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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

21/1

CP 2455/89

LOW PRIORITY

BETWEEN EQUITICORP INDUSTRIES GROUP LTD (IN STATUTORY MANAGEMENT) AND OTHERS

2378

Plaintiffs

AND ALLAN ROBERT HAWKINS AND OTHERS

Defendants

Hearing: 14,15,16,17 June 1993

Counsel: Miss S Elias QC and Miss H Winkelmann for Plaintiffs
Mr J Timmins and Miss Gwyn for 15th Defendant (Elders)

Judgment: 13 July 1993

JUDGMENT NO 6 OF SMELLIE J
(RE: STRIKE OUT OF SUBROGATION, UNCONSCIONABILITY AND UNJUST ENRICHMENT ALLEGATIONS AGAINST ELDERS)

INTRODUCTION

This is an application by the 15th Defendant (Elders) pursuant to r 186 of the High Court Rules and the inherent jurisdiction of the Court to strike out section L.1.2 (paras 283 to 286 inclusive) of the third amended statement of claim.

Some general understanding of the nature of the litigation is required before the strike out application as such can be addressed.

In ***Equiticorp Industries Group Ltd v Hawkins*** [1991] 3 NZLR 700, Wylie J in a passage commencing on page 705 under the heading "Summary of allegations in relation to impugned transactions" which completes at the top of page 708, set out in 23 succinct paragraphs what the litigation is all about. I need not repeat them here but draw attention in particular to paras 1 to 13 which cover the facts that are relevant to this application.

In very general terms the Plaintiffs allege that in late October 1987 EHL purchased from the Crown a parcel of New Zealand Steel shares, the consideration being the issue of almost 93 million EHL shares (the NZS/EHL parcel).

At the same time the 13th Defendant, BWL - the broker which had arranged the sale - entered into an underwriting agreement with the Crown whereby it agreed to purchase, or procure a purchaser for, the NZS/EHL parcel from the Crown by March of 1988 for a figure in excess of $325m. BWL in turn entered into a take out deed with EHL and several other companies allied to it, which effectively passed the responsibility of finding a buyer and financing such a buyer back to the Equiticorp group of companies.

Ultimately on or about 16th March 1988 AI4 was nominated as the purchaser of the NZS/EHL parcel and it paid in excess of $327m for the parcel which by then, however, had reduced in value to not more than $104m.

The Plaintiffs claim is that by a process of laundering through 50 Hong Kong companies, Five Turks and Caicos companies, and Concorde Limited, a Vanuatu Company, the Equiticorp Group put up all the money to buy back its own shares through its subsidiary, AI4.

Subsequently, in order to redistribute funds throughout the Equiticorp Group so that the requirements of auditors and trustees of debenture holders could be satisfied the Plaintiffs allege that the original borrowing by AI4 to effect the purchase of the NZS/EHL parcel was repaid by the First Plaintiff.

It is against that background that the First and Second Plaintiffs have proceeded against the Crown, BWL, Elders and others, alleging that the repurchase and refinancing of the NZS/EHL parcel was accomplished by a scheme or schemes to which the Defendants were parties which were

fraudulent and illegal. The Plaintiffs claim against the Defendants that they are constructive trustees and that the Crown was a knowing recipient of the proceeds of the buy back breach of trust and that Elders in particular, which helped to finance the buy back and benefited from the refinancing when it took place at a later stage, knowingly gave assistance.

THE PARTICULAR CLAIMS THAT ELDERS SEEK TO STRIKE OUT

The original group of Equiticorp companies which initiated the laundering process that finally put AI4 in funds are identified as EAL, EFGL/EFSL, and ET, and they may conveniently be described as the "financing companies". When the loans they had made to AI4 were repaid it was EIGL which effectively took over the burden of the liability.

In section L.1.2 of the third amended statement of claim EIGL claims by virtue of having taken over the financing companies' burden, to be subrogated to their rights against Elders as a constructive trustee. Alternatively EIGL claims that it would be unconscionable and unjustly enriching of Elders if it were not obliged to account.

With that introduction I now set out the pleading as found in L.1.2 on pages 211 and 212 of the third amended statement of claim.

> **"L.1.2 And as a further or alternative cause of action by EIGL against Elders (Subrogation, Unconscionability, Unjust Enrichment), EIGL repeats paragraphs 1 - 125 and 269 - 282 above and says:**
>
> 283. BY virtue of the facts pleaded at paragraphs 99-125 and 269-282 above, at the time of the sale of the NZS/EHL Parcel Elders was liable as a constructive trustee to compensate those members of the Equiticorp Group other than EIGL which contributed to the initial funding of the NZS/EHL parcel, (namely EAL, EFGL/EFSL, and ET), and by virtue of the refinancing of those members by EIGL, Elders is liable to compensate EIGL for the moneys it has lost as a consequence.
>
> PARTICULARS
>
> 283.1 EIGL repeats the particulars contained in paragraph 71 above.
>
> 283.2 In carrying out the refinancing no consideration was given to the rights and remedies of EAL, EFGL/EFSL, or ET arising out of or related to the purchase of the NZS/EHL Parcel and the initial funding thereof against other parties, including Elders, nor to the assignment to EIGL of such rights and remedies.
>
> 283.3 The refinancing was without benefit to EIGL or it was undertaken for a consideration which was illusory, and it had

the effect of substantially depleting EIGL's assets and rendering it insolvent or of placing it in financial jeopardy.

283.4 The EIGL Directors, the AI4 Directors, and the directors of EAL, EFGL/EFSL, and ET had knowledge, actual or constructive, that the refinancing constituted the misapplication of EIGL's assets, that it was for an improper or collateral purpose, and that it breached section 62 of the Companies Act 1955, or alternatively that there was an appreciable risk that it breached the said section.

284. IN the premises, EIGL is subrogated to the rights and remedies of EAL, EFGL/EFSL, and ET, (as the contributors to the initial funding of the NZS/EHL Parcel).

285. ALTERNATIVELY it would be unconscionable to deny EIGL the right to assert against other parties, including Elders, the rights and remedies of EAL, EFGL/EFSL, and ET.

286. ALTERNATIVELY, to deny EIGL the right to assert against other parties, including Elders, the rights and remedies of EAL, EFGL/EFSL, and ET, would unjustly enrich those companies and/or Elders at the expense of EIGL.

WHEREFORE EIGL CLAIMS AGAINST ELDERS:

(a) an order that it compensates EIGL in the sum of $192,848,536 (being the amount of the initial funding of the NZS/EHL Parcel provided by other members of the Equiticorp Group and refinanced by EIGL);

(b) an order that it compensates EIGL for the cost of servicing the financial assistance it provided as pleaded in paragraph 93 hereof;

(c) interest on such judgment sum at 11% per annum pursuant to section 87(1) of the Judicature Act 1908;

(d) the costs of the incidental to this proceeding."

As can be seen the pleading is in the nature of a backup or insurance by the Plaintiffs against the possibility that the direct claims by EIGL against the Defendants will not succeed on an issue of causation or some such. In a matter of such complexity understandably the Statutory Managers have sought to cover such a contingency.

SUBROGATION

Elders challenges the availability of subrogation to EIGL in respect of the financing companies' losses on two principal grounds.

First it is contended that either in law or in fact the claims of the original financing companies remain extant and have not been replaced by the alleged "refinancing". That submission is based upon the proposition that the payments were effected by book entries and that in the case of EAL (the

largest of the financing companies) it readvanced moneys on further inter-company loans which have turned out to be worthless. On that basis Elders' primary submission is that the "refinancing" could be a vehicle by which it is exposed to double jeopardy.

The second principal submission is that irrespective a party such as EIGL which seeks to be subrogated to the rights of the financing companies should not advance such a claim without either suing in the name of the financing companies or joining them as parties. This, say Elders, the Plaintiffs have not done and indeed cannot now do because they have settled their claims against EAL (Equiticorp Australia Limited) and could not now make a claim against it.

More generally Mr Timmins argued that the various established categories where subrogation is allowed by the law (e.g. indemnity insurers, sureties, lenders, bankers, and business creditors of trust estates) will not accommodate the approach which the Plaintiff seeks to adopt to the availability of subrogation in this case.

Alternatively, it was argued that EIGL should be seen as a volunteer and that as there was no legal or moral compulsion upon it to participate in the "refinancing" it ought not to be allowed to take advantage of the doctrine of subrogation.

The Plaintiffs' response to the above challenge to the availability of subrogation is first that there is no double jeopardy. Miss Elias pointed out that the Plaintiffs plead specifically that the financing companies were repaid by . EIGL. Counsel submitted that Elders' submission that in effect the repayments were shams cannot be entertained at this stage, because that depends not upon the pleadings as they stand but upon evidence that would have to be adduced and accepted at the hearing. Additionally Counsel relied upon authorities such as ***Mills v Dawdle*** [1983] NZLR 154 and ***Marac Finance v CIR*** [1986] 1 NZLR 694 to demonstrate the efficacy of repayment of debts by book entry.

Dealing with Elders' contention that the original financing companies should have been joined, Counsel for the Plaintiffs referred to a number of cases in which plaintiffs have been held entitled to be subrogated to the rights

of another, even though that other is not cited as a party. ***Butler v Rice*** [1910] 2 Ch 277 and ***Ghana Commercial Bank v Chandiram*** [1960] AC 732 are perhaps the best known examples. Other cases to similar effect, however, are ***In Re Tramway Building and Construction Co*** [1988] 1 Ch 293 and ***Rogers v Resi Statewide Corporation Ltd & Ors*** 105 ARL 145. These cases were quoted in opposition to Mr Timmins' reliance upon the statement of Lord Goff in ***Esso Petroleum v Hall Russell*** [1989] 1 All ER 37 at page 43 where it was said that even though Esso had made ex gratia payments to Crofters in the Shetlands for damage caused by an oil spill they were not subrogated to their rights and could not pursue recovery against Hall Russell the allegedly negligently responsible party.

On the more general issue of the availability of subrogation in circumstances where an equitable claim is being made Miss Elias relied upon certain statements made in the House of Lords in ***Orakpo v Manson Investments Ltd*** [1979] 3 All ER 1. In particular the statement of Lord Salmon at page 12:-

> "The test whether the Courts will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is, I think, impossible to formulate any narrower principal than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be."

And Lord Edmund-Davies at page 14:-

> "Apart from specific agreement and certain well-established cases, it is conjectural how far the right of subrogation will be granted though in principle there is no reason why it should be confined to the hitherto-recognised categories."

Subsequently Slade LJ in ***Re T H Knitwear (Wholesale) Ltd*** [1988] 1 Ch 275 at 283 and 286 said:-

> "Subrogation is in essence a remedy, available in a variety of situations, providing in effect for a transfer of rights by operation of law from one person to another against a third party in order to prevent unjust enrichment ... I agree that the doctrine of subrogation is a flexible one, capable of giving a remedy in many and various situations as the instances given in ***Goff and Jones, The Law of Restitution*** will illustrate. I also accept that in some cases it may be capable of applying even though it is impossible to infer a mutual intention to this effect on the part of the creditor and the person claiming to be subrogated to the creditor's rights."

I was also referred to the American Restatement which at para 162 under the heading, "Subrogation" reads:-

> "Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

In this area of the argument the applicant has failed to persuade me that because of the potential for double jeopardy, the failure to join the financing companies as parties or the non-availability of subrogation as a form of relief, that the Plaintiffs pleading has no prospect of success.

So far as the alternative argument that EIGL was a volunteer is concerned, I consider the pleadings defeat that contention. In reality EIGL was no more a volunteer than AI4. It was the breaches of fiduciary duty of the Director defendants controlling those two companies that set in train the illegal schemes which Elders joined in as a knowing assister. It would be odd, if in those circumstances, the beneficiary which allegedly suffered at the hands of the constructive trustees was denied the right to subrogation because of a position which was improperly imposed upon it.

UNJUST ENRICHMENT AND UNCONSCIONABILITY

Mr Timmins' initial submission was that recovery on the basis of the alternatives of unjust enrichment and unconscionability would still require the application of the doctrine of subrogation and that since it would not be available neither of these claims could be advanced and they both should be struck out.

Miss Elias submitted, however, that paras 285 and 286 are true alternatives, not dependent upon the availability of subrogation. And in that I incline to the view that she is correct.

More generally Mr Timmins submitted that while unconscionability is a recognised ground for setting aside contracts where one disadvantaged party has been exploited nonetheless the Courts have moved cautiously. Counsel submitted that the point has not yet been reached where the "conventional

ingredients" of causes of action can be ignored to allow the Court to apply some ill-defined and uncertain objective of fair treatment.

Similarly on the issue of unjust enrichment Counsel for Elders submitted that the doctrine has only been recognised and applied in cases such as ***Gillies v Keogh*** [1989] 2 NZLR 327, and that outside that area no "definitive statement as to its existence as a cause of action has been made."

It could be said that the Court was tending in the direction of the Plaintiff's argument in ***Powell v Thompson*** [1991] 1 NZLR 597 but Mr Timmins drew my attention to the fact that that decision was not followed by Tipping J in ***Marshall Futures Ltd v Marshall*** [1992] 1 NZLR 306. I was also referred to the unreported decision of Master Williams QC in ***O'Neill Buildings and Maintenance Ltd v G P S Chambers Ltd*** (High Court Wellington, CP 298/92, 21.9.92) where the Master held that the elements of a claim in unjust enrichment were insufficiently established as part of the New Zealand law to found an application for summary judgment.

In response Miss Elias submitted that the unjust element in the claim is based upon Elders' knowing participation in the dishonest design. And that so far as unconscionability is concerned the Plaintiffs contend that Elders should not be allowed to avoid liability in respect of its knowing assistance of the breaches of trust and illegality involved. Furthermore Counsel submitted that want of probity on the part of Elders is integral to the claim made.

The Plaintiffs submitted that equitable relief of the kind sought has been recognised for some time as available in principle and that the Courts have ceased to create difficulties for litigants whose claims have merit. Thus Lord Wright's celebrated statement in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barber Ltd*** [1943] AC 32 61 to the effect that any civilised system of jurisprudence "is bound to provide remedies for cases of what has been called unjust enrichment" has received recent confirmation in the House of Lords in ***Lipkin Gorman v Karpnale Ltd*** [1992] 4 All ER 512.

Counsel also cited from the decision of Wallace J in ***Lankshear v ANZ*** [1993] 1 NZLR 481 at 496 where the judgment reads:-

> "Before parting with knowing receipt liability I should mention that, as is so often the case with constructive trust issues, there are

> probably several other ways in which the case can be approached. In the first place it can be viewed simply as a claim for a personal remedy against the defendant for misapplying what it knew to be trust or partnership funds for its own benefit. On that basis it may not be necessary to refer to a constructive trust at all. Alternatively, it is possible to emphasise the concept of unjust enrichment as the unifying and essential basis for the imposition of a remedial constructive trust in cases of knowing receipt. That, as I understand it, is the approach taken in Canada and also appears to underlie the analysis of knowing receipt liability undertaken in ***Powell v Thompson,*** where Thomas J (in the context of considering knowing assistance liability and unconscionability) drew support from comments made in ***Elders Pastoral Ltd v Bank of New Zealand*** [1989] 2 NZLR 180. In essence, however, one looks at the present case, and keeping fully in mind its commercial nature, it is unjust or unconscionable for the defendant to retain at the plaintiff's expense the funds used to repay Mr Broadley's Cobblestone Paving overdraft."

Another authority which I found helpful in this case is the unreported decision of Wylie J in ***Bell v John Holland Properties (NZ) Ltd and Ors*** (Auckland Registry, CL 121/89, judgment 12.7.91.) There His Honour declined to strike out a cause of action based on unjust enrichment saying at page 5 of the judgment:-

> "In recent years the Courts appear to have been moving closer to the concept of relief being available on the grounds of unjust enrichment, even though it may be difficult to fit that concept into any of the conventional causes of action. Although I do not think we yet have any binding authority to constitute such a cause of action in its own right, the tendency is to give relief against unjust enrichment by way of conventional constructive trust concepts or in other ways and the Courts may yet take the final step and constitute unjust enrichment on its own as an independent cause of action."

This litigation involves an enormously complex factual situation in which the rights, obligations and competing interests of the Plaintiffs and the Defendants emerge on the pleadings as a bewildering multiplicity of possibilities. I have spent considerable time struggling with those possibilities, endeavouring to understand them and see where they might lead to. In the end I am not prepared to reach the conclusion that these two alternative causes of action which are advanced by the Plaintiffs have no prospect of succeeding. Either on the law as it presently stands or in the more advanced state that it may have reached by the time the final decision comes to be made

in this matter, my judgment is that given the right factual conclusion, unjust enrichment and unconscionability may be found sustainable.

STRIKE OUT PRINCIPLES

There was no real dispute between Counsel as to the principles applicable. I need not rehearse them here. The basic approach is that the jurisdiction to strike out is to be exercised sparingly and for the purposes of such an application the pleadings are to be taken as capable of proof.

In this case, however, I consider that the assessment of the availability of the causes of action attacked cannot satisfactorily be undertaken simply on a consideration of the pleadings. I have no confidence, despite the careful and detailed arguments of Counsel, that at this early stage, bereft of evidence to flesh out the lengthy and complex pleadings, I can safely discern whether this is a case where subrogation may be available and what the relationship of that relief is to unjust enrichment and unconscionability, advanced as they are as alternatives. In the end, (as Wallace J points out in ***Lankshear***), they may only be different ways of looking at the same overall claim for relief and if that be the case they may stand or fall together.

A further consideration is that even if I were to strike out L.1.2 of the statement of claim, the majority of the case would still remain and the overall saving of time and effort might well be quite limited. Griffiths LJ obviously had this point in mind when he said in his dissenting judgment in ***McKay v Essex Area Health Authority*** [1982] QB 1166 at 1191:-

> "If on an application to strike out as disclosing no cause of action a Judge realises that he cannot brush aside the argument, and can only decide the question after long and serious legal argument, he should refuse to embark upon that argument and should dismiss the application unless there is a real benefit to the parties in determining the point at that stage. For example, where striking out the cause of action will put an end to the litigation a Judge may well be disposed to embark on a substantial hearing because of the possibility of finally disposing of the action. But even in such a case the Judge must be on his guard that the facts as they emerge at the trial may not make it easier to resolve the legal question."

Discussing that point of view Lord Templeman in ***Williams and Humbert Ltd v W & H Trademarks*** [1986] 1 AC 361 at 435, line H and on to page 436 said:-

> "My Lords, if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."

In this case the application occupied three days, plus part of a fourth. The Applicants' written synopsis ran to 52 pages and the Plaintiffs' reply to 28. Seventy-five photocopied authorities were placed before me, although only a handful of them were referred to or discussed in any detail. It was also a case in which, as a matter of experiment, a verbatim record of the proceedings was kept. It ran to 350 pages.

It will be apparent then that I could have considered and discussed the arcane and interesting legal issues thrown up by this application in much greater detail had that course been appropriate.

JUDGMENT AND COSTS

The application to strike out is refused. If ultimately I find that these causes of action, or some of them, are not available to the Plaintiffs then it may be that I shall regard the attack by Elders as having been justified. Had I been prepared to fix costs at this juncture I would have been minded to award the successful party $7,500. As it is I reserve the question of costs having recorded that indication for future reference.

Robert Smellie J.

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