

BETWEEN CBA FINANCE HOLDINGS LIMITED

Plaintiff

A N D ALLAN ROBERT HAWKINS

First Defendant

A N D KEVIN J. GILLESPIE and
IAN L. GUNTHORP

Second Defendants

A N D EQUITICORP HOLDINGS LIMITED

Third Defendant

A N D B/H PARTNERSHIP

Fourth Defendant

Hearing : 2nd April 1984

Counsel : G.P. Curry and R.L. Towner for Plaintiff
J.S. Henry Q.C. and B.P. Henry for Defendants

Judgment : 2nd April 1984

(ORAL) JUDGMENT OF BARKER, J.

The plaintiff, CBA Finance Holdings Limited ("CBA") seeks a second series of injunctions against the first defendant and others associated with him. This morning, in an oral judgment, I dismissed the plaintiff's principal application for an interim injunction against the first and third defendants and the first-named second defendant. The background to this application is given in that judgment; I do not find it necessary

to repeat the narrative in the present judgment.

Relief is not sought against the second defendant by reason of the undertakings given in the earlier action. The injunctions sought against the first, third and fourth defendants are as follows:

- "A. RESTRAINING the First Defendant by himself, his agents or servants or any company controlled by him from:
- (i) Using any funds or shareholdings within his legal or beneficial or de facto control (and in particular shareholdings in Teltherm Industries Limited and the proceeds of the sale of his shareholdings in the Plaintiff) to enable the promotion of the Third Defendant as a competitor of the Plaintiff, or to fund or invest in the Third Defendant, whether such use of funds or shareholdings is by way of purchase of or subscription for shares in the Third Defendant, loan or security to enable such purchase or subscription, exchange or transfer for shares in the Third Defendant, or by way of the provision of financial assistance (including the making of loans and the giving of guarantees and other forms of security) to or for the benefit of the Third Defendant, or otherwise, during such periods as the First Defendant's fiduciary duties and/or duties of good faith and fidelity and/or contractual obligations to the Plaintiff continue;
 - (ii) Directing, counselling, advising, persuading, inducing, or encouraging the use of any funds or shareholdings within his legal or beneficial or de facto control (and in particular shareholdings in Teltherm Industries Limited and the proceeds of the sale of shareholdings in the Plaintiff) to enable the promotion of the Third Defendant as a competitor of the Plaintiff, or to fund or invest in the Third Defendant, whether such use of funds or shareholding is by way of purchase of or subscription for shares in the Third Defendant, loan or security to enable such purchase or subscription, exchange or transfer for shares in the Third Defendant, or by way of the provision of financial assistance (including the making of loans and the giving of guarantees and

other forms of security) to or for the benefit of the Third Defendant, or otherwise, during such periods as the First Defendant's fiduciary duties and/or duties of good faith and fidelity and/or contractual obligations to the Plaintiff continue."

"C. RESTRAINING the Third Defendant by itself, its agents or servants, or any company controlled by it, from accepting any funds or shareholdings from the First Defendant, or the Second Defendants, or the Fourth Defendant, whether jointly or severally, or from any agent or servant of or any company controlled by any of the Defendants, whether such funds or shareholdings are to be used for the purchase of or subscription for shares in the Third Defendant, loan or security to enable such purchase or subscription, exchange or transfer for shares in the Third Defendant, or by way of the provision of financial assistance (including the making of loans and the giving of guarantees and other forms of security) to or for the benefit of the Third Defendant, or otherwise, during such periods as the First Defendant's and/or the Second Defendants' fiduciary duties and/or duties of good faith and fidelity and/or contractual obligations to the Plaintiff continue;

ALTERNATIVELY: if any funds or shareholdings within the legal or beneficial or de facto control of the First Defendant or the Second Defendants or the Fourth Defendant have been applied or used already to enable the promotion of the Third Defendant as a competitor of the Plaintiff or to fund or invest in the Third Defendant, howsoever applied or used, requiring the Third Defendant forthwith to return any such funds or shareholdings to the First Defendant, or to the Second Defendants, or to the Fourth Defendant or to any other party from whom or through whom any such funds or shareholdings were obtained (including any agent or servant of or any company controlled by any of the Defendants) as the case may be, whether such funds were provided jointly, or severally, or otherwise."

"D. RESTRAINING the Fourth Defendant whether jointly or severally, and whether by itself, its agents or servants or any company controlled by it from:

- (i) Using any funds or shareholdings within its legal or beneficial or de facto control (and in particular shareholdings in Teltherm Industries Limited and the proceeds of the sale of its shareholdings in the Plaintiff) to enable the promotion of the Third Defendant as a competitor of the Plaintiff or to fund or invest in the Third Defendant, whether such use of funds or shareholdings is by way of purchase of or subscription for shares in the Third Defendant, loan or security to enable such purchase or subscription, exchange or transfer for shares in the Third Defendant, or by way of the provision of financial assistance (including the making of loans and the giving of guarantees and other forms of security) to or for the benefit of the Third Defendant, or otherwise, during such periods as the First Defendant's fiduciary duties and/or duties of good faith and fidelity and/or contractual obligations to the Plaintiff continue;
- (ii) Directing, counselling, advising, persuading, inducing, or encouraging the use of any funds or shareholdings within its legal or beneficial or de facto control (and in particular shareholdings in Teltherm Industries Limited and the proceeds of the sale of its shareholdings in the Plaintiff) to enable the promotion of the Third Defendant as a competitor of the Plaintiff, or to fund or invest in the Third Defendant, whether such use of funds or shareholdings is by way of purchase of or subscription for shares in the Third Defendant, loan or security to enable such purchase or subscription, exchange or transfer for shares in the Third Defendant, or by way of the provision of financial assistance (including the making of loans and the giving of guarantees and other forms of security) to or for the benefit of the Third Defendant, or otherwise, during such periods as the First Defendant's fiduciary duties and/or duties of good faith and fidelity and/or contractual obligations to the Plaintiff continue."

In general, the orders sought would restrain the first defendant and the fourth defendant - a partnership controlled by the first defendant:

- (a) From using funds or shareholdings controlled by them to promote, fund or invest in Equiticorp, the third defendant, for such a period that such use would constitute a

breach of the alleged fiduciary duties of the first defendant to the plaintiff; and

- (b) From directing, advertising or encouraging such use of funds or shareholdings.

Reciprocally, the third defendant is sought to be restrained from accepting any such funds or shareholdings or, if already accepted, requiring it to disgorge those funds and other shareholdings.

Mr Henry advises there is now a paid-up shareholding of \$10.2 million in Equiticorp; Richardson Camway Limited has subscribed shares of \$8.1 million. Richardson Camway Limited is a company in which the shares are held as to half by Budget Loans Limited, one-quarter by Mrs G.A. Bayldon and one-quarter by the estate of H.J. Bayldon. Budget Loans Limited has a capital of \$25,000; the shares are owned as to 6,500 shares by the first defendant, 6,500 by his wife and 4,000 by each of three persons with the surname of "Hawkins" living at the same address as the first defendant; one can infer they are his children.

The fourth defendant (according to an affidavit ordered to be filed by the first defendant) is a partnership of which the partners are the first defendant, his wife, Mrs G.A. Bayldon and the H.J. Bayldon Family Trust; the trustees of this trust are Mr W. Wilson, a chartered accountant, Mr N.L. Godden, a psychologist, and the first defendant. It is to be noted that the H.J. Bayldon Family Trust is not the same as the H.J. Bayldon Estate which is the one-quarter shareholder in Richardson Camway Limited. I do not have information as to whether the trustees

of the H.J. Bayldon Estate are the same as those of the H.J. Bayldon Family Trust.

Mr Curry pointed to various references in the plaintiff's affidavits to statements by the first defendant that he "controls" the B/H Partnership and that when he sold the shares in the plaintiff owned by various members of the B/H Partnership in the manner detailed in the earlier judgment, he was the alter ego of the partnership and that he was the one who decided when and for how much to sell. It appears that his various interests control 51% shareholding in Teltherm Industries Limited, plus Richardson Camway Limited and Budget Loans Limited.

Apart from the details as to control of the various shareholdings, which have not really been denied by the first defendant, and references to newspaper reports of a share purchase and exchange transaction between Equiticorp and Teltherm, there is little in the way of relevant additional facts in this present application which are not found somewhere or other in the voluminous affidavits relating to the other application.

Mr Curry was at pains to point out that the plaintiff does not seek to prevent Equiticorp from competing with it; he submitted, however, that Equiticorp should not be entitled to compete by using funds or shareholdings supplied unlawfully by the first and fourth defendants. Accordingly, the plaintiff seeks an interim injunction to prevent the use of those funds in the manner proposed.

Essentially, the submission on behalf of the plaintiff is that there is a residual fiduciary duty reposing in the first defendant even though he has ceased to be a director and employee of the plaintiff. For the reasons given in my earlier judgment, I am not able to hold that there is such a fiduciary duty now remaining in him.

This present particular claim of the plaintiff is one step removed from the submissions made in support of the earlier injunction in that it seeks to control the use of funds from investments in the shares of the plaintiff which the first defendant sold, not only on his own behalf, but also on behalf of others who had sufficient confidence in him to allow him to manage their investment affairs.

It may well be - and I am not making any ruling - that the sale by the first defendant of those shares during the course of his employment may give rise to some sort of breach of his service agreement which did make some reservations in that it permitted him to invest and deposit family and personal funds during his employment with the plaintiff. However, I express no view on that because, whatever the duties under the service agreement, with one exception, those duties have come to an end now that he has ceased to be an employee of the plaintiff.

It seems to me that the application by the plaintiff is two steps removed when it seeks to control the funds of persons who never owed any duty to it; i.e. the Bayldon Family Trust, Mrs Bayldon and Mrs Hawkins. Surely at law, these persons are

entitled to sell their shares in the plaintiff and to invest the proceeds of sale in a competitor. The fact that they may, in selling their shares in the plaintiff, have used an agent who may have been breaching his fiduciary relationship to the plaintiff at the time, cannot, after that agent has ceased to have any fiduciary relationship, be reason to restrain them from investing their money in such manner as they think fit.

Mr Henry pointed out in his submissions, which were similar to those which he advanced in opposition to the other application, that there was no fiduciary duty on a director not to invest funds in, nor to promote a competitor of a company after he has ceased to be a director of that company; likewise, with the exceptions noted earlier in the other judgment, there is no fiduciary duty on an employee within the limits there noted.

At common law, of course, a director may compete with the company; the parameters of this right were discussed by Mahon, J. in Berlei Hestia (NZ) Limited v. Fernyhough, (1980) 2 N.Z.L.R. 150, 160-161; see also Gower, Modern Company Law (4th Edition) 600; and Adams, Company Directors in Australia, p.150. There is a surviving duty which I noted earlier, established by a number of cases, which is applicable to anybody in a fiduciary relationship; that is a duty not to use company property, information, opportunity etc. which has come to a director or employee in the capacity as director or as employee. In fact, if the argument of the plaintiff were taken to its logical extreme, it would be difficult for the servant of any finance company to retain shares in another finance company quoted on the Stock Exchange, purely as an investment.

I note again that the plaintiff does not, in these present proceedings, seek any injunction against the first defendant based on Clause 13 of the service agreement, which prevents the first defendant from being employed by or acting as consultant to any finance company other than the plaintiff. There is no cause of action presently pleaded on that; no doubt the plaintiff will be vigilant if there is any evidence of such a breach; likewise, the first defendant will be vigilant to ensure that his activities do not come within the parameters of Clause 13.

However, for the reasons which I advanced earlier, I cannot see how there is a fiduciary duty now remaining in the first defendant preventing him from using his funds in the manner in which he is sought to be restrained.

A fortiori I fail to see what possible right the plaintiff can have to prevent these other three entities from investing their money in such way as they think proper. As Mr Henry submitted (and many cases have shown) an injunction must be based on a legal duty; there is absolutely no legal duty owed by the other members of the partnership to the plaintiff; there never has been one owed by them to the plaintiff.

The other cause of action upon which an injunction is sought to be based is the tort of unlawful interference with contractual relations. This tort was discussed recently by the Court of Appeal in Van Camp Chocolates Ltd. v. Aulsebrooks Ltd., (CA 169/82, 2 March 1984). Essentially, the elements of that tort are:

- (a) There must be deliberate interference with the trader's interests by use of unlawful means;
- (b) It must be shown that the defendant acted for the purpose of advancing his own interests;
- (c) The defendant used against a rival weapons that were unlawful; and
- (d) The defendant thereby caused the rival injury.

Assuming, but certainly not deciding, that all the other elements of the tort are present, it has not been shown that there was an unlawful weapon used in the present case. The same weapon is relied on here as in the other cause of action; namely, breach of a continuing fiduciary duty by the first defendant; in my judgment, there has not been shown to be any such duty after the first defendant has left the plaintiff's employ. Again, for the reasons indicated, I must decline the injunction based on this further cause of action.

As in the earlier case, I find that even if I were wrong in holding that there is no arguable case or no serious question to be tried, I consider that damages would be an adequate remedy for the plaintiff. Equiticorp now has a paid-up capital of over \$10 million; the first defendant is in a good financial position. There are also a number of other factors which weigh on the side of the defendants; these are:

- (a) The Court cannot make an injunction against the third defendant as sought in the alternative (paragraph C) because to do so would involve a reduction of capital which can only be done pursuant to the procedures of the Companies Act 1955;
- (b) The major shareholder in Equiticorp is now Richardson Camway Limited which, as indicated, is one-quarter owned by the Bayldon Estate which is not a member of the B/H Partnership; in any event, Richardson Camway Limited has not been joined as a party to this action;
- (c) Damages might not adequately compensate Equiticorp in that it could otherwise be required to refund share capital to which it is presently contractually committed. This could have a damaging effect on a new finance company and put an end to its business operations; whereas the plaintiff, although it may suffer some set-back because of the departure from its ranks of a number of its top management, will doubtless be able to withstand that shock and will not lose commercial credibility;
- (d) Any delay between now and the substantive hearing could affect the proposed public flotation of Equiticorp;
- (e) Innocent third parties might be detrimentally affected; in other words, those with loan arrangements with Equiticorp negotiated prior to the proceedings could suffer.

All these matters cumulatively of course come into the balance on the question of damages being an adequate remedy; even more than in the first case, because of the above matters which were not present there, damages would be an adequate remedy.

It follows, therefore, that the application for an interim injunction must be dismissed. As in the first case, I make no judgment on whether the plaintiff is likely to succeed

in any substantive action.

I point out in this case as in the first, that Mr Henry's attitude has been that to answer the numerous allegations made by the plaintiff is unnecessary and irrelevant because no cause of action in law exists, whatever the facts may be.

The question of costs is reserved.

R. D. Barker J.

SOLICITORS:

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for Plaintiff.

Wilson, Henry, Martin & Co., Auckland, for Defendants.