relevant information such as will enable the Plaintiff to make a reasonable decision whether it or any of its associated companies wish to become involved with or invest in such purchase, and

(b) The Plaintiff has not within such period of 14 days advised the First Defendant in writing of its intention to proceed with that purchase.

Costs will be reserved.



Solicitors:

Russell McVeagh, Auckland, for Plaintiff

Jordan Smith & Davies, Auckland, for First Defendant

Earl Kent & Co., Auckland, for Second Defendant