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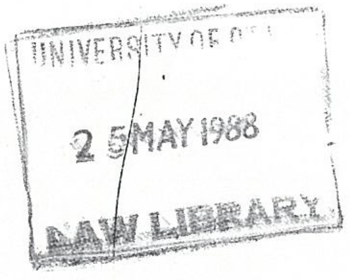
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 1333/84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25 MAY 1988
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IN THE MATTER of an application for review under Section 4 of Part 1 of the Judicature Amendment Act, 1972

BETWEEN CONSOLIDATED ENTERPRISES LIMITED

APPLICANT

A N D THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED

FIRST RESPONDENT

A N D INTERTASMAN N.Z. GROUP LIMITED

SECOND RESPONDENT

Judgment: 13 DEC 1984

Hearing: 6 December 1984

Counsel: D.F. Dugdale and N. Dugdale for Applicant
L.J. Newhook and R.D. Wallis for Second Respondent

JUDGMENT OF CASEY J.

Consolidated Enterprises Ltd. issued proceedings under Part 1 of the Judicature Amendment Act, 1972 calling into question the validity of a resolution by Intertasman (Second Respondent) as contravening its Articles of Association, and alleging further that the resolution was unduly harsh and oppressive against the Applicant as a shareholder and was a fraud against it, and that there has been no valid resolution of the Directors for the allotment of shares. It seeks appropriate declarations and an injunction restraining both Respondents from acting pursuant to the resolution and proceeding with the issue of share

certificates. The First Respondent is simply the share registrar for Intertasman, and took no part in the proceedings, indicating that it will abide by the Court's decision.

The Chief Justice granted an interim injunction along these lines on 22nd November 1984, on the ex parte application of Intertasman, and Consolidated now moves for its discharge and in support has filed affidavits in reply to those of the Applicant setting out its side of the story. I accepted Mr Dugdale's submission that the correct procedure is to deal with the application de novo, following Carter Holt v. Fletcher Holdings (1980) 2 NZLR 80.

Briefly the facts are that the Consolidated owns twenty percent of the ordinary shares in Intertasman, which offered an issue of 1,155,000 convertible specified preference shares at fifty cents each, the capital of the company then being divided into 2,310,000 shares. If the issue had been offered in strict proportion, shareholders would have received one new share for two existing shares held. In fact, the resolution passed provided for it to be a one for three issue, with the right to apply for additional shares and the surplus was to be taken up by the underwriter.

There are a total of 239 shareholders, the major ones now being Messrs Reesby (22.9 percent), Mulchin (9.8 percent), and Williams Properties Ltd. (18.85 percent), these parties constituting a group having 51.55 percent of the voting strength. Consolidated did not apply for any additional shares and, if the transactions proceeds, will be entitled to take up its one for two allotment of the new issue, thereby preserving its proportionate voting strength of twenty percent. At the bottom of this litigation is the belief of its Director, Mr Leggett, that the Intertasman Directors engineered the issue in order to put a block of shares at their disposal and thereby dilute the voting power of Consolidated's holding.

Submissions were directed mainly to the question of whether the Applicant had established an arguable case, with Respondent's Counsel attacking its very foundations by submitting that the review procedure under the Judicature Amendment Act was not available to settle what was essentially a dispute based on the contractual relationship between the company and its share-holders created by its Articles. I was referred to the unreported judgment of the Court of Appeal in New Zealand Stock Exchange v. Listed Companies Association Incorporated & New Zealand Forest Products Ltd. (C.A. 83/84; 30th July 1984), in which the President drew a distinction between an incorporated company exercising powers of decision in its commercial operations, and a statutory body exercising the powers conferred upon it. However, I acknowledge Mr Dugdale's point that the decisions under attack here are not those made in furtherance of the company's normal commercial functions; they deal with the relationship between it and its constituent members under its constitution.

Because of developments at a late stage in the hearing, it is not necessary for me to reach a conclusion about whether the Applicant has established an arguable case on this and the other issues it raised, which were also strenuously opposed by the Second Respondent. Mr Newhook informed me that he had received instructions whereby the latter would undertake to offer the Applicant through the underwriters a parcel of the specified preference shares which are held unalloted at fifty cents each, sufficient to bring up its holding of the new issue to the total it would have been entitled to if it had been a one for two offer instead of the one for three offer made. Furthermore, in the event of the issue being declared invalid at the hearing of the substantive action, it will refund the price of fifty cents per share paid in respect of that total holding of the specified preference issue. This effectively puts Consolidated into the position that it expected to obtain on its view of the Articles of Association - namely, that the issue had to be proportionate to the shareholding; and it also maintains its relative voting

strength, thereby answering any suggestion that the other Directors might manipulate the surplus shares to their own advantage. In any event, on the figures supplied by Respondents' Counsel, the effect of these unalloted shares on the respective voting strengths of the major shareholders appears to be insignificant.

Mr Dugdale suggested that even with such an offer - which Counsel made clear was an open one - his client was still entitled to the interim injunction, because the company should not be allowed to allot shares which the Applicant maintains are invalidly issued, having regard to the effect that a decision in its favour in the action could have on the other shareholders, who have accepted the allotment in good faith. The short answer is that none of them have seen fit to join in this action or to attack the issue, and and they may well be covered by the principle enunciated in Royal British Bank v. Turquand 65 E & B 248.

This dispute is essentially a commercial struggle between two rival groups of Intertasman shareholders. Notwithstanding the "public law" overtones implicit in the form of the remedy sought, I see the situation between the immediate parties as my main concern in the exercise of my discretion. Interlocutory injunctions in these cases are usually meant as holding operations until the litigant have marshalled their resources for trial, and a fixture can be obtained. Their basic justification is that delay will cause the Applicant irreparable harm. I consider that risk has now been eliminated by the Second Respondent's offer. This circumstance must in any event weigh heavily in the latter's favour in the balance of convenience, especially having regard to the obvious prejudice it is suffering in the commercial world by having the allotment brought to a halt, and by the Stock Exchange suspending quotation of the preference shares. There are disputed questions of fact relating to the proper constitution of Intertasman's Board and the good faith of its Directors, so that all the issues could not be resolved

in the present hearing.

Mr Newhook has now filed written undertakings by Intertasman and the underwriters along the lines of his intimation to the Court, which I find acceptable. The ex parte injunction is therefore dissolved, with costs reserved.

M E Casey J

Solicitors:

Kensington Haynes & White, Auckland, for Applicant
Brandon Brookfield Towle & Beyer, Auckland, for Second Respondent