IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

LOW PRIORITY

CP No. 5/88

IN THE MATTER	of the Companies Act 1955
AND	in the matter of an intended action
BETWEEN	JOHN CEDRIC FIELD of Hastings, Farmer Intending Plaintiff
AND	THE HAWKES BAY FARMERS MEAT COMPANY LIMITED Intended Defendant

Hearing: 13 June 1988

Counsel: G.W. Calver for Intending Plaintiff
J.F. Timmins for Intended Plaintiff

Judgment: - 2 SEP 1988

JUDGMENT OF HERON J.

This is an application for particular discovery before proceedings are commenced pursuant to Rule 299.

The intended plaintiff is a small shareholder in the Hawkes Bay Farmers Meat Company Limited (HBMC), owning some 1,300 shares. He also has an interest by way of a family trust in a further 2,000 shares. The Company is subject to a takeover offer. In addition to these proceedings the plaintiff is objecting to the value he is to receive for the shares pursuant to s.208 of the Companies Act 1955. Those proceedings remain undetermined but an affidavit in respect of them has been read in these proceedings. The plaintiff is concerned about the recent sale of the Whakatu Freezing Works near Hastings owned by HBMC. He has had a long connection with the Company, and as a farmer in the district is familiar with its manner of operation over a long period of time. He can be described as a loyal and enthusiastic supporter of the Company as it was.

In November 1986 an application was made to the Commerce Commission by various parties in order to arrive at an agreement to close the Whakatu Works. The arrangement is described by Mr Field, and it is clear that he participated as an objector in the hearing that took place. He records that notwithstanding an interim decision which was critical of the closure agreement a further hearing authorised the closure and was given on 22 July 1987. When this present application was lodged, the HBMC had not called an extraordinary general meeting to obtain approval for the sale of what was one of its assets, and which was required by its Articles of Association. Following the filing of these proceedings (and I do not have to find whether it was in response thereto), an appropriate meeting was held, and the resolutions were passed by the necessary majority. Mr Field says:

> "The closure of Whakatu is now a fait accompli. As a minority shareholder I have no idea of what has happened to the assets of Whakatu, whether they have been sold, if so at what price and what has happened to the proceeds."

To some extent the meeting I have referred to has remedied that, but following on the sale has come the offer of $3 per share, which Mr Field is resisting and is the subject of the other proceedings not before the Court. Mr Field considers that the agreement for the sale of Whakatu may not have been conditional as was suggested, but rather unconditional, and as I understand it, part of a predetermined plan where the views of the minority or any shareholders would not necessarily have been important.

Finally, Mr Field laments the passing of Whakatu, suggests that its previous profitable record and ability to give good prices for lambs required it to remain open and that there has been double dealing and something of a conspiracy, in its demise. Finally he says:

> "I do not believe the actions taken by the directors of HBMC over the last two years can be said to be in the interests of the minority shareholders, and I have taken legal advice on the point which suggests that I at least prima facie have sufficient evidence to bring an application pursuant to s.209 of the Companies Act 1955 alleging that the affairs of the company are being carried on in a manner which is oppressive, discriminatory and unfairly prejudicial to me."

He then seeks discovery of a vast amount of documentary material, including "any heads of agreement with any other company re the closure of Whakatu and sale of the Whakatu assets."

In his second affidavit Mr Field has had the benefit of attending the meeting, and again the question as to whether the agreements were conditional or unconditional was raised. At that meeting it was suggested that the meeting be adjourned so that other interests could put in a counter offer for the purchase of assets at $40 million, but that adjournment was not allowed. At the meeting the shareholders were advised of the amount of the sale price. Again, the plaintiff says that no attention was given to the interests of the minority shareholders, and that the decision was more in the interests of the major shareholders, being meat companies, and was something of a rationalisation where the interests of those shareholders, contrasted with the interests of HBMC, were preferred.

Finally the plaintiff says:

> "I am advised by my legal advisers that it would be possible for me to file a set of proceedings at this stage pursuant to s.209 of the Companies Act making very broad allegations against the directors of the type set out in this my affidavit and my first affidavit. The difficulty however is that until I have seen the documents specified in my first affidvit it is very difficult for me to be specific. I am one single shareholder, with resources which are tiny compared with those of the other parties involved. It has proved almost impossible for the farmer shareholders of the company to gain any detailed information about the decisions leading up to the shutting

> down of Hawkes Bay Farmers Meat Company Limited, and I cannot be specific in my allegations until I have seen the relevant papers. I am told that it might be possible to file a statement of claim now with very broad allegations raised in it but that the Rules require allegations to be fully and fairly spelt out."

Mr Hutton, the Managing Director of Waitakei International Limited, a Director of AML Finance Limited, the proposed purchaser of the shares in HBMC, and also a Director of HBMC, details the circumstances surrounding the agreement made by the Board of HBMC, and the way in which that decision was implemented in accordance with a recommendation received by overseas consultants. At the same time, Mr Hutton gives an explanation for the reasons for the acquisition of shares in HBMC by other meat companies. Whether that explanation is accepted or not is of no concern in this application. It does, however, focus attention on the respective roles of the directors, so far as the interests they represented at the time the resolution was passed to sell Whakatu. The history of the shareholding thereafter is given in some detail. Already there is in my view a structure around which the plaintiff can construct a case suggesting as he does that the directors acted contrary to their lawful requirements. I say at once that the Court of course forms no view of that at this stage. The factual structures are disclosed in Mr Hutton's affidavit, and I think the plaintiff already has information which is really at the heart of his complaint under s.209. S.209(1) reads:

> "Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is or any act or acts of the company have been or are or are likely to be oppressive, unfairly discriminatory, or unfairly prejudicial, to him (whether in his capacity as a member or in any other capacity), or, in a case falling within s.173(3) of this Act, the Attorney-General may make an application to the Court for an order under this section."

In addition, Mr Hutton describes the manner in which the price for the various properties was reached. That is the subject of independent checking by the plaintiff, but it may not just be a question of Government value or true worth, but as Mr Hutton

mentioned, the availability of purchasers. In any event, it seems to me the broad scope of the matters in issue between the parties are now reasonably clearly defined, and do not require the assistance of any particular documentation for them to be advanced at least to the stage of the issuing of proceedings under s.209. I think it would be inappropriate for me to comment on the principles involved in s.209 cases, other than to refer to the often quoted passage in Thomas v. H.W. Thomas Limited [1984] 1 NZLR 993 Richardson J.:

> "I do not read the subsection as referring to three distinct alternatives which are to be considered separately in watertight compartments. The three expressions overlap, each in a sense helps to explain the other, and read together they reflect the underlying concern of the subsection that conduct of a company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under s.209."

Nor do I think it is of assistance to debate here the principles of law which require a director to exercise his discretion in the interests of a company as a whole rather than to obey the directions of the majority shareholders. See Lonro v. Shell Petroleum Limited [1980] Q.B. 358. For this is no doubt the basis on which the plaintiff proceeds.

I think this case can be decided on the basis that it is not impossible or impracticable for the intending plaintiff to formulate his claim. I should mention in particular, that in addition Mr Hutton has produced a copy of the minutes of 9 October 1986 in which the decision to sell Whakatu was taken. Those minutes are of considerable interest in addressing the question as to conflicts of interest and proper considerations to be taken into account in the circumstances here. It must be remembered that there will be an opportunity for legitimate discovery consequent upon the issue of the proceedings. It is my general view that there is sufficient information in the possession of the intended plaintiff now, having regard to his association with the Commerce Commission case, and armed with

the detail of the shareholding, and the minutes of the critical meeting of directors, to proceed at least to the issue of proceedings. To some extent Mr Calver agreed with that state of affairs, but considered that further documentation might be of some assistance, but was able to identify the same other than in the general terms sought.

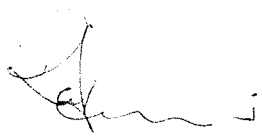
For the reasons I have given I do not think the plaintiff is handicapped in any material sense, and certainly does not come within the wording of the Rules that it is impossible or impracticable to formulate the sort of claim that I consider the plaintiff is mounting at this stage. It is not a claim that is dependent on detailed documentation, although there may indeed be the need to have further discovery as part of the proof of matters that the plaintiff considers relevant. That is not the test, however. The test is one of impossibility or impracticability, and having regard to the background to this case already, the intended plaintiff cannot succeed.

I should also add that there is some question here as to whether some of the documentation would be necessarily within the possession or control of HBMC. If it is the actions of the shareholders that are in issue it may be relevant documentation is held by other parties, and I think the plaintiff will need to address that consideration. But the fact that there is a likelihood of documentation in the hands of third parties is another reason, it seems to me, for not making a general order of discovery of the kind sought here. The other matters the plaintiff seeks, such as heads of agreement relating to the sale of Whakatu and Takapau and independent valuation of shares, seem to be something that one might expect to obtain following a fishing expedition. I do not think they are appropriate here against the admitted documentation that was the subject of the Commerce Act 1986 approval which the plaintiff must have, or at least know its contents. I do not accept the intending plaintiff's primary submission that:

> "It seems clear that to properly plead its cause of action and to specify in compliance with Rule 108(a) the actions the directors took which the intending plaintiff alleged were not in the interests of the company or against the interests of the minority shareholders, and (b) the manner in which those decisions acted to the detriment of the company and to the detriment of the minority shareholders, the plaintiff needs access to the documents specified."

I think that impracticability or necessity has not in the circumstances of this case been made out. The intended plaintiff's application is dismissed accordingly and he must pay the defendant's costs, which I fix at $750.

I regret the delay in the issue of this judgment, which has been brought about by pressure of work on the High Court bench at the moment.



Solicitors

Coleman & Porteous, Hastings, for the Intending Plaintiff

Chapman Tripp Sheffield Young, Auckland, for the Intended Defendant