AUCKLAND REGISTRY A. No. 380/84

IV

OFFICE File I/Injunction

BETWEEN TIMOTHY LAIRD [redacted] of Auckland, Information Systems Manager

Plaintiff

A N D COMMODORE COMPUTER (N.Z.) LIMITED a duly incorporated Company having its registered office at Auckland, Wholesaler

First Defendant

A N D CHARLES RICHARD ANDERSON of Auckland, Managing Director

Second Defendant

A N D MICHAEL WILLIAM COOCH of Auckland, Company Director

Third Defendant

A N D BRUCE MICHAEL TAYLOR of Auckland, Company Director

Fourth Defendant

Hearing: 30th May and 1st June, 1984.

Counsel: R. P. Smellie, Q.C., T. N. B. Wilson and Twist for Plaintiff.
A. J. J. Agar and G. R. Halford for Second, Third and Fourth Defendants.

Judgment: 13th June 1984

JUDGMENT OF TOMPKINS, J.

The Plaintiff seeks an interim injunction against the Second, Third and Fourth Defendants. He has also commenced an action seeking a number of remedies on six causes of action against the Second, Third and Fourth Defendants. He also seeks relief by way of a derivative action on behalf of the First Defendant against the other three Defendants.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. No. 380/84

BETWEEN TIMOTHY LAIRD EDNEY

Plaintiff

A N D COMMODORE COMPUTER (N.Z.) LIMITED

First Defendant

A N D CHARLES RICHARD ANDERSON

Second Defendan

A N D MICHAEL WILLIAM COOC

Third Defendant

A N D BRUCE MICHAEL TAYLOR

Fourth Defendan

Reserved decision delivered by me this 13 June 1984 at 2pm

S. Peters
Deputy Registrar.

JUDGMENT OF TOMPKINS, J.

Received copy.

Brookes Cox Gisbick
13.6.84

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Nicholson Gribbin

Pending the trial of this action or further order of the Court, an interim injunction issue restraining the Second, Third and Fourth Defendants, or any of them, or their agents or servants or any company controlled by them or by any of them, otherwise than as directors or servants of the First Defendant from -

(i) soliciting, approaching or otherwise performing services as agents in New Zealand for Commodore Business Machines Proprietary Limited or any other related services;

(ii) acting as agents, wholesalers or retailers of Commodire Micro Computers or of software for Commodore Micro Computers;

(iii) Using the confidential information disclosed to the Second, Third and Fourth Defendants by the First Defendant for the purpose of establishing an agency with Commodore Business Machines Proprietary Limited or any other person for distributing Commodore Micro Computers and soliciting the customers or prospective customers of the First Defendant;

(iv) Doing any acts calculated to damage the First Defendant's business or discredit the First Defendant, its Offices and employees.

Costs are reserved. They shall be in the discretion of the Court when the action is finally determined.

J

Solicitors:

Rennie, Cox, Garlick & Sparling, Auckland, for Plaintiff.

Nicholson, Gribbin & Co., Auckland, for Second, Third and Fourth Defendants.

passed using their majority, that they were proposing to obtain for themselves the Company's most valuable - indeed its only substantial - asset. They thereby forced the Plaintiff into taking these present proceedings in an attempt to preserve that asset for the Company.

Nor do I consider it unjust if, as a result of the grant of the interim injunction, the Defendants consider they will have to accept the Plaintiff's offer. It is agreed that the price proposed for the shares is fair if the First Defendant continues to have the benefit of the distributorship agreement. If, contrary to the expectations of the parties, the agreement is not renewed to the First Defendant without the Plaintiff as a shareholder, then the condition is not fulfilled, the acceptance of the offer lapses, and the parties would be left to their legal remedies.

CONCLUSION:

Having regard to all the factors to which I have referred, the balance favours the granting of the relief sought. Had I otherwise considered the balance to be even, then the scales would be tipped in the Plaintiff's favour by the relative strength of the Plaintiff's case. I have already found he has established a serious case to be tried. But relevant to the final exercise of the Court's discretion is my view that on the evidence in the affidavits the Plaintiff has shown a real likelihood that he will succeed in his allegation that the Defendants, in acting in the manner they were proposing, would be breaching their duty to the First Defendant.

There will be an order in these terms:-

THE FINALITY OF AN INTERIM INJUNCTION:

The relevance of this was referred to by Lord Diplock in N.W.L. Ltd. v. Woods (supra) at 626. He said:-

> " Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete, and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other. "

In Cayne v. Global Natural Resources plc (supra) the court took into account that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial.

A like submission was advanced by the Defendants in the present case. Mr. Halford submitted that if the interim injunction were granted then this would, in effect, force the Defendants to purchase the Plaintiff's shares on the Plaintiff's terms because if they did not do so there would be a risk that the distributorship agreement may pass to a third party. The injunction would therefore, he submitted, put pressure on the Defendants to enhance the Plaintiff's position. In that sense, therefore, he contended that the grant of the interim injunction would determine the action without the Defendants having had the opportunity of arguing the issue on the merits.

If this be so, this is a situation caused by their own actions. At the meeting of the 10th April, 1984, they made it clear, both by what they said and by the motion that they

All of these factors indicate a degree of difficulty and uncertainty in the assessment of damages. No doubt if faced with the task the Court would make an assessment, but I consider, in deciding whether or not to issue an interim injunction, the relative difficulty of making that assessment is a relevant factor.

No issue arises out of the ability of the parties, that is, either the Plaintiff or the three Defendants, to pay damages for which any of them may become liable.

THE STATUS QUO:

In considering the maintenance of the status quo, the Court takes into account the position prevailing when the Defendants embarked on the activity sought to be restrained (Fellowes v. Fisher (1975) 2 All E.R. 829, Sir John Pennycuick at 843).

Thus maintaining the status quo would involve maintaining the position as it existed immediately prior to the meeting of the 10th April, 1984. The Company held and was operating successfully the distributorship agreement. The three Defendants were managing the Company. The Plaintiff was a shareholder but otherwise was playing no active role in the management of the Company. If the interim injunction were granted then that would, at this stage, result in the position being the same as it was immediately prior to the 10th April.

I recognise that the distributorship agreement comes to an end at the end of this month. It may or may not be renewed. However, that too was the position immediately prior to the 10th April. So that the granting of an interim injunction would, in the sense I have indicated, preserve the status quo.

fiduciary duty to the First Defendant, then it is at least open to the Plaintiff to argue that they, or any company formed by them, hold the distributorship agreement in trust for the First Defendant. They would then be liable to account to the First Defendant for the profits resulting from the operation of the agreement. Ascertainment of these profits could be a complex matter, particularly if the new company has additional capital injected into it, or if additional shareholders become involved in it. If, alternatively, the claim on behalf of the Company were advanced as a claim for damages for breach of the duty rather than on the basis of the benefit of the agreement belonging to the Company, it would then be necessary not only to assess the profitability of the distributorship agreement, but convert that into an appropriate damages award when the duration of the agreement must, as Mr. Shepherd points out in his affidavit, be a matter of uncertainty.

Mr. Halford advanced the submissions on behalf of the Defendants on this aspect of the case, and urged that if the Plaintiff should ultimately establish these causes of action then compensation can be ascertained in the usual way. He also pointed to the possible alternative that if the interim injunction should issue, the distributorship may be awarded to a third party. If that were to occur the Defendants would have suffered irreparable damage by the permanent loss of an on-going business opportunity.

Relevant to the damages issue, and in particular the difficulty of assessing damages to the Plaintiff, is the volatile nature of the computer business. Profits can vary substantially, partly dependent upon the performance of the individuals involved in the business, and partly as the result of the action of competitors.

to the Plaintiff's dismissal as a director and employee in May, 1982, there is not any significant factual difference between the parties. Having done so, and having considered the authorities to which I have referred, and others cited during argument, I have arrived at the clear conclusion that the Plaintiff has, in respect of the relevant causes of action, established that there are serious questions to be tried. Having reached that conclusion it is inappropriate that at this interlocutory stage I should elaborate in any greater detail on the factors that have led me to that conclusion.

DAMAGES:

If the Plaintiff can be adequately compensated by an award of damages for the loss he would have sustained as a result of the Defendants' doing what is sought to be enjoined between the time of the application and the time of trial, then this is a relevant and sometimes decisive factor against the granting of an interim injunction.

If the interim injunction be not granted, then it is certain that the First Defendant will not, after the end of June, have the benefit of the distributorship agreement. It will as a result cease to be in business. The Plaintiff will suffer loss resulting from the diminution in value of his shares in the First Defendant. This loss is probably ascertainable, being the difference in the value of the shares in the Company with the benefit of the distributorship agreement, and that value when the Company does not have the benefit of the agreement.

However, the damages issue is not as simple as that. The Plaintiff, as he is entitled to do, brings the action not only on behalf of himself but also on behalf of the Company. If the three Defendants, in seeking to acquire for themselves the distributorship agreement, are held to be in breach of their

but also on behalf of the Company by way of a derivative action, Mr. Smellie referred to Wallersteiner v. Moir (No. 2) (1975) 1 Q.B. 373. Lord Denning, M.R., stated the problem that can require a derivative action at p.390:-

> " But suppose (the company) is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a Board meeting is held they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. "

Lord Denning gratefully adopted the following extract from Professor Gower in Modern Company Law, 3rd Ed. (1969), p.587:-

> " Where such an action is allowed the member is not really suing on his own behalf, nor on behalf of the members generally, but on behalf of the company itself. Although . . . . he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company . . . . . In the United States . . . this type of action has been given the distinctive name of a "derivative action" recognising that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it. "

The same passage appears at p.647 of the 4th Ed. At p.648 Professor Gower lists a number of conditions that need to be complied with before the action can properly be regarded as a derivative action. I do not propose to examine each of these - suffice it to say that it would appear on the facts deposed to in the affidavits that the Plaintiff's action comes within these conditions.

I have considered the evidence contained in the affidavits. Except in connection with the circumstances relating

Secondly, he submitted that even if otherwise these actions could be regarded as breach of a fiduciary duty, the beneficiary of that duty can consent to what would otherwise be a breach. In support of that submission he referred to passages in the judgments in Regal (Hastings) Ltd. v. Gulliver which made it clear that had the shareholders in general meeting approved of the directors acquisition of the shares, then they would not be in breach of any duty.

In response the Plaintiff submitted that the consent of the Company acquired in the manner in which the consent was obtained in this case would not avail the Defendants. Support from this submission was derived from the following passage in the advice of the Privy Council in Cook v. Deeks (supra) at p.564:-

> " Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority . . . . . In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts . . . . . "

It was submitted on behalf of the Plaintiff that this passage precisely fits the facts of the present case. The directors, by the majority of their votes, would be making a present to themselves of an exceedingly valuable right held by the First Defendant. To do so in a manner that would deprive the Company of this right, and thereby deprive the Plaintiff of that part of the value of his shareholding as was represented by the right, would allow a majority to oppress the minority.

In support of his submission that the Plaintiff was entitled to bring this action not only on behalf of himself

then they would be liable to account to the First Defendant for any profits they may hereafter make as a result of that acquisition. In support of that contention Mr. Smellie referred to Cook v. Deeks (supra) where the Privy Council held that the directors could not retain the benefit of the contract for themselves but must be regarded as holding it on behalf of the company, and to Regal v. Gulliver (supra) where Lord Russell at p.149 held:-

> " In the result I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained the shares by reason, and only by reason of the fact that they were directors of Regal, and in the course of the execution of that office are accountable for the profits which they have made out of them. "

Reference can also be made to the judgment of Gresson, J. in G. E. Smith Ltd. v. Smith (1952) 2 N.Z.L.R. 470, where he held that a director who had obtained an import licence in breach of his fiduciary duty to the company held the licence as trustee for the company.

Mr. Agar, for the Second, Third and Fourth Defendant accepted that they as directors owed a fiduciary duty to the First Defendant. However, he submitted that there had been no breach of that duty, first in the light of the events that had occurred, and secondly, because the Company had consented to the actions the three Defendants proposed to take.

As to the first, he submitted that all that the Defendants had done is that they had decided to "withdraw their labour". Having so decided they quite properly notified Commodore Business Machines of that intention and they then called the meeting in order to put the matter on a regular basis with the First Defendant. He emphasised the absence of any attempt to conceal what they were proposing to do.

" Once, it was said, they came to a bona fide decision that the appellant company could not provide the money to take up the shares, their obligation to refrain from acquiring those shares for themselves came to an end. With the greatest respect I feel bound to regard such a conclusion as dead in the teeth of the wise and salutary rule so stringently enforced in the authorities. "

Thus it is submitted in the present case on behalf of the Plaintiff, the fact that the distributorship agreement was due to come to an end at the end of June, 1984, and is thereby available for the three Defendants personally, avails them not. Their action in attempting to take the benefit of the agreement, even if they did not do so in secret, is still, the Plaintiff submits, in breach of their fiduciary duty.

The Supreme Court of Canada in Canadian Aero Service Ltd. v. O'Malley, 40 D.L.R. (3d) 371, was also concerned with the actions of directors in obtaining the benefit of a contract as the result of their connections with the company. Lasken, J., delivering the judgment of the Court, stated at p.382 the principles applicable:-

" An examination of the case law in this court and in the courts of other like jurisdictions on the fiduciary duties of directors and senior officers, show the pervasiveness of a strict ethic in this area of the law. In my opinion this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired. "

The relevance of this citation to the facts of the present case, needs no emphasis.

Then it was submitted on behalf of the Plaintiff that if the three Defendants acquired the distributorship agreement in breach of their fiduciary duty to the First Defendant

reality on their own behalf, but in exactly the same manner as they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through. "

The Plaintiff submitted that this closely resembled the present situation in that it was obvious that the three Defendants had been dealing with Commodore Business Machines on the basis that, if they took the action they proposed, Commodore Business Machines would award the distributorship agreement to them, and that, as is clear from Mr. Shepherd's affidavit, this would be because of the way in which the three Defendants had managed the distributorship agreement while it was held by the First Defendant.

In Regal (Hastings) Ltd. v. Gulliver & Ors. (1942) 1 All E.R. 378, the plaintiff company sought to recover from five defendants who were former directors of the company profits they had made by the acquisition and sale of shares in a subsidiary company. It was submitted that the actions of the directors were justified because the company lacked the resources to acquire the shares which the directors had. Therefore it was submitted that what the respondents did caused no damage to the company and therefore involved no neglect of the company's interest nor similar breach of duty. The House of Lords rejected this contention and held the directors liable. Lord Wright said at p.392:-

" However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not enquire whether the other person is damnified or has lost profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. "

Then at p.394 he said:-

(6) Acceptance of this offer to be conditional upon the First Defendant obtaining a renewal of the distributorship agreement for a further term of at least one year. If this condition be not fulfilled, then the acceptance would lapse and the Plaintiff remain free to pursue the proceedings he has commenced.

THE INTERIM INJUNCTION:

The factors relevant to the grant of an interim injunction are well established. I propose to consider them against the facts of the present case. I do so on the basis that in the end the decision whether to grant the interim injunction is to be made by deciding whether, having regard to such of the factors as may be relevant, it is, in the exercise of the Court's discretion, appropriate to grant the relief sought. This discretion is to be exercised bearing in mind all the circumstances of the case and not by the application of a formula or a set of rules (Congoleum Corporation v. Poly-flor Products (N.Z.) Ltd. (1979) 2 N.Z.L.R. 560, Somers, J. at 571).

In considering the "balance of convenience" I do so with the observations of May, L.J. in Cayne v. Global Natural Resources plc (1984) 1 All E.R. 225, at 237, in mind:-

> " That is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand, but in truth, and as Lord Diplock himself made clear in N.W.L. Ltd. v. Woods (1979) 3 All E.R. 614, the balance that one is seeking to make is more fundamental, more weighty than mere "convenience". I think that it is quite clear from both cases (American Cyanamid Co. v. Ethicon Ltd. (1975) 1 All E.R. 504, and the N.W.L. case) that, although the phrase may well be substantially less elegant, the "balance of the risk of doing an injustice" better describes the process involved. "

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distributorship agreement. It is accepted that on that basis the accountants for the respective parties agree that the Plaintiff's shareholding is worth something in excess of $200,000.

It is the contention of the Second, Third and Fourth Defendants that the Plaintiff's shareholding should be valued on the basis that the distributorship agreement expires at the end of this month, that there is no certainty that it will be renewed, and that therefore the shares should be valued as if the Company were in liquidation and without the benefit of the distributorship agreement. On this basis the Defendants' accountant has assessed the value of the Plaintiff's shareholding at $44,000. The Plaintiff's accountant has assessed the value at $20,000.

At the hearing before me counsel were agreed that there should be disclosed to the court an offer that has been made by the Plaintiff. Both sides waived the privilege that would otherwise attach to this offer resulting from it being an offer made without prejudice in the course of negotiations. The offer is:-

(1) The Plaintiff will sell his shares for $200,000, $40,000 payable now, and the balance payable at the rate of $40,000 a year, carrying interest at 10%, secured by a mortgage over the shares.

(2) Alternatively, the Plaintiff would sell his shares for $185,000, payable in full in cash now.

(3) This offer to remain open for acceptance for seven days from the date of the sealing of the judgment on the application for an interim injunction.

(4) The Plaintiff would discontinue all the claims he has brought on behalf of himself and the First Defendant against the Second, Third and Fourth Defendants.

(5) The guarantee given by the Plaintiff to secure the First Defendant's overdraft and the mortgage securing that guarantee to be released. If the Bank will not agree then the Plaintiff would accept an indemnity from the Second, Third and Fourth Defendants but would still require the mortgage to be released.

the appointment of a sub-distributor for one of the products.

Mr. Shepherd regards the Second, Third and Fourth Defendants as successful and with the potential for continuing with that success.

With regard to future Commodore distribution, he points out that the present distributorship agreement terminates on the 30th June, 1984, and indicates that if the dispute is not resolved by then, his Company will not extend the distributorship agreement with the First Defendant. He believes that the Second Third and Fourth Defendants, because of their respective abilities have the potential successfully to operate a distributorship of his Company's products, although probably not in the present corporate structure. He makes it clear that his Company would not be prepared to enter into a distributorship agreement with a Company in which the Plaintiff exercises control, either as a shareholder or as an employee. If the Second, Third and Fourth Defendants are able to operate a distributorship free of the present problems and were properly capitalised, then his Company would be prepared to consider a further distributorship agreement with them. However, he makes it clear that he is giving no undertaking or commitment.

THE PLAINTIFF'S SHAREHOLDING:

Counsel were in agreement that the real issue between the parties is what is a fair price for the purchase of the Plaintiff's shareholding. The Plaintiff is prepared to sell. The Second, Third and Fourth Defendants are prepared to buy, but they cannot reach agreement on the basis upon which the shares should be valued. The Plaintiff claims that they should be valued on the basis that the First Defendant has, and on the sale of his shares to the Second, Third and Fourth Defendants, is likely to continue to have, the benefit of the

nor any rights or duties hereunder are transferrable or assignable or delegable by Distributor, either voluntarily or by operation of law. Any unauthorised transfer or attempted transfer or assignment of delegation shall automatically and immediately terminate this Agreement. Major changes in ownership or management of Distributor shall also automatically and immediately terminate this Agreement.

(5) The minimum value of products to be purchased under the agreement for the period from the 1st July, 1983, to the 30th June, 1984, is $5 million, Australian.

Mr. Shepherd is the managing director of Commodore Business Machines. He was also a director of the First Defendant, appointed by the Articles of Association, until he resigned in March of this year. He has filed an affidavit setting out the attitude of Commodore Business Machines to the matters at issue in this litigation. He states that the market for micro computers is relatively new and, because of competing manufacturers, extremely volatile. Commodore Computers have been particularly successful in supplying new areas of demand and in many cases has been one of the earliest suppliers in particular fields.

It is his Company's practice to enter into distributorship agreements for a period of no longer than one year with renewal on a year to year basis thereafter. This is because of the volatile nature of the computer market and the fact that the suppliers destiny is dependent on the success of its distributors.

Mr. Shepherd spells out two areas of concern in relation to the distributorship of the First Defendant. These are the dispute between the Plaintiff and the Second, Third and Fourth Defendants, which he believes could affect the management and stability of the First Defendant, and the limited ability of the First Defendant to borrow. This has limited the volume of the products the First Defendant can buy. It has resulted in

as Plaintiffs sought and obtained an interim injunction prohibiting the advertising of this petition.

At the hearing before me the parties were in agreement that the petition should not at this stage proceed and that the interim injunction prohibiting advertising should remain in force.

THE DISTRIBUTORSHIP AGREEMENT:

The terms of the distributorship agreement between the First Defendant and Commodore Business Machines are recorded in a written agreement made on the 1st July, 1983. Prior to that there was no written agreement, but the parties accept that the agreement of the 1st July, 1983, records the informal arrangement that had existed from the commencement of the distributorship about August, 1981, until the completion of the written agreement. The terms of that agreement relevant to the matters now at issue between the parties are:-

(1) The First Defendant was appointed the exclusive distributor of Commodore home, personal and business computers and accessories within New Zealand.

(2) The term is of particular significance. Clause 2 of the agreement read:-

" This agreement shall commence on the date hereof and terminate on June 30, 1984, subject to the terms and conditions hereinafter set forth and may thereafter be extended from year to year by the mutual written agreement of the parties. "

(3) Clause 9 provides for earlier termination by Commodore Business Machines upon the occurrence of the events listed in the clause. The event relevant to the present proceedings is the occurrence of any change in the financial condition of the First Defendant which, in the sole judgment of Commodore Business Machines, is materially adverse.

(4) Clause 11 prohibits the transfer of the agreement. It provides:-

" Due to the personal nature of Distributor's commitments hereunder, neither this Agreement

them as agents for Commodore Business Machines.

(e) In respect of each of its causes of action aggravated damages of $300,000 against the Second, Third and Fourth Defendants.

(f) In respect of each of its causes of action exemplary damages of $300,000 against the Second, Third and Fourth Defendants.

(g) The Plaintiff's and the First Defendant's costs were sought against the Second, Third and Fourth Defendants.

The statements of defence of the Second, Third and Fourth Defendants admit certain facts about which there is no dispute but otherwise deny the allegations contained in the Statement of Claim.

The Plaintiff on the same day, the 19th April, 1984, filed his notice of motion for interim injunction. He thereby sought an interim injunction in the same terms as the permanent injunction.

On the same day, the 19th April, 1984, the Plaintiff filed a petition pursuant to s.209 of the Companies Act, 1955, as amended by s.11 of the Companies Amendment Act, 1980. The grounds set out in the petition are that the affairs of the First Defendant have been, are being, and are likely to be conducted in a manner that has been, is, and is likely to be oppressive, unfairly discriminatory, and unfairly prejudicial to the Plaintiff in his capacity as a member. Particulars are set out. The Plaintiff sought various orders regulating the affairs of the Company, forbidding the implementation of the resolution passed on the 10th April, 1983, ordering the purchase by the Second, Third and Fourth Defendants of the shares of the Plaintiff, and seeking an injunction in the same terms as that sought in the action.

In response the Second, Third and Fourth Defendants

(f) Stealing the goodwill of the First Defendant's business;

(g) Converting or intending to convert the property of the First Defendant for example records of the First Defendant.

Sixth cause of action:

This alleges that the Plaintiff's contract of service with the First Defendant had been wrongfully terminated and that the Plaintiff was entitled to additional payments by way of salary from the First Defendant.

Relief sought:

The Plaintiff claimed for and on behalf of the First Defendant and, where appropriate, on his own behalf, the following relief:-

(a) $74,896, being salary due and salary in lieu of notice.

(b) A permanent injunction restraining the Second, Third and Fourth Defendants or any company controlled by them from:-

(i) Soliciting, approaching or otherwise performing services as agents in New Zealand for Commodore Business Machines Proprietary Limited or any other related services;

(ii) Acting as agents, wholesalers or retailers of Commodore Micro Computers or of software for Commodore Micro Computers;

(iii) Using the confidential information disclosed to the Second, Third and Fourth Defendants by the First Defendant for the purpose of establishing an agency with Commodore Business Machines Proprietary Limited or any other person for distributing Commodore Micro Computers and soliciting the customers or prospective customers of the First Defendant;

(iv) Doing any acts calculated to damage the First Defendant's business or discredit the First Defendant, its Offices and employees.

(c) Loss suffered by the Plaintiff which cannot be assessed at the date of the statement of claim.

(d) An account for profits made by the Second, Third and Fourth Defendants or any company controlled by

Defendant, they were in breach of their obligations to act in accordance with their fiduciary duties as directors of the First Defendant.

Third cause of action:

This alleges that the Second, Third and Fourth Defendants, as employees of the First Defendant, received confidential information and that they used that information to establish an agency with Commodore Business Machines and to obtain the business of the First Defendant. It was alleged that they were thereby in breach of their duty not to use that confidential information otherwise than for the benefit of the First Defendant.

Fourth cause of action:

This alleges that the Second, Third and Fourth Defendants will, upon the termination of their employment by the First Defendant, remove records of various kinds necessary to establish a business as a going concern with Commodore Business Machines, and that such removal amounted to converting or detaining this information.

Fifth cause of action:

This alleges that the Second, Third and Fourth Defendants formed a wrongful conspiracy by conspiring and combining amongst themselves with intent to injure the First Defendant by:-

(a) Breaching their contracts of employment with the First Defendant;

(b) Breaching their fiduciary relationship with the First Defendant;

(c) Breaching the confidence of the First Defendant;

(d) Procuring, causing and inducing, Commodore Business Machines Proprietary Limited to cease dealing with the First Defendant;

(e) Damaging or ruining the First Defendant's business and discrediting the First Defendant;

Immediately before the holding of this meeting the Plaintiff obtained from his accountant a draft of the latter's share valuation. This assessed the value of the Plaintiff's shares in the First Defendant at between $240,000 and $300,000 as a going concern. At that meeting the Plaintiff offered to sell his shares for $240,000. That offer was not accepted.

THE PROCEEDINGS:

On the 19th April, 1984, the Plaintiff filed the writ of summons and statement of claim in this action. The statement of claim, after pleading the essential facts, sets out six causes of action. They are:-

First cause of action:

This alleges against the Second, Third and Fourth Defendants breaches of their contract of employment with the First Defendant in that -

(a) The Second, Third and Fourth Defendants have not given any or proper adequate notice to terminate their respective contracts of employment;

(b) Each of the Second, Third and Fourth Defendants has failed to serve the First Defendant with good faith and fidelity;

(c) Each of the Second, Third and Fourth Defendants has not devoted his working hours and energies to the business of the First Defendant and in the First Defendant's interest.

Second cause of action:

This alleges that the Second, Third and Fourth Defendants, as directors of the First Defendant, were in a fiduciary position required to act in good faith for the interests and advantage of the First Defendant. It alleges that in calling the meeting of the 10th April, 1984, in passing the motion at that meeting, and in terminating their employment with the First

The letter went on to set out in considerable detail the history as seen by the Plaintiff, recorded what the Plaintiff considered was the clear duty of the First Defendant and the other three Defendants as directors to prevent the loss of the agency agreement, and suggested that the only solution was for the sale of the Plaintiff's shares to the Second, Third and Fourth Defendants to proceed. The letter made it clear that in the absence of agreement proceedings would be taken to prevent the proposed course of action both by the Plaintiff personally and as a derivative action on behalf of the First Defendant.

The meeting took place on the 10th April, 1984. There were present the Plaintiff, his solicitor, the Second, Third and Fourth Defendants, and their solicitor. The Second Defendant moved the motion. There followed a discussion of which a verbatim record was kept. I do not propose to record the discussion in detail. The Plaintiff put to the Second, Third and Fourth Defendants a series of questions, to which he received answers that, as it appears from the transcript, he did not find satisfactory. The following matters that emerged during the meeting appear to be of some significance:-

(1) The only reservation that Commodore Business Machines had of the performance of the First Defendant related to structure and growth capability to take advantage of the market.

(2) The Second, Third and Fourth Defendants had verbally advised Commodore Business Machines of their intention to resign from the employment of the First Defendant some four weeks before the meeting. The First Defendant, or its directors the Second, Third and Fourth Defendants, had taken no steps to preserve the business of the First Defendant except the calling of the meeting.

(3) The Second, Third and Fourth Defendants were not prepared to give an undertaking not to enter into an agency agreement with Commodore Business Machines.

The motion was then put and passed, the Plaintiff voting against it.

the Second Defendant that the price he would require for his shares was $500,000.

THE MEETING OF THE 10th APRIL, 1984:

The Second Defendant, as secretary of the First Defendant, gave notice of an extraordinary general meeting of the First Defendant to be held on the 10th April, 1984, for the purpose of considering and if thought fit passing a resolution in these terms:-

> " That the company has no objection to the action of the directors in establishing a new company to distribute Commodore Computers in New Zealand and in the directors negotiating with Commodore Business Machines Proprietary Limited to secure a distribution licence from that Company. "

The notice set out the following note:-

> " Explanatory Note:
>
> The directors have advised the Company that they will not continue with their employment with the Company after the 30th June this year. The Company has notified Commodore Business Machines Proprietary Limited of this and that Company has intimated that the distribution agreement which terminates on the 30th June, 1984, and does not contain a right of renewal will not be extended.
>
> The directors have indicated to the Company that they intend to form a new company which will enter into a distribution agreement with Commodore Business Machines Proprietary Limited. "

This brought an immediate response from the Plaintiff. The solicitors wrote to all four Defendants on the 5th April, 1984, a letter that commenced:-

> " This letter is in response to and to register the strongest possible objection to the fraudulent course of action of Messrs. Anderson, Cooch and Taylor which they propose should be endorsed by the Company in extraordinary general meeting on 10th April, 1984. "

There followed a lengthy period of inconclusive negotiations between the Plaintiff and the Second, Third and Fourth Defendants relating to a possible sale from the Plaintiff to those Defendants of the Plaintiff's shares. It was not until June, 1983, that agreement was reached between the parties pursuant to which the chartered accountant instructed by the Plaintiff was to have access to the records of the First Defendant for the purpose of preparing a share valuation. There followed some further delay resulting from that accountant's difficulties in obtaining the accounting information he considered he required.

By a notice dated 14th November, 1983, addressed to the Plaintiff in the name of the First Defendant and signed by the Second Defendant as secretary of the First Defendant, the Plaintiff was advised of a proposal that there be passed by way of entry in the Minute Book of the First Defendant a special resolution to increase the nominal capital of the company by the addition of a further 60,000 one dollar shares. The Plaintiff was offered to subscribe for 15,000 of these one dollar shares, being the number to which he was entitled in proportion to the shares he held. To this the Plaintiff responded by pointing out through his solicitors that the notice of special resolution did not comply with the First Defendant's Articles. The solicitors acting for the Defendants then advised that the meeting will not be proceeding and the notice regarding the proposed special resolution and the offer to the Plaintiff to subscribe for 15,000 shares at one dollar each were withdrawn. However, the Plaintiff had made it clear that if, notwithstanding his opposition, the share capital had been increased in the manner proposed, he intended to subscribe to his proportion of the new share capital.

In July, 1982, the Plaintiff had offered to sell his shares for $336,000. Then in November, 1983, he informed

his employment as managing director and general manager. The Plaintiff was tendered a cheque for $6,000 as final payment in lieu of notice. This cheque was accepted without prejudice.

It appears from the affidavits that there was little detailed discussion relating to these events. A letter signed by the Second, Third and Fourth Defendants, and addressed to the Plaintiff, dated the same day, refers to growing difficulties between the Plaintiff and the three Defendants. At the meeting it was stated that there was little point in going over the reasons for the resolution. However, in the affidavits filed in opposition to this motion the Second Defendant sets out the reasons as being that the Plaintiff had performed his duties unsatisfactorily, that the Plaintiff had entered into negotiations to secure a licence to distribute a computer that would be in competition with Commodore Computers, and that the Plaintiff had endeavoured to obtain an unjustified benefit for his wife. All these allegations are denied by the Plaintiff. A considerable volume of the affidavit evidence relates to these allegations, but for reasons to which I shall refer in more detail later I consider it neither appropriate nor necessary that I make findings on them.

The Plaintiff left. He has since played no part in the management of the First Defendant. More particularly it seems that he has deliberately avoided becoming involved in any way with dealings between the First Defendant and Commodore Business Machines.

In June, 1982, the Second, Third and Fourth Defendants offered to purchase from the Plaintiff his 10,000 shares in the First Defendant for $20,800. This price accorded with a valuation of the shares that the three Defendants had obtained from the chartered accountants who acted for the First Defendant. The Plaintiff did not accept this offer.

BACKGROUND:

The First Defendant was incorporated on the 27th January, 1981. Its capital of 40,000 one dollar shares are and have been since incorporation held equally by the Plaintiff and the Second, Third and Fourth Defendants.

The First Defendant was incorporated to acquire an agency from Commodore Business Machines Proprietary Ltd. ("Commodore Business Machines") to sell by way of wholesale Commodore Micro Computers within New Zealand.

The First Defendant acquired the agency. Initially this was by way of an informal agreement. Then the terms of the agency were incorporated into a written distributorship agreement made on the 1st July, 1983, for a term commencing on that date and ending on the 30th June, 1984. I shall refer in more detail later to the relevant provisions of that agreement.

The First Defendant commenced its business, which has always been solely that of wholesaling Commodore Micro Computers, early in 1981. The venture was successful. There was a significant growth in sales and in profitability. The Plaintiff, the Second, Third and Fourth Defendants, and Mr. Shepherd, the managing director of Commodore Business Machines, were the directors of the First Defendant. The Plaintiff was managing director and general manager. The Second, Third and Fourth Defendants were also employed by the First Defendant in senior executive positions.

On the 4th May, 1982, there was held a meeting of the First Defendant at which the Plaintiff and the Second, Third and Fourth Defendants were present. The meeting by a majority made up of the Second, Third and Fourth Defendants passed resolutions dismissing the Plaintiff as a director and terminating