

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

30/7

C.L. 85/87

1389

**NOT
RECOMMENDED**

BETWEEN JAGWAR HOLDINGS LIMITED
First Plaintiff

AND JAGWAR INVESTMENTS
LIMITED
Second Plaintiff

AND FULLERS CORPORATION
LIMITED
First Defendant

AND H.L.H. JULIAN & OTHERS
Second Defendants

AND PRICE WATERHOUSE
Third Defendants

Hearing: 29 June 1990 (In Chambers)

Counsel: R.J. Craddock Q.C. and R.J. Beech for
 plaintiffs
 B.D. Gray for first defendant
 P.J.P. Grace for first and second second
 defendants
 R.J. Asher for the third second defendant
 M.S. Cole and Mr Matenga for fourth, fifth
 and eighth second defendants
 G.S. Millar and Mr Butler for sixth and
 ninth second defendants
 M.R. Schamroth for seventh second defendant
 P.G. Brown for third defendant

Judgment: 29 June 1990

(ORAL) JUDGMENT OF BARKER J

There are two applications for further particulars which were the subject of a defended hearing. Prior to that, I made a number of consent orders as follows -

1. The first defendant's application for stay is dismissed. Costs reserved. I note that proceedings are continuing against the first defendant by leave of its scheme manager;
2. By consent of the plaintiffs, there will be an order as moved for further particulars against the first and second second defendants, to be supplied within 14 days;
3. The plaintiffs' applications against the sixth and ninth second defendants for particulars are dismissed by consent;

The plaintiffs' applications for further particulars against the fourth, fifth and eighth second defendants can be dealt with promptly.

The plaintiffs sought particulars relating to an allegation that shares had been dumped by the defendants. Mr Cole initially had been unable to provide further particulars until he had received answers to interrogatories; having received those, he is unable to supply further particulars.

Mr Cole for the fourth, fifth and eighth second defendants then mounted a detailed application for further particulars of the plaintiffs' amended statement of claim. He was supported by counsel for the third defendant, the sixth and ninth second defendants and the seventh second defendant. The applications, according to a chronology prepared by the plaintiffs' solicitors, date back to July of last year when letters were first sent. Further particulars were provided by the plaintiffs but not in sufficient detail to satisfy the request of the defendants.

I must say that lengthy applications for further particulars are most unusual in the Commercial List, this having been the first time in my memory where such a detailed application has been presented. However, the matter must be determined in accordance with the usual rules about particulars, bearing in mind of course the aim of the Commercial List is to achieve a speedy resolution of all matters in dispute within of course the requirement that the parties be fully informed as to what is in issue.

I do not think it necessary to refer to many cases. I said at p.10 - Re Securitibank (No 25) (judgment 10 October 1983) where I had to conduct a similar exercise -

"The function of particulars is to carry into operation the over-riding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, incidentally, to reduce

cost. Their function has been stated inter alia:"

- (a) To inform the other party of the nature of the case he has to meet, as distinguished from the mode in which the case will be proved;
- (b) To prevent the other party from being taken by surprise;
- (c) To enable the other party to know with what evidence he ought to be prepared; and
- (d) To limit and define the issues.

A certain amount of detail is necessary in order to ensure clearness. What particulars need to be stated depend on the facts of each case."

That summary seems to accord with the views of the Court of Appeal, in a case to which Mr Cole referred, viz Hooper Group Ltd v Parker & Ors (C.A.5/87, 22 May 1987) at page 8 of the unreported decision -

"One essential part of pleadings is to state precisely the basic facts on which the plaintiff relies so as to clearly define the issues which the defendant has to meet. If that is not done, it is difficult for a defendant to prepare for trial and questions such as payment into Court or offers of settlement can hardly be considered. Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a defendant might be taken by surprise when the real issue not previously stated clearly suddenly emerges."

As against those statements of course, a party is not entitled to seek evidence by way of further particulars; if an allegation is made with the clarity required by the Rules and the authorities, then a party cannot be required to submit details of the evidence to be called in support of an allegation.

In the present case, I consider the various requests for particulars and rule on each on the way through.

In respect of paragraphs 20, 21, 22 and 59-63 it is alleged in respect of the first group of paragraphs that certain documents constituted an offer within the meaning of the Securities Act 1978. In respect of the second group of paragraphs the documents are said to have created an advertisement within the meaning of that Act.

In respect of the first allegation about the offer, it is said that all documents said to be issued by the first and second defendants to the plaintiff, namely a corporate profile, financial profile, letter of offer and a contract note relating to an issue of shares were an 'offer of securities' to the public within the meaning of that Act.

The defendants seek further particulars as to how it is alleged that these documents constituted an offer of securities. In my view, the plaintiff has done all that is required. It has stated that it has ascertained all the documents alleged to have been posted or sent to the plaintiff and alleged to have constituted an offer.

Whether they did or whether they did not is not a question which I am determining now. The plaintiff rests its case on the allegation that these four documents together constitute an 'offer of securities' within the meaning of the Act. I do not think that any further particulars are required. It may be that the defendants are quite

correct when they say, under no circumstances, could these four documents properly be caught by the statute. They may well be right but I am not deciding that now. Therefore, I do not consider further particulars are necessary.

The same applies to allegations that certain documents are said to be an 'advertisement' within the meaning of that Act, (clause 41 of the amended statement of claim). For the same reasons I decline to order further particulars.

In paragraph 23(a), the plaintiff sets forth a list of representations said to be false and sub-divides these into financial profile, corporate profile and negotiations. The allegations on which there is complaint relate to particulars of falseness of representations in the various documents said to have been made without reference to properly kept and adequate books of account. There is a reference back to item 54 of the first defendant's list of documents.

The plaintiff in its filed reply says that the forecast financial positions were made without financial reports on the subsidiaries, as a consequence of which revenue expenses etc of the subsidiaries were unknown. I should have thought that this was sufficient to inform the defendants that the allegation here as to the forecast was made without proper reference to the financial reports of the subsidiaries. It is a matter of evidence whether or

not those reports of the subsidiaries should have given rise to an accurate forecast.

The next paragraph is 'having been made without reference to appropriate asset valuations'. The complaint here is that it was not specified which asset valuations were inappropriate. I think that here the plaintiff has replied that a number of boats were sold for prices at the market valuation. The plaintiff should state which assets were not the subject of appropriate valuations, if that is possible.

Likewise, the plaintiff should state the assets not owned by Fullers at the time but were allegedly taken into account in the forecast. This direction relates to the paragraph 'having been made taking into account assets which at the time of the forecast were not owned by Fullers'.

Dealing with the allegation 'having been made without disclosure of the fact that the net tangible assets in the financial profile included a goodwill component in the order of \$860,000' that is a question of fact which is either true or false; it is not susceptible to further particulars.

The next paragraph 'The forecast earnings per share, forecast earnings and forecast financial positions could not be met in that the trading losses sustained by Fullers

at 31 March 1987 were in excess of \$200,000 and the prospective trading losses to 31 October 1987 were in the order of \$2,000,000'. The plaintiff should state the commencement and terminal date of each of the periods for which a date is given; though one would have thought it was probably fairly easy to work out; just to put the matter beyond doubt these dates should be given.

The next paragraph is 'The forecasted figures were completed from records which were known by the directors to be incomplete, inaccurate and unacceptable to management within Fullers'. The plaintiffs in their reply state a number of matters which show incomplete, inaccurate or otherwise unacceptable accounts; they should be confined to those matters found in paragraph B.12.

Paragraph 23(b) 'As at 21 April 1987 the skills claimed in the corporate profile did not exist at board or senior management levels, and there was conflicts at both board and senior management levels'. The reply refers to a dismissal of a named person and lack of confidence by the managers in the financial information received by them and a need for a financial investigation. If that is what is claimed, then I think there are sufficient particulars, though I think there should possibly be more particulars of alleged conflicts between the directors in respect of an account furnished by Jackson Allison Securities Limited and of the alleged friction between Mr Julian and other directors.

In respect of paragraph 23(I) (i)-(iii) in my view the plaintiffs' statement does provide sufficient particulars.

The next statement complained of: (j) 'Fullers' books of accounts were in good order was inaccurate and misleading having been made in the knowledge by the directors of a financial review prepared by the third defendants dated 10 February and establishing significant deficiencies in the company records'. The plaintiff refers to the particulars in the first amended statement of claim and those contained in paragraph 21 of the reply. This is an allegation presumably applying to all directors and referring to a statement in the profile. Whether the statement that the books were in good order was or was not inaccurate or misleading is a matter on which proof must be adduced by the plaintiff if it is to succeed. Bearing in mind that this is a action for false representation, I think that the statement is sufficient.

With respect to paragraph 31 'the said advice and information was given negligently and in breach of the duty of care owed to Jagwar and the second plaintiff and was incorrect in the respects set forth in paragraph 23 hereof'. As a result of what I have ruled, once those particulars are given, I do not think there needs to be any change to paragraph 31.

Paragraph 32(b), seeks particulars of alleged negligence of the second defendant one of which is 'Failing to

disclose that the financial and other records of Fullers and its subsidiaries had not been maintained in accordance with their obligations under the Companies Act 1955 and the Securities Act 1978'. The further particulars refer to the duties under the Companies Act to keep proper books of account. The allegation seems to me to be against Fullers only and not its subsidiaries. The plaintiff therefore assumes the burden of proving that the books had not been kept in accordance with S.151 of the Companies Act and does need to refer to matters of evidence which support its contention. I think, however, that in respect of this allegation there should be some statement in the pleading as to the respects in which the books did not comply with S.151 of the Companies Act; there should be an amendment accordingly.

Paragraphs (d) and (e) - I consider that these are matters of evidence and that the allegations are satisfactory and do not require further particulars.

Paragraph (n) 'Failing to exercise reasonable care in the preparation or examination of the forecasts'. Since this is an allegation of negligence I think there should be some further particulars in the way in which the directors failed to exercise reasonable care. In particular, there should be some differentiation (if there is to be any) amongst directors. I tend to think from the statement of claim that the allegation is against all the directors equally, even although some were executive directors and

others were not employed fulltime by the company.

Paragraph (o) 'Failing to ascertain or disclose Fullers' true financial position before making the representations' must be right along with the earlier part of the statement of claim and allegations.

So far as the cause of action based on fraud is concerned, there is of course a particular duty for care, precision and detail when pleading fraud; these allegations must be in the context of the whole statement of claim when it is alleged that the directors made the representations falsely or recklessly then it seems clear to me on reading a statement of claim that the particulars are those already traversed.

In respect of other matters, including the Fair Trading Act allegations in paragraph 50, the plaintiff should make it clear, as I think it is clear to me from reading the documents, that they refer to all directors. When the plaintiffs refer to the alleged false, misleading or deceptive conduct under S.9 of the Fair Trading Act, they should make it clear that they are referring to all directors and not just some of them.

Accordingly, I have given an indication as to matters which should be covered in an amended pleading, not necessarily an amended pleading, but an amended notice of particulars which might before trial be converted into a

further statement of claim.

There is also extant a motion for particular better discovery and an application by the defendants under R.41S to argue as a point before trial, the Securities Act question. I have no time to deal with that aspect today. This is for mention on the ordinary list on 20 July 1990.

R. D. Barlow J.

Solicitors: Chapman Tripp, Auckland, for plaintiffs
Bell Gully Buddle Weir, Auckland, for first defendant
Duthie Shyte, Auckland, for second and third second defendant
Simpson Grierson Butler White, Auckland, for fourth, fifth and eighth second defendants
Peak Rogers, Auckland, for sixth and ninth second defendants
Mervyn Schamroth & Partners, Auckland, for seventh second defendant
Morrison Morpeth, Auckland, for third defendant

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