IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

No. M.1808/89

BETWEEN HARRIS

Plaintiff

A N D PHILLIPS

First Defendant

A N D PHILLIPS

Second Defendant

A N D SHAW

Third Defendant

Hearing: 5 November 1990

Counsel: G.J. Judd for First Defendant in Support
Miss Diamond for Third Defendant
Miss Shaw for Plaintiff to Oppose
No Appearance of Second Defendant

Judgment: 5 November 1990

ORAL JUDGMENT OF HOLLAND, J.

These proceedings were commenced just on 12 months ago. They are brought by the plaintiff as Registrar of Companies seeking orders pursuant to s.189 of the Companies Act 1955 that the defendant should not, without the leave of the Court, be directors or promoters of, or in any way be concerned or take part in the management of, any company incorporated under the Companies Act 1955.

In so far as it has been stated that the Court, in considering such an application, should approach the matter with protection of the public in mind, it is a matter of some

concern to me to observe the lack of progress that has been achieved in having the issue brought before the Court.

The first defendant has clearly taken steps to indicate dissatisfaction with the form of the plaintiff's pleadings. An amended statement of claim was filed on 19 June 1990. Some two weeks or so after that was done the first defendant has applied to strike out the amended statement of claim on the basis that it does not comply with the Rules and that it is likely to cause prejudice, embarrassment, or delay in the proceedings. That application has been called on a number of occasions but has not been argued as to its merits until today.

In the meantime the position has changed. The second defendant some while ago filed an undertaking in the Court which was acceptable to the plaintiff and the plaintiff discontinued against the second defendant. This morning counsel for the third defendant filed an undertaking in the Court and indicated that the plaintiff was willing to accept the undertaking and that a discontinuance would be filed against the third defendant as soon as practicable. The matter now proceeds solely between the plaintiff and the first defendant.

On 8 August 1990 a conference was held before Barker J. I am told that he raised the issue with counsel that as these were proceedings brought under Part IV of the High Court Rules, affidavits should have been filed with the statement of claim. In a Minute made on that date the Judge

directed that the plaintiff was to file affidavits in support of the statement of claim before 22 August 1990 and that this application to strike out would be dealt with on 27 August. It was apparently not possible for the plaintiff to comply with that order, and in view of the affidavits which I have examined I am not surprised that those affidavits could not be supplied in that time. On 27 August the first defendant's application was further adjourned and it is now for resolution before me.

The primary submission advanced by counsel for the first defendant is that the plaintiff is alleging a number of causes of action against the first defendant. He refers to R114 of the High Court Rules which requires a plaintiff in such circumstances to specify separately the relief or remedy sought by the plaintiff on each cause of action. He submits that the amended statement of claim is defective in that respect.

In reality, however, the argument on behalf of the first defendant is advanced that as there are a number of allegations made in a general way against the first defendant, supported by a large number of particulars, it is important to the defendant to be able to identify precisely what particulars are relied on by the plaintiff in support of each separate general allegation. Section 189 of the Companies Act gives a Court a discretion to make the form of order sought in the statement of claim. It is quite clear, however, that that discretion only arises if the plaintiff has established one of

the matters set out in paragraphs (a), (b), (c) and (d) of s.189(1).

In the present case the plaintiff relies on s.189(1)(c) of the Act and has pleaded that the first defendant has (a) persistently failed to comply with the Companies Act; has (b) been guilty of fraud in relation to the company; has (c) acted in breach of his duty to the company; and has (d) acted in a reckless or incompetent manner in the performance of his duties as an officer of the company. I am by no means satisfied that counsel for the first defendant is correct in his submission that such a pleading amounts to three or four separate causes of action. I should prefer the view that the cause of action alleged by the plaintiff is that the circumstances of the conduct of the first defendant were such that under s.189 of the Companies Act 1955 an order should be made prohibiting him from acting as an officer of a company. I do not, however, regard that as material to my decision. It is quite apparent that a plaintiff is required to plead his or her case in such a way as will not cause prejudice, embarrassment, or delay in the proceedings.

This claim was complicated because there were three defendants against whom some of the allegations were made jointly but in respect of whom there were different and separate allegations. That made the pleading of the statement of claim a difficult exercise. The situation is now substantially simplified by the fact that there is only one defendant remaining. Obviously a further amended statement of

claim is required to eliminate allegations that are now irrelevant because of the removal of the second and third defendants.

There are various ways in which allegations may be pleaded in a statement of claim. I do not have a great deal of sympathy with the submissions advanced on behalf of the first defendant and might have taken a great deal more time before deciding to order an amendment of the statement of claim if it were not for the fact that an amended statement of claim is needed in any event.

I direct that a further amended statement of claim be filed by the plaintiff and it should take the form of pleading all the facts alleged against the first defendant. The plaintiff should then plead what parts of s.189 are relied on in order to obtain relief sought and should then give particulars of each of the alternative grounds relied on under s.189 by referring to the paragraphs earlier set out in the amended statement of claim.

This proceeding should not be delayed any further than is absolutely necessary. The plaintiff should file the further amended statement of claim in accordance with this judgment before 4pm on Monday 12 November. Those advising the first defendant are well aware of what is alleged by the plaintiff and they have the advantage of the plaintiff's entire case by way of affidavit. A statement of defence should be filed within 14 days thereafter, that is by 4pm on 26 November.

The question of evidence has arisen for discussion. Counsel for the defendant has submitted that he will have difficulty in filing affidavits in support of the statement of defence at the time of its filing, or indeed within a short time thereafter. He submits that he should not be required to file an affidavit with the statement of defence as appears to have been contemplated by Barker J. in a Minute he made directing the plaintiff to file his affidavits.

Rule 456 provides that every claimant under the Family Protection Act 1955 and the Matrimonial Property Act 1963 or the Matrimonial Property Act 1976 shall at the time of serving his statement of claim serve his own affidavit in support thereof. My attention has not been drawn to any other rule under Part IV requiring either party to file their evidence by way of affidavit with the pleadings. Indeed, R458 contemplates affidavits by a defendant being filed after a statement of defence. With respect to Barker J., I should not wish it to be thought that in all cases under Part IV of the High Court Rules a plaintiff or a defendant was required to present his case on affidavit at the time of the pleadings. The purpose of having pleadings is to define the issues. A lot of irrelevant evidence can be eliminated once those issues are determined, and indeed further evidence might also be required once those issues are determined.

This is a matter that would ordinarily fall within R458A requiring a plaintiff within 14 days after the expiration of the time for filing statements of defence to

apply to the Court for directions as to the subsequent conduct of the proceedings. I am concerned as to further delay that will arise because of the Christmas vacation. The first defendant has indicated that his time at the moment is fully occupied in the interests of the company of which he is still an officer and that he would require the Christmas vacation to enable his affidavits to be prepared. I think it appropriate to make an order, and I accordingly do order, that the defendant shall file all affidavits in defence on or before 31 January 1991. The plaintiff should then proceed to make such application as he considers appropriate under R458A seeking further directions and I should hope also seeking a fixture for the hearing of the matter.

Although the first defendant has been successful in this application, he has been assisted substantially by a chain of events for which the first defendant is not directly responsible. In those circumstances I think it appropriate to reserve costs in relation to this application.

Mr Judd has asked for leave to be reserved in respect of these timetables because, as he says, one does not know what is going to happen. I do not contemplate anything occurring which would justify a departure from these time limits but I must accept his submission that one does not know entirely what will happen. I do not consider it appropriate to reserve leave. If something extraordinary happens an application will have to be made to vary this judgment, but I do not wish it for one moment to be thought that this was only

an introductory form of order leading to further negotation. If something unexpected occurs, as Mr Judd contemplates, then it will have to be of such a nature as will persuade a Judge or a Master that the order that I have made should be varied.

The question of discovery has been raised. I do not propose to make an order for discovery because it is not clear to me at the moment what the issues might be. Nevertheless the pleadings should be completed within three weeks. Discovery can take place in the normal manner and I should record that I would anticipate that discovery and examination of documents should be completed by 31 January when the defendant is required to have filed all its affidavits.