27/4 (3) N2LR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.417/84

1440

IN THE MATTER OF The Companies Act 1955

AND

IN THE MATTER OF THE GREAT OUTDOORS COMPANY LIMITED
a duly incorporated company having its registered office at Norris Avenue, Te Rapa, Hamilton

Hearing: 9 November 1984

Counsel: H.T.D. Knight in Support
J.F. Timmins to Oppose

Judgment: 21-11-84

JUDGMENT OF GALLEN J.

Jeffery Gordon Roberts who is most appropriately referred to as "the applicant", seeks an order restraining Investment Finance Corporation Limited to which I will refer as "the Corporation", from offering for sale or attempting to sell or selling that company's shareholding in the company known as The Great Outdoors Company Limited.

The background to the application is that in 1983 the applicant and his company entered into an arrangement to acquire the shares in The Great Outdoors Company Limited

from the then owner of the shares. It appears that the negotiations were carried out in November and December 1983 and the final understanding between the parties was arrived at after legal offices had closed so that it was not possible to commit the details of the arrangement to writing in terms which might have been acceptable to legal advisors.
Since the factual material out of which the proceedings arise is the subject of dispute, it would be inappropriate in this judgment to do other than indicate the generally agreed basis of the arrangement.

The shares were purchased in such a manner that the applicant acquired 49% of the shareholding and the Corporation 51%. It was accepted that this arrangement would give control in the last resort to the Corporation, but the applicant was at the time managing The Great Outdoors Company Limited for its then shareholders and it seems to have been accepted that he would be appointed Managing Director and retain actual day to day control. It is alleged that the transaction was effectively one whereby the applicant was acquiring the business, the Corporation taking a financial or investment interest. Both parties retained the right to appoint Directors, but the Chairman was to be and was, appointed by the Corporation. Rather surprisingly, the Articles of The Great Outdoors Company Limited had not been perused by either party before the acquisition of the shares, but it is agreed that there had been some negotiation over

rights of pre-emption as between the parties. The Articles did not contain any such right and the understanding between the parties was not in such precise terms as to enable any agreed form to be put forward. Since that time, the applicant alleges that a number of problems have arisen. He maintains that the Corporation has threatened to use its majority shareholding to remove him as Managing Director; that the Corporation has not been prepared to agree to new Articles of Association reflecting the understanding between the parties; that there have been disagreements over dividend policy; that the Corporation has required The Great Outdoors Company Limited to enter into disadvantageous financial arrangements for the benefit of the Corporation and that the Corporation has endeavoured to depress the value of the applicant's shares by putting an emphasis on his minority shareholding while at the same time inflating the value of its own shares on the same basis.

With that background, the applicant has presented a petition to the High Court under the provisions of s.209 of the Companies Act 1955 as amended by the 1980 amendment, seeking an order that the Corporation transfer the shares held by it to the applicant or alternatively, restricting the Corporation from selling its shares until appropriate pre-emptive rights are included in the Articles, or for such further or other orders regulating The Great Outdoors Company Limited's affairs in the future as the Court considers

appropriate, basing the application upon contentions that there has been unfairly discriminatory or unfairly prejudicial or oppressive conduct in terms of the Act. The applicant seeks an interim order preventing sale of the Corporation's shareholding or any part thereof until such time as the substantive application under s.209 has been dealt with. There is no doubt that the threshold question in applications of this kind is whether or not the applicant can show there is a serious question to be tried.

Mr Timmins in detailed and comprehensive submissions for the Corporation, maintains that the applicant cannot satisfy this test. Initially he bases his opposition on an analysis of the factual position appearing from the affidavits, on the basis of which he contends that the factual allegations upon which the appoicant relies are not borne out. These allegations relate to the matters already referred to. It is true that there is a substantial dispute on the affidavits, but it is quite inappropriate that such a dispute should be resolved in these proceedings where oral evidence has not been heard and where the material before the Court consists substantially of assertions untested by cross-examination.

It would normally be an almost impossible task to establish on such material that there was no factual basis for an application of this kind and I cannot accept that such a task has been performed in this case. In my view, the allegations made by the applicant and supported by Mr Barclay

cannot be said to be so controverted by the material filed on behalf of the company that they do not give rise to any factual basis upon which the application could be supported. Mr Timmins however goes further. He contends that the material relied upon by the applicant is not sufficient to justify the intervention of the Court under the provisions of s.209 of the Companies Act and he supports this contention on a number of bases.

Mr Timmins began by analysing the differences between s.209 before the 1980 amendment and subsequently. He maintains that the jurisdiction conferred by the section can only be exercised where it is possible to show that the affairs of The Great Outdoors Company Limited have been or are likely to be conducted in a manner that is ".....likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him." He says that the dispute between the applicant and the Corporation is contractual in nature and any action which the applicant may have, should be brought in contract as between the parties. He says that the dispute has nothing to do with the conduct of the affairs of The Great Outdoors Company Limited. I cannot accept this contention.

The scope of s.209 as amended has been considered by the Court of Appeal in Thomas v. H.W. Thomas Limited (unreported judgment delivered 23 July 1984, C.A. 151/83). That was a case where one minority shareholder in a private company complained of an inadequate return on the shareholders'

funds and wished to be bought out at a price for his shares which reflected the assets value of the company. The Court was not prepared to hold that the company's actions in relation to its assets was unjustly prejudicing the applicant's interest but went on to hold that it was premature in the absence of an adequate distinction as to the fair value of the shares or the availability of purchasers, to conclude that the applicant was inevitably locked into the company.

Richardson J. analysed the position under the section before its amendment as compared with the amended section and considered those decisions which had been brought under the preceding section or its counterpart in other comparable jurisdictions. In referring to the just and equitable standard which proves the basis for approach under the provisions of the section, he referred to the decision of the House of Lords in Ebrahimi v. Westbourne Galleries Limited 1973 A.C. 360 and specifically stated that the comments in that decision relating to the just and equitable standard were equally apt under s.209. The Ebrahimi decision was not one which specifically related to the United Kingdom equivalent of s.209. It was in fact brought under the provisions of s.222 of the United Kingdom Act, the general section which allows the Court to wind-up a company where it is considered just and equitable to do so. Lord Wilberforce considered that the use of the words

"just and equitable" of themselves, gave a wider jurisdiction. He stated:-

> "The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

Those words were repeated by Richardson J. in Thomas v. H.W. Thomas Limited and that learned Judge went on to say:-

> "Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often

> depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies' legislation in general and s.209 in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognise that s.209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing....."

That clearly indicates that the section is sufficiently wide to consider the rights of shareholders or groups of shareholders inter se and further, that an over-riding consideration is the question of fair dealing in relation to the importation of equitable standards by the use of the words in the section.

In my view, the section is wide enough to allow the contentions of the applicant to be taken into consideration. I would however, if necessary, be prepared to go further than this and to conclude that some at least of the matters raised by the applicant may properly be regarded as matters arising out of the affairs of The Great Outdoors Company Limited in the sense in which I consider those words are used in the section.

Finally, the major dispute between the applicant and the Corporation depends upon rights of pre-emption, rights which depend upon the Articles or rather an alteration to the Articles of The Great Outdoors Company Limited. The Articles of that company are as between shareholders, contractual in nature and it is appropriate that a dispute over the contractual rights between the shareholders should be dealt with in the context of the provisions of s.209.

Mr Timmins goes on to argue that even if the allegations of the applicant were borne out, the conduct complained of could not be regarded as oppressive, unfairly discriminatory or unfairly prejudicial within the meaning of the section. Mr Timmins bases his contentions substantially upon the comments of the Court of Appeal decision in Thomas v. H.W. Thomas Limited. He contends that the applicant would not suffer any unjust detriment if the Corporation were to sell its shares to a third party. If the applicant succeeds in establishing his contentions, then he has a claim to a right of pre-emption arising out of the negotiations between himself and the Corporation. There could be no guarantee that he could establish such a right against a third party who had no notice of that claim, bearing in mind that the Articles of Association which must be normally regarded as providing notice of the rules of management of the company and the rights appertaining to shares, do not refer to any such provision.

The applicant is employed by The Great Outdoors Company Limited. He would remain a minority shareholder in a company which has to be regarded as not only his principal asset, but also his means of livelihood. He has an arrangement with the Corporation which recognises his management entitlement. In my view, he would suffer a serious detriment if the shares were sold as that term is contemplated in the decision of the Court of Appeal.

I therefore conclude that the applicant does succeed in meeting the requirements of the threshold question; that there is a serious question to be tried. Accordingly, it is necessary to move to consider the balance of convenience.

The applicant maintains that his position would be seriously affected if the Corporation were to sell its majority shareholding. In my view this contention is justified. I believe that it is justified because any claim which the applicant may have in respect of pre-emptive rights is unlikely to succeed against a third party without notice of his contention in the matter already referred to. Further however, the relationship between the applicant and the Corporation is such as to give some grounds for the applicant's contention that his shares should be valued on a special basis which reflects the joint enterprise into which the parties entered. No such contention could succeed against a third party who was not involved in the negotiations and the Corporation's own contention that its shareholding is worth

more and the applicants less because of the control situation, is of itself a justification for the view that the applicant's position would be seriously affected by a sale at this stage. Actions which are designed to - or have the effect of - depressing share values, have been accepted as oppressive for the purposes of the winding-up section of the Companies Act, see for example Scottish Co-operative Wholesale Society Limited v. Meyer and Another 1959 A.C. 324.

Equally, I do not believe that the applicant's position could be met by an award of damages. Assessing such damages would be difficult and in any event, his position as Managing Director would be placed in jeopardy were an outside party to become the majority shareholder.

Mr Timmins submitted that there was inadequate evidence of the applicant's ability to meet an award of damages if he should ultimately fail in his substantive proceedings. The applicant has sworn that his net worth is in the vicinity of $500,000. The Corporation does not contend that it has any immediate prospect of sale or any particular purchaser in mind. The measure of damages would be presumably any loss occasioned by the Corporation's present inability to sell. In the absence of any evidence, it would not seem likely that that loss would exceed the applicant's net worth. I accordingly reject that submission.

There was some argument addressed on the question of preserving the status quo. The applicant contended that the status quo was the present ownership of the shares. The Corporation contended that the status quo was the present unrestricted ability of the Corporation to sell its shares because of the lack of any pre-emptive clause in the Articles. The concept of status quo in matters of this kind is often difficult to apply. I prefer the applicant's view as it takes into account the possibility that rights of pre-emption exist because of negotiations between the parties, even if these have not yet been reduced to an enforceable form.

In some cases where other considerations were equal, the strength of the respective cases has been a decisive factor. In this case, I do not think this aspect falls to be considered. In any event, it would depend upon findings of fact which cannot be made on the material before me.

In my view, the applicant is entitled to an order. There will therefore be an interim injunction until such time as the substantive proceedings under the provisions of s.209 of the Companies Act have been dealt with, restraining Investment Finance Corporation Limited from offering for sale, or attempting to sell, or selling, that company's shareholding in The Great Outdoors Company Limited. The question of costs is reserved.

Solicitors in Support: Messrs Bennett, Vollemaere and Company, Auckland

Solicitors to Oppose: Messrs Sheffield, Young and Ellis, Auckland