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NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

10/9

M.452/93

1518

UNDER the Companies Act 1955

BETWEEN LEE ANTHONY FINDLAY

Plaintiff

AND ESTORIL HOLDINGS LIMITED

Defendant

Hearing: 27 August 1993

Counsel: R. H. Hansen for Plaintiff
R. O. Parmenter for Defendant and Mr & Mrs Catley
P. J. Wright for N.Z. Geographic Publications Ltd, Academy Interprint Ltd and Academy Press Ltd

Judgment: 27 August 1993

ORAL JUDGMENT OF THORP, J.

The Court is asked to deal with two interlocutory applications.

1. An application by the defendant company for an extension of time in which to file a statement of defence: and

2. An application by the three companies for whom Mr Wright appears, seeking variation of orders made pursuant to the interim judgment in these proceedings dated 22 July 1993, directing the provision to the plaintiff and his advisors of information relating to those companies.

1. Application for extention of time in which to file a statement of defence:

The substantive action is for orders under s.209 Companies Act 1955. It came on for hearing on 22 July 1993. On that date Mr Parmenter appeared stating that his appearance was on behalf of Mr and Mrs Catley, who either in their own right or as trustees of a Catley Family Trust are the holders of 60 per cent of the shares in the defendant company, in which the plaintiff holds the remaining 40 per cent. Mr Parmenter said he did not have instructions from the defendant company itself.

The position he then took was obviously the result of a conscious decision by Mr and Mrs Catley. It still seemed to me necessary to make sure they knew that this meant the Court was left with no alternative than to proceed with the hearing of the application without imput from them. For that reason as is recorded in the interim judgment on page 2:

> *"I asked Mr Parmenter to confirm that Mr and Mrs Catley intended that the Court should proceed on what was effectively the ex parte application of the plaintiff, and that they were aware that his attendance in the fashion which it was made left the Court with no basis on which to balance the opposing interests of the parties. Mr Parmenter was good enough to inform me that the Catleys did indeed know that by proceeding in the manner in which they had the Court was deprived of the basis for a balanced assessment of the two sides to what was obviously a longstanding dispute. It accordingly remains that I have no option but to proceed on that basis."*

The judgment then indicated that it was unlikely on the information before the Court that it would order a winding up and made orders intended to facilitate the valuation of the company's shares.

The present application for an extention of time in which to file a statement of defence is supported by affidavits from Mr and Mrs Catley. Mr Catley's affidavit advises that he had been inclined to allow the company to

go into liquidation, thinking that that course would "serve the defendant right". That advice is confirmed and explained by an affidavit filed for the plaintiff by Mr Willis of Staples Rodway. He testifies that Mr Catley informed him on 21 July 1993 that he had received advice to the effect that on liquidation he would be able "to successfully deal" with the liquidator to get in the remaining shares in the company's three principal subsidiaries.

It was common ground today that the Court has jurisdiction to grant leave to enter a defence after it has commenced hearing such proceedings as these. It was considered by counsel that the proceedings required the grant of special leave in terms of r.700T. My initial inclination was to regard that leave as no more than the type contemplated under r.6. However, Mr Hansen produced the Australian authority, ***Re Property Growth Securities Ltd*** [1991] ACSR 783, which considered the exercise of one of the rules of the Supreme Court of Victoria which appears to be in like terms. That decision held that special leave involves a higher threshold than merely what is just in the circumstances of the case, and may require the applicant to show something of the order of the nature of a *prima facie* case.

Even with the lower threshold I would be unimpressed by this application. It would still have been necessary for the applicant to show that the overall interests of justice required leave, to have explained the delay, and to have shown appropriate merits, even if not to the level of *prima facie* case.

The first question here is whether the interests of justice require that majority shareholders in the s.209 proceedings who consciously left the Court to determine those proceedings without imput from them, in the belief that market forces would allow them to acquire the minority interests on

terms favourable to them but unfavourable to the minority, should be allowed to re-enter and take an active part in the proceedings after an interim judgment of this Court informs them that that expectation is unlikely to be realised.

The basic purpose of the s.209 jurisdiction is to protect minorities from the arbitrary exercise of power by majorities. The principal methods adopted for that purpose are orders for purchase by the majority of the minority interests at a fair value, or for liquidation, although a wide variety of other types of relief may be given to meet special circumstances. In some cases liquidation is patently likely to operate oppressively, such as where the majority constitutes the only or the principal market for the company's assets. In this case the shareholding structure of the group indicated this as a significant factor. That was the reason why the interim judgment advised that the Court was unlikely to order a winding up. I doubt that that kind of abuse of majority power would provide the basis for s.209 relief. It is nevertheless the use of power by the majority for its interests, not for the interests of the company, which is the essence of the s.209 jurisdiction.

I find that acceptable reasons have not been given for the delay in pleading, and that while it is impossible on the information now before the Court, including an affidavit by Mrs Catley contending that the actions taken by the company of which complaint has been made were taken in the ordinary course of business, to assess with any accuracy the merits of those contentions, they are less than compelling.

All in all I do not consider that the interests of justice require that the applicant be given leave to contest oppression. In my view the further

evidence supplied since the previous hearing tends to confirm the basic conclusion in those proceedings that the majority shareholders are prepared to use their powers arbitrarily and oppressively and accordingly justifies the Court both in confirming the finding of oppression which was made on a *prima facie* basis and in concluding that leave should not now be granted to challenge that finding.

On the other hand I believe the Court should be as fully advised as is practicable about the types and form of the remedy to be granted to the plaintiff. I believe it may assist the just determination of the quantum issues, if I can call them that, between the parties, if the defendant is allowed to participate in the consideration of those issues by the Court, and if Mr and Mrs Catley are permitted to join as further defendants. Leave is accordingly granted to the defendant company to file an appearance to record its desire to be heard on matters of quantum or remedy and for Mr and Mrs Catley, in any shareholder capacity, to do likewise. I believe that some allowance of costs to the plaintiff should be awarded on this application and that the claim for $1,000 on that account by Mr Hansen is reasonable. It is allowed.

2. Application for variation of orders contained within the judgment of 22 July 1933 as to the provision of information by the defendant and its directors, and by the three companies N.Z. Geographic Publications Ltd, Academy Interprint Ltd and Academy Press Ltd:

This matter starts with a hiccup because the order as sealed does not match with any precision the terms of the judgment delivered on 22 July 1993, although Mr Wright made no particular point of that. The orders were intended to run against the defendant and its directors. As sealed they run against the defendant only.

In my view the finding already made and confirmed in the first part of this judgment in favour of the plaintiff on oppression has the necessary consequence that any orders of this Court as to the provision to him of information should now be considered on the different basis that all the remaining issues are as to remedy.

Mr Hansen stated that although he saw the most likely form of relief as an order for the purchase of his client's shares by the majority shareholders, nevertheless he wished to reserve his position and to retain a prayer for relief as broad as his present pleadings. There can be no objection to that course. At the same time I am satisfied by the material supplied to the Court by Mr Wright on behalf of his clients that obtaining information from those clients does raise questions of confidentiality sufficiently to require the Court to try to balance the opposing interests of the plaintiff and of those companies, particularly, of course, those with significant outside majority shareholders.

At this moment it appears to me that the plaintiff can legitimately seek information both in respect of the matters bearing on a valuation of his interests and as to his financial exposure, whether direct or indirect, under guarantees of any of the group companies. At this time work as to the valuation of his interests is being carried on by Mr J. Hagen. It is desirable that that work be continued and that he receive all relevant information for that purpose from the defendant, from its directors, and from Mr Wright's three client companies, all of which are subsidiaries of the defendant.

Mr Wright's concerns about confidentiality on a commercial basis would in my view would be sufficiently met if the supply of information was limited at this time to supplying information:

(a) As requested by Mr Hagan, for the purposes of valuing the plaintiff's interest in the defendant company: and

(b) As requested by Mr R. J. Willis, a partner of Staples Rodway and accountant to the plaintiff, for the purposes of advising the plaintiff as to his liability under guarantees.

Such requests are to be furnished in writing to the defendant and to Mr Wright's firm within 21 days of today's date and to be accompanied by undertakings as to confidentiality completed by Mr Findlay, Mr Hagen and Mr Willis in the form attached to Mr Wright's submissions with the following variations:

1. Paragraph 1 is amended by changing "order" in line 1 to "judgment", by changing the date in line 2 to today's date, by deleting the word "and" at the end of the 5th line, by inserting the words "and kept" after the word "used" in the 6th line, by deleting the words after "confidence", and inserting in their place "and will be discussed and published as between the plaintiff and his legal and accounting advisors only".

2. Paragraph 3 is deleted and in its place "I will return any such documents or copies when this litigation is completed" is inserted.

The order sealed in relation to the judgment on 22 July 1993 is revoked as to paragraphs 1 to 6 inclusive, it being the intention of this

judgment that it shall define the ambit of the information to be obtained by the plaintiff from the defendant and its directors and subsidiaries and shall take the place of the former orders contained in those paragraphs.

Leave is reserved to any party to seek further directions or for the clarification or implementation of this judgment.

Solicitors: Simpson Grierson Butler White, Auckland for Plaintiff
Brookfields, Auckland for Defendant and Mr & Mrs Catley
Grove Darlow & Partners, Auckland for N.Z. Geographic Publications Ltd, Academy Interprint Ltd and Academy Press Ltd

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