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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

No A.255/84

459

BETWEEN HAROLD KENT BAIGENT, GRAEME DOUGLAS BOWKETT and JAMES ALTON JAMIESON all of Auckland, Company Directors

Plaintiffs

AND D. McL WALLACE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Engineers

First Defendant

AND DAVID McLEAN WALLACE, BRUCE McLEAN WALLACE, CHARLES ALBERT STABLES, LESLIE GEORGE PIPER, NEIL HUTTON PLOWMAN, ROBERT IVORY McMILLAN and DESMOND JOHN MALCOLM all of Auckland, Company Directors.

Second Defendants

Hearing : 30 March and 2 April 1984

Counsel: Katz & Hutchinson for Plaintiffs
Johnson for Defendants.

Judgment: 3 May 1984

JUDGMENT OF PRICHARD J

The plaintiffs' application was originally for an interim injunction restraining the defendant company and its directors until the further order of the Court from completing the sale to TNT Tranport (NZ) Ltd, of the .

defendant company's shareholding in a company called Industrial Waste Collections Ltd for $1.2 million. In the course of his submissions for the Plaintiffs, Mr Katz indicated that the Plaintiffs sought no more than an order restraining the sale of the shares until the shareholders of the defendant company have been afforded an opportunity of considering in general meeting the competing merits of an offer emanating from the plaintiffs.

The defendant company is an old established public company. It has a paid up share capital of $5,297,448 and assets in excess of $16 million. It has diverse interests, mostly in the field of manufacturing and assembling machinery of one kind or another, particularly pumps and hydraulic equipment. A recent major enterprise of the company is the conversion of motor vehicles to run on alternative fuels Amongst the company's interests is a holding of half the share capital of Industrial Waste Collections Ltd. The other half is held by TNT Tansport (NZ) Ltd. That has been the situation since 1980.

TNT Transport (NZ) Ltd is a subsidiary of an Australian company.

The interest of D.McL. Wallace Ltd in Industrial Waste Collections Ltd represents about one fifth of the D. McL. Wallace assets and accounts for about the same proportion of the company's revenues.

Industrial Waste Collections Ltd was incorporated in 1968. At that time D.McL. Wallace Ltd subscribed for 10 percent of the share capital. Four years later the major shareholder sold his shares and these were purchased by three companies, - D.McL. Wallace Ltd, Brambles Burnett Ltd, and (through two subsidiary companies) TNT Transport (NZ) Ltd, then called Alltrans Ltd. The Industrial Waste shares were then acquired in proportions which resulted in the three companies being equal shareholders.

In 1980 the Brambles Burnett shares were sold to the other two shareholders, who since then have each held 50% of the shares.

Mr David McLean Wallace is Chairman of Directors of both the defendant company and Industrial Waste Collections Ltd.

During the period of the triumvirate - from 1972 to 1980 - the three companies holding the shares in Industrial Waste Collections Ltd were parties to a deed which governed their relations with the company and contained covenants restricting the parties from competing with Industrial Waste Collections Ltd either directly or through any associated company. When D.McL Wallace Ltd and TNT Transport (NZ) Ltd became the only shareholders of Industrial Waste Collections Ltd, they entered into a similar deed containing covenants in restraint of trade. In addition Industrial Waste Collections Ltd adopted new Articles of Association which contained a pre-emptive clause to the effect that if either shareholder should wish to dispose of its shares it must first offer them to the other. In this way Industrial Waste Collections Ltd became the joint enterprise of D.McL Wallace Ltd and TNT Transport (NZ) Ltd. Each partner undertook not to engage independently of the other, either directly or indirectly, in the waste industry, and (in terms of the Articles of Association) not to sell its shares to an outsider without first offering them to the other partner.

The Plaintiffs are also involved in the industry of waste collection and disposal. They are all shareholders and directors of A.W. Bryant Limited, a company engaged in that activity in the Auckland metropolitan area. Messrs Baigent & Bowkett also control an associated company, Solid Waste Systems Ltd, while Mr Bowkett is the major shareholder in Bad Bins Ltd. These companies are all competitors of Industrial Waste Collections Ltd.

Clearly it will be to the advantage of the Plaintiffs if they can gain control of Industrial Waste Collections Ltd.

With this objective, towards the end of 1983 the Plaintiffs made approaches to both TNT Transport (NZ) Ltd and D.McL Wallace Ltd. The sequence of events was as follows :-

1. On 19 October 1983 Mr Farquar of the Investment Finance Corporation Ltd approached Mr Wallace, Managing Director of D.McL Wallace Ltd and Mr Hannigan, Chairman of the TNT Transport (NZ) Ltd Board, with an offer to purchase 100% of the capital of Industrial Waste Collections Ltd for $2 million. At that stage Mr Farquar did not disclose the identity of his clients. The offer was declined.

2. Thereupon the Plaintiffs began purchasing D.McL Wallace Ltd shares.

3. On 17 November 1983 Mr Farquar again approached Mr Wallace and orally made two alternative proposals on behalf of the Plaintiffs:-

(a) That D.McL Wallace Ltd purchase A.W. Bryant Ltd, Bad Bins Ltd and Solid Waste Systems Ltd, at valuation, the considerations to be the issue of new shares in D.McL Wallace Ltd. Mr Farquar suggested that the capital of D.McL Wallace Ltd would need to be increased by about $3 million to achieve that result.

(b) That D.Mc Wallace Ltd purchase TNT Transport (NZ) Ltd's 50 percent shareholding in Industrial Waste Collections Ltd and then sell the whole of the Industrial Waste Collections Ltd shares to Messrs Baigent & Bowkett for a cash price to be agreed. It was suggested

that a price of $2-$2.2 million would be appropriate. It was a term of the offer that Messrs Baigent & Bowkett would amalgamate all four waste companies and within two years float the group to the public, and that D.McL Wallace Ltd would then be given an option to subscribe for up to 20% of the shares in the merged group.

4. On 23 November 1983 Mr Farquar wrote to Mr Wallace outlining the two proposals which he had made orally on 17 November. It is not without significance that in the letter Mr Farquar said "The sale of the Industrial Waste Collections Ltd shares would allow D.McL Wallace Ltd to recognise further capital profits in its centennary year and it will also increase the company's ability to pay further tax free dividends."

5. On 2 December 1983 Mr Wallace replied to Mr Farquar's letter, saying that the letter had been considered by the Board of D.McL Wallace Ltd, and that the proposals it contained were of no interest to D.McL Wallace Ltd.

6. The Plaintiffs, meanwhile, had continued purchasing D.McL Wallace Ltd shares, and by mid December owned about 20 percent of the Wallace shares.

7. On 20 January Mr Jamieson, writing on behalf of A.W. Bryant Ltd, requested a meeting between the Plaintiffs, or the directors of D.McL Wallace Ltd. He proposed that the parties meet on 27 February.

8. On 3 February 1984 Mr Hannigan, Chairman of Directors of TNT Transport (NZ) Ltd wrote to Mr Jamieson, saying that TNT Transport (NZ) Ltd was not interested in selling any of its holding in Industrial Waste Collections Ltd.

9. On 21 February Mr Hannigan of TNT Transport (NZ) Ltd met Mr Wallace and told him that the acquisition by the

Plaintiffs of the shares held by D.McL Wallace Ltd in Industrial Waste Collections Ltd would be regarded by his company as a breach of covenant and that TNT Transport (NZ) Ltd was prepared to purchase the shares itself for cash. Mr Wallace said that his company would be prepared to sell the shares to TNT Transport (NZ) Ltd but that he would have to discuss this with his Board of Directors. Mr Hannigan asked him to do this, and to put a price on the shares.

10. On 22 February 1984 the meeting between the Plaintiffs and the directors of D.McL Wallace Ltd took place. The Plaintiffs' proposals were rejected.

11. On 6 March 1984 the Plaintiffs' solicitors were advised by the Examiner of Commercial Practices that in terms of s.69 of The Commerce Act, 1975 the Examiner consented to the Plaintiffs' proposal to increase their holdings in D.McL Wallace Ltd to a maximum of 51%.

12. On 7 March 1984 the Directors of TNT Transport (NZ) Ltd were apprised of the fact that the Examiner of Commercial Practices had consented to the Plaintiffs' acquisition of up to 51% of D.McL Wallace Ltd. The Directors of TNT Transport (NZ) Ltd thereupon resolved to purchase the Wallace interest in Industrial Waste Collections Ltd.

13. On 8 March TNT Transport (NZ) Ltd and D.McL Wallace Ltd agreed to the purchase by TNT Transport (NZ) Ltd of the D.McL Wallace Ltd holdings in Industrial Waste Collections Ltd at a price of $1.2 million.

14. On 9 March D.McL Wallace Ltd advised the Stock Exchange of the sale.

15. This action was commenced on 20 March 1984.

16. On 27 March 1984 the Secretary of the Overseas Investment Commission, informed the Plaintiffs' solicitors that the application by TNT Transport (NZ) Ltd to acquire control of Industrial Waste Collections Ltd was declined because it conflicted with government policy in respect of applications by overseas interests to take over NZ companies or carry on business in New Zealand. (It seems remarkable that this decisions was conveyed to the Plaintiffs before it was notified to TNT Transport (NZ) Ltd). TNT Transport (NZ) Ltd is currently seeking to have the decision reversed, but if it stands the sale which the Plaintiffs seek to have restrained cannot be completed in any event.

The Plaintiffs have commenced this action in the role of minority shareholders. Except in certain special cases the rule in Fosse v Harbottle precludes shareholders from bringing an action in which they assert a right belonging to the company against the directors of the company or anyone else. The theory is that apart from certain exceptional cases, such actions are the sole prerogative of the company as an entity distinct from its shareholders. The rule has no application when the Plaintiffs, qua shareholders, seek to assert against the company a right which belongs to them personally by virtue of their shareholding.

In the present case the Plaintiffs seek to bring their action under both headings.

Firstly, as shareholders, the Plaintiffs claim that they have personal rights against the company which have been infringed, or are about to be infringed by the company agreeing to sell its Industrial Waste Collections Ltd shares to TNT Transport (NZ) Ltd. The Fosse v Harbottle rule has nothing to do with an action of that kind. The only questions are whether there is vested in the shareholders the personal right which they claim, and if

so whether the company is infringing that right. The Plaintiffs say that the personal right on which they found their claim in respect of the proposed sale of shares, arises because there is a threatened takeover of D.McL Wallace Ltd. If it were not for that fact, the sale of the Industrial Waste shares would be a matter for the company, and a matter in respect of which the directors have full authority to make decisions, and which they can implement without reference to the shareholders.

But the directors of a company which is the subject of a takeover bid, have a special responsibility to their shareholders. A company in that situation is usually referred to as an "offeree company", although in truth the offer to purchase shares is made to the shareholders, and it is for the shareholders, not the company or its directors, to decide whether the offer will be accepted. Where there is a formal takeover bid the offeror notifies the directors of the offeree company of the bid. Thereupon it becomes incumbent upon the directors to convey the offer to their shareholders.

A takeover bid generally poses a threat to the position of the directors although, on the other hand, the offer may include such benefits to the directors in the way of directorships in the merged companies, or the promise of a "golden handshake" on their removal from office, that it presents the directors with personal advantages rather than disadvantages. In any case the situation is one in which the directors are likely to be faced with a moral conflict between duty and interest. The directors then have a duty to ignore their personal interests and to advise the shareholders whether or not the shareholders should in their own interests accept the offer. The directors are bound to convey to the shareholders full particulars of the offer and to give their honest and disinterested advice on all matters pertinent to the decision which the shareholders have to make. Besides

this, the directors of an offeree company have an obligation not to take measures which are designed to thwart a bona fide take-over offer without first giving the shareholders an opportunity to consider whether defensive measures should be taken. If the directors of an offeree company embark on defensive measures without reference to the shareholders, then if the measures are successful the shareholders are effectively deprived of the opportunity to consider an offer which might be greatly to their advantage. The Directors' obligation not to take defensive measures during the dependency of a take-over offer extends to cases where, although no formal offer has been made, the directors know that one is impending.

The obligation to inform and advise the shareholders has the force of statute of law in New Zealand. The Companies Amendment Act, 1963 prescribes the duties of the directors of an offeree company in this regard. The Amendment is concerned in the main with the steps to be taken by the directors to acquaint their shareholders with the terms of a formal take-over offer made in writing and to advise the shareholders fairly of the matters relevant to making an informed decision. However, the Amendment applies only to written take-over bids. (Multiplex Industries Ltd v. Speer (1966) N.Z.L.R. 122). Nor does it concern itself with the question of defensive measures. There is nothing in the 1963 Amendment which requires the directors of D. McL Wallace Ltd. to consult their shareholders with regard to the sale of the company's Industrial Waste Collection shares - firstly, because the statute relates only to formal take-over offers and secondly, because the statute is not concerned with defensive measures.

The position in England is different. The obligations of the directors of offeree companies are defined and enforced, not by statutory provisions, but by a body set up in 1959 by the Governor of the Bank of England and now

comprising a number of influential organisations including the Stock Exchange. This body known as the "City Working Party" has promulgated a comprehensive set of principles to be observed by the parties to take-over negotiations - the "City Code on Take Overs and Mergers". The City Working Party has such influence in the commercial world that in England it is able to police effectively the actions of the participants in take-overs and mergers. The Code describes itself as a "measure of self discipline" in an area which "does not easily lend itself to legislation". The Code is administered on a day to day basis by a panel constituted by the City Working Party. The rules of the "City Code" do not, as such, have the force of law and will not be enforced by the Courts except in so far as they coincide with rules of law or principles in equity. However, the Code provides a useful reference to the matters which are recognised by commercial men as important in the context of take-over and merger negotiations. Although the Code does not attempt to list the defensive measures available to companies faced with take-over bids, it does refer to the duty not to take steps to frustrate a bona fide take-over offer without the authority of the shareholders.

In New Zealand there is no institution able to apply the same effective sanctions in relation to takeover negotiations as does the City Working Party in England; but the New Zealand Stock Exchange does have a comprehensive Take-over Code which, although not contractually binding on the present defendants, and not enforceable at the suit of the Plaintiffs, does serve to give an indication of the matters to which regard should be had in take over negotiations. The status of the Stock Exchange Code was fully considered by Barker, J. in an unreported decision - New Zealand Forest Products Ltd v.New Zealand Stock Exchange (Auckland Registry A.15/84, 7 February 1984).

What the Plaintiffs allege in the present case is that, by agreeing to sell the company's shareholding in Industrial Waste Collections Ltd to TNT Transport (NZ) Ltd, the directors of D. McL. Wallace Ltd have deliberately taken one of the recognised defensive measures used to deflect a take-over bid - they have put out of reach a corporate asset, which is the main, if not the only, objective of the take-over offerors. (Here I observe that in making that allegation, the Plaintiffs virtually admit that their main, if not their only purpose in seeking to gain control of D.McL. Wallace is to secure the D.McL. Wallace holding in Industrial Waste Collections Ltd.).

One can well understand that the designs of the Plaintiffs are a matter of the gravest concern to TNT Transport (NZ) Ltd. If the Plaintiffs, by acquiring control of D.McL. Wallace Ltd can gain control of half the shares in Industrial Waste Collections Ltd, TNT Transport (NZ) Ltd will be in the unenviable position of having 50% of the Industrial Waste Collections Ltd shares held by a business competitor and will be locked into Industrial Waste Collections Ltd with no prospect of being able to dispose of its shareholding except to that competitor. It was a situation in which TNT Transport (NZ) Ltd was bound to make the most generous offer it could afford to acquire for itself D.McL. Wallace's shares in Industrial Waste Collections Ltd. In offering $1.2 million for 50% of the Industrial Waste Collection Ltd shares, that is exactly what TNT Transport (NZ) Ltd has done - in a situation precipitated by the actions of the Plaintiffs.

The Directors of D.McL. Wallace Ltd claim that their decision to accept the TNT offer is primarily influenced by the generosity of the cash offer. The acceptance of the offer will, in their opinion, benefit D.McL. Wallace Ltd and the majority of its shareholders. But they concede that they are influenced to a degree by the fact that the sale of the shares will effectively thwart the

Plaintiffs' designs - and this also, they say, is a good thing for D.McL. Wallace Ltd and its shareholders.

The question whether the primary motive behind the directors' decision is to defeat the Plaintiffs' intentions, or whether it is to benefit their own company by taking up a good cash offer is not a question which ought to be resolved in an interlocutory application. I think I must approach the matter on the basis most favourable to the Plaintiffs -i.e. on the basis that the directors resolved to sell the shares as a defensive measure, with the knowledge that the Plaintiffs were in the market for a controlling interest in D.McL. Wallace shares The question then is whether, by taking such defensive action the directors are in breach of a fiduciary duty which they owe to the shareholders of their company.

It becomes necessary to consider the implications of the Plaintiffs' moves to acquire an interest in Industrial Waste Collections Ltd by gaining control of D.McL. Wallace Ltd. The Plaintiffs have elected not to make a formal take-over offer in writing. Instead they have chosen to buy up D.McL. Wallace shares on the Stock Exchange. It is clear from the fact that they have obtained approval under the Commerce Act to acquire only 51% of the Wallace shares that they have no intention of acquiring them all. One of the first requirements of a bona fide take-over bid is that all the offeree shareholders are treated alike. In some circumstances a partial bid is permissible: but, if so, the City Code says that all the offeree shareholders must be able to participate pro rata. R.27(4) of the City Code reads:-

> "Partial offers must be made to all shareholders of the class and arrangements must be made for those shareholders who wish to do so to accept

> in full for the relevant percentage of their holdings. Shares tendered in excess of this percentage should be accepted by the offeror from each shareholder in the same proportion to the number tendered to the extent necessary to enable it to obtain the total number of shares for which it has offered."

This principle is at the forefront of the City Code. As Barker, J. pointed out in New Zealand Forest Products Ltd v. New Zealand Stock Exchange (Auckland Registry, A.15/84, 7 February 1984), there is no equivalent rule in the New Zealand Stock Exchange "Takeover Code". Clause 612 of the New Zealand Stock Exchange's Takeover Code reads:-

> "All shareholders of the same class shall be treated similarly by the offeror except that allotments of less than a marketable parcel of shares may be satisfied by cash. The amount shall be stated in the offer documents."

Barker, J. concluded that even though the Stock Exchange may have meant to import into its own Takeover Code the same principle of fairness as does the City Code, it had failed to say so and that a takeover offeror can, as Barker, J. phrased it, "pitch his offer only to selected offerees" and that the clause in the Stock Exchange Code then means that he must treat all those offerees the same - i.e. make the same offer to all. Not only must he do this, but, in terms of the 1963 Amendment, the offer, once made, must remain open for acceptance for at least a month so that all offeree shareholders (whether they be a selected group or not) are afforded the opportunity to participate equally. No offeree can be "left out in the cold" except of his own choice. Had the Plaintiffs made a formal take-over bid they would have had to comply with that requirement. Because they have elected to take another course, if the company takes no defensive action the Plaintiffs, by purchasing D.McL. Wallace shares

(whether by "standing in the market" or otherwise), can acquire just enough Wallace shares as to gain control. Then there will be a substantial body of the Wallace shareholders who will not be afforded the opportunity to sell their shares on the terms now being offered: the Plaintiffs will have secured what they want - control of the Wallace holding in Industrial Waste Collections Ltd shares - and they can do this at no more expenditure than is required to gain a controlling interest in the shares of D.McL. Wallace Ltd.

The purpose of the Plaintiffs is plain enough. Their interest is not in the main enterprise of D.McL. Wallace Ltd: it is simply to gain a footing in the waste disposal company. That fact is apparent from the very nature of their present claim - that the sale of the waste company shares effectively defeats their objective. It follows that if the Plaintiffs succeed, there will be a bleak prospect of a large body of D.McL. Wallace shareholders who will be left holding shares after the Plaintiffs have gained control. If the plaintiffs can achieve their purpose of gaining control of 50% of the waste disposal business, the likelihood is that they will have little interest in the welfare of the D.McL. Wallace enterprise. In my view the D.McL. Wallace directors have every justification for thinking that once their company comes under the control of persons whose present interests are in the waste disposal industry, the company will be dismantled and its shareholders - with the exception of those who have sold to the Plaintiffs - will sustain a heavy loss. I am satisfied therefore that the directors have correctly recognised that they have a duty to protect the majority of their shareholders, not from a straightforward take-over offer in which all may benefit, but from a "raid" which is plainly calculated to affect adversely the majority of the shareholders of their company and indeed, threaten the survival of the company itself. By taking the prompt measure which they have taken, the directors have discharged their fiduciary duty

to the majority of their shareholders, albeit that the defensive move has been made promptly - as it had to be if it was to be effective - without being first referred to a general meeting. The requirement that directors refrain from taking defensive measures in the face of an impending takeover bid applies only to a bona fide takeover offer: the requirement is so expressed in, for example, the Code of the City Working Party to which the plaintiffs have referred in support of their case. This is not a bona fide take-over bid.

So far as the rights of the shareholders vis a vis the directors are concerned, it is my view that in the circumstances of this case, and in the interests of the majority of the company's shareholders, the directors of D.McL. Wallace are fully justified in taking a step which can fairly be described as a defensive measure against the threat posed by the Plaintiffs' actions.

The second limb of the Plaintiffs' case is the assertion that, in selling the Industrial Waste Collection shares, for reasons which include the purpose of frustrating the Plaintiffs' activities, the directors of D.McL. Wallace Ltd are acting in breach of their fiduciary obligations to their company. The Plaintiffs invoke an aspect of the subjective duty of honesty and good faith which the directors owe to their company. The principle involved is that directors who are invested with powers to be used in the company's interests for specific purposes will not be permitted to use those powers for purposes other than the purposes for which they are intended. The Plaintiffs, who come to the Court wearing the mantle of protectors of the company's rights, say that the directors are abusing their power to dispose of the company's assets by selling the shares for reasons which are extraneous to the purpose for which the directors are empowered to sell corporate assets.

An action by a shareholder who purports to assert rights belonging to the company is generally precluded by the rule in Fosse v. Harbottle. But there is an exception if the action is against directors who are in breach of their fiduciary obligations to the company. A shareholder can then maintain an action, generally referred to as a derivative action, in which the shareholder invokes the rights of the company against directors who, for obvious reasons, will not initiate proceedings by the company against themselves - for example if the directors are abusing their position by appropriating to themselves assets which belong to the company. The allegation in the present case is that the directors are misusing their fiduciary position by using their power to sell corporate assets for a purpose other than that for which it was entrusted to them. If the Plaintiffs can establish such an abuse of power then they have the necessary standing to pursue the present action, notwithstanding the rule in Fosse v. Harbottle (supra).

The leading case in this area is the Privy Council decision in Howard Smith Ltd v. Ampol Ltd (1974) A.C. 281. In that case the directors had made an allotment of shares to another company for the purpose (inter alia) of destroying an existing majority of shareholders in their own company. The consequence was that a take-over bid supported by the existing majority was thwarted and success was assured to an alternative offer made by the company to which the shares were alloted. It was found that the directors had acted in the honest belief that what they were doing was in the best interests of the company as well as the existing minority of shareholders. Lord Wilberforce observed that there is ample authority for the proposition that an allotment of shares made by the directors of a company for the sole purpose of creating voting power is to be condemned. The reason for this lies in the constitution of a company. The directors are appointed by the votes of the majority: if the directors

use their power of alloting shares to destroy that majority, when it disagrees with policy of the board, and to substitute for it another majority bloc which does agree, that is clearly an abuse of power. That is precisely what the directors did in the Ampol case and it mattered not that the directors believed their policy to be in the best interests of the company.

In the course of the judgment delivered by Lord Wilberforce it was pointed out that in determining whether an action taken by directors amounts to an abuse of their powers, it is first necessary to determine the nature of the power and then to decide whether the allegedly improper use of the director's powers lies outside a "broad line" within which the motive for using the power can be related to the purpose for which it was given:-

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

In the case of powers such as the power to allot shares and the power to refuse to register share transfers, the "broad line" is comparatively narrow: the purposes for

which such powers are intended are well defined and they are restricted in scope: the use of such powers to affect the voting structure of the company for purposes unrelated to the object of the powers is readily identified as an abuse of power. The reported cases are generally within that category.

I was not referred to any case in which it has been held that directors acted in breach of their fiduciary duty to the company simply by reason of their selling to an outsider an asset belonging to the company. This is only to be expected, not only because the sale of a corporate asset is a matter wholly unrelated to the constitution of the company, but also because the considerations to which the directors can properly have regard in deciding to sell one of the company's assets cover a very wide range indeed. What they have to decide in essence is whether it will be of benefit to the company to dispose of the asset, or whether it is in the company's interests to retain it: any matter whatsoever which is relevant to that broad question is pertinent to the decision - and this will necessarily include any disadvantage to the company which can be foreseen as a likely consequence of retaining the asset. It would, I think, be only in the most extreme case, if ever, that the Court would find that the decision of a board of directors to sell one of the company's assets was an abuse of power unless, of course, the directors obtained some personal advantage from the sale. In the context of the present case, I am in no doubt that the directors of D.McL. Wallace Ltd were entitled to consider not only the fact that a good price was offered for the shares but also the expediency of disposing of the company's interest in the waste collection business when, by reason of the activities of the Plaintiffs, that interest was proving to be an embarrassment to the company. They had also to consider the comparative merits as well as the comparative disadvantages of falling in with the Plaintiffs' wishes. The cash price offered by

TNT Transport (NZ) Ltd was better than the price offered by the Plaintiffs. The merger proposal put forward by the Plaintiffs as an alternative was not considered by the directors to be in the interests of the company. I think the directors had good reason for reaching the decision to sell to TNT Transport (NZ) Ltd in preference to either selling to the Plaintiffs or effecting a merger with the Plaintiffs' companies; but it is not the province of the Court to review that decision - merely to determine whether the decision was made for motives not properly referable to the purpose for which the directors are empowered to sell corporate assets.

I am in no doubt that the present case is outside the ambit of Howard Smith Ltd v. Ampol Ltd because the wide range of matters which are properly relevant to a decision to effect a sale of a company asset (in contrast with the limited number of the reasons for which it is proper to make a share allotment) entitled the directors to take into account all the foreseeable consequences to their company of their decision, including the threat to the company's undertaking which, in the opinion of the directors, was implicit in the plaintiffs' competing proposals. I believe the view I have taken of the effect of the Ampol judgment to be consonant with recent decisions of the Australian Courts, notably two judgments of the Supreme Court of Queensland - Rossfield Group Operations Pty Ltd v. Austral Group Limited (1981) Qd.R. 279, 285 and Pine Vale Investments Ltd v. McDonnell & East Ltd & Anor. (1983) 1 A.C.L.C. 1, 294.

I conclude, therefore, that the Plaintiffs have not shown that there is a case to be tried - either on the ground that, by taking a defensive measure the directors of D.McL. Wallace Ltd have deprived their shareholders of their right to consider a bona fide take-over offer, or on the ground that by selling the Industrial Waste Collection shares to a cash buyer in preference to acceeding to the

Plaintiffs' proposals, the directors have abused their powers.

Accordingly the application for an interim injunction is dismissed. Costs are reserved.

Solicitors:
Messrs Butler White & Hanna, Auckland, Solicitors for the Plaintiffs;
Messrs Buddle Weir & Co., Auckland, Solicitors for the Defendants.