IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

C.P.62/96

BETWEEN	HAMILTON JOINERY LIMITED	
	Plaintiff/Respondent	
AND	DIXON ALUMINIUM LIMITED	
	First Defendant/Applicant	
AND	LESLIE DIXON	
	Second Defendant/Applicant	

NOT RECOMMENDED

Hearing: 10 February 1997

Counsel: R. Middleton for applicants (defendants)
G. Matenga for respondent (plaintiff)

Judgment: 11 February 1997

(ORAL) JUDGMENT OF HAMMOND J

Solicitors: Patel Kumar Law, Hamilton, for applicant (defendants)
Preston Matenga, Hamilton, for respondent (plaintiff)

This is an application for an interim injunction.

Hamilton Joinery Limited ('HJL') and Dixon Aluminium Limited ('DAL') both carried on business as aluminium joiners. HJL had specialised in residential work; DAL in commercial work. The second defendant, Mr Dixon, is a director of DAL.

In 1992 the two companies decided to pool their resources. A "home made" agreement was entered into on 3 September 1992 between HJL, DAL, Mr Dixon, a Mr Rees and a Mr Frame. Mr Dixon agreed to purchase 25% of the shares of HJL (from the Otorohonga Timber Company Limited group of shareholders); all contracts "held by any of Mr Dixon's companies [were] to be transferred to HJL"; and Mr Dixon was to become a salaried employee of HJL at $40,000 per annum plus the use of a vehicle. The commercial effect of this transaction was therefore a merging of the operations of HJL and DAL.

The agreement - given its importance - would have been better attended to by professional advisors. For whatever reason that was not done. That is the root cause of the difficulties which have arisen before me. Indeed, some of the difficulties which had not been addressed by this agreement soon became apparent. In particular, DAL was a sub-contractor on some significant building contracts including the Hamilton Courthouse project and a medical laboratory building. In functional terms

the head contractors refused to "an assignment" of their contracts to HJL. But to give effect to the agreement Mr Dixon in fact transferred to HJL's employ. The problems with these head contractors were addressed by what amounted to a double system of invoices. DAL continued as contractor in name only; HJL supplied the goods and services to complete the relevant contracts; HJL invoiced DAL. If all had gone well, the practical resolution would have been that DAL would be paid by the external contractors and DAL would then pay HJL. At some point, however, DAL stopped paying HJL. HJL did an accounting. According to its calculations, DAL then owed HJL $54,347.69. Relations between the parties became soured. An attempt at mediation between HJL and DAL failed.

HJL then sought summary judgment in the District Court against DAL for the alleged deficiency. On 12 September 1996, a District Court Judge refused to order summary judgment. There were strongly contested matters of fact; and HJL was relying on the implication of terms into the contract. The Court took the view that the matter would have to proceed to a contested trial. Timetable orders were made by that Court. Shortly thereafter DAL filed a counterclaim for almost $500,000. Because that claim exceeded the jurisdiction of the District Court, application was made and granted to have the whole of the proceedings transferred to this Court.

On 2 December 1996, the secretary of HJL (Mr Frame) issued a notice of an extraordinary general meeting of shareholders, such meeting to be for 24 December 1996 to consider a special resolution "that the business of [HJL] be sold". The notice also contained an explicit acknowledgement that "the directors of the company Messrs D.C. Frame and C.W. Rees advise that it is intended to sell the business of the company to an entity in which they shall hold a substantial interest".

On 16 December 1996, DAL and Mr Dixon moved ex parte for an interim injunction "restraining the plaintiff/respondent, and/or its directors from selling, disposing of, or otherwise dealing with the business, and assets, of the plaintiff company". The stated grounds for the application were that such a course would seriously affect and prejudice the interests of the defendants; that such an order "is necessary to protect the defendants until the substantive matter is heard"; that there is a serious question to be tried; and upon the grounds in the affidavits. That application came before Penlington J. He refused to deal with it ex parte. It was then included in a Chambers list for 18 December 1996. HJL was prepared to give an undertaking (and did) to postpone the prospective meeting until 14 February 1997. The injunction application was then listed for hearing before me, as a matter of urgency.

Given the nature of the application, which is not without its complexities, I would have preferred to reserve my judgment. But the

exigencies of the case are such that I consider that I should deal with the matter now.

At the outset of the hearing, I suggested to Mr Middleton that although the application was framed as what I would term a "pure" interim injunction, the application as made is really more in the nature of an application for a Mareva injunction. For Mr Dixon has deposed in his affidavit in support of the application that "it is my belief that [HJL] is attempting to avoid the counterclaims that have been brought against it by myself and the first defendant, by disposing of its business and assets, so as to hinder the progress of our claims." I did not understand Mr Middleton to dissent from the suggestion that the application before me is really one for relief commonly described today as a "Mareva injunction". Essentially the applicants seek a freezing of HJL's asset situation pending the disposal of its counterclaim, and other relief sought by it. In any event, both counsel then proceeded to argue the case on the basis of that head of relief.

The availability of Mareva relief in New Zealand has been established since (at least) the judgment of Barker J in **Hunt v BP (Libya)** [1980] 1 NZLR 104. The principles for the grant of a Mareva injunction are also now well established by the English and New Zealand case law.

In brief, first, the claimant must assert a legal or equitable right recognised by New Zealand law. Second, this Court must have jurisdiction. Third, the claimant must demonstrate a good arguable case on one or more causes of action. Fourth, there must be assets within the legal or beneficial ownership of the party sought to be enjoined. Fifth, there must be a risk of dissipation of such assets. Sixth, the claimant must give an undertaking as to damages. Seventh, the Court retains an overall discretion as to whether to grant relief of this kind.

It may be as well to add that, although the Mareva injunction had its genesis in cases involving the removal of assets outside the jurisdiction there is clear authority for the proposition that an intra-jurisdictional Mareva injunction may be granted. For instance in **Rahman (Prince Abdul) Bin Turki v Abu-Taha** [1980] 1 WLR 1268, Lord Denning MR held at 1273

> "So I would hold that a Mareva injunction can be granted against a man *even though he is based in this country* if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction, *or otherwise dealt with* so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied." (Italics added)

In this case there is no difficulty in the claimants DAL and Dixon meeting principles 1, 2, 4 and 6 above. In my view the questions for the Court are whether they have demonstrated a good arguable case on their counterclaims; and whether there is a risk of dissipation of the assets in the sense comprehended by the Mareva cases.

As to a good arguable case, the claimants allege that there was not one, but two agreements. They say there were breaches of the second, oral, agreement. Mr Middleton argued that the September letter of agreement was a shareholders' agreement; and that there was a separate subsequent oral agreement which is pleaded *in extenso* in paragraph 19.2 of the counterclaim. The parties may not be all that far apart on the *fact* of some further agreement after 2 September 1996; but the terms of any such subsequent agreement are hotly contested, as is the accounting to give effect to whatever was then agreed.

For their part DAL and Mr Dixon claim that there was incorrect invoicing; in some cases over-charging; withholding of expenses; and what amounts to a broad allegation of improper interference in the business and affairs of DAL. The losses claimed to have been suffered by the defendants are -

"(i)	Overcharged in the sum of	$ 9,048.89
(ii)	Charged where no goods or services provided	$ 3,375.00
(iii)	Charged for sums payable by other parties	$ 14,137.87
(iv)	Costs incurred to the benefit of the plaintiff -	
	advertising (yellow pages)	$ 3,300.00
	vehicle costs for 12 months to September 1993	$ 1,800.00
(v)	Loss of profits for the periods:	
	September 1992 to March 1993	$ 50,000.00
	For the years: 1/4/93 to 31/3/94	$ 90,000.00
	1/4/94 to 31/3/95	$ 90,000.00
	1/4/95 to 31/3/96	$ 90,000.00

(vi)	Goodwill in relation to business acquired by the plaintiff as a result of taking over the first defendant's telephone number (07) 849-4869 as of September 1992	$ 90,000.00
	Total	$441,661.76"

A second cause of action alleges oppression under S.209 of the Companies Act 1955 and, in broad terms, seeks an investigation of HJL's affairs.

Thirdly, there is a claim of a failure (on HJL's part) to distribute profits. I take these three claims in reverse order.

The third claim is plainly misconceived. There is no absolute obligation (in law) that Mr Dixon is presently entitled to a share of HJL's profit pro rata to his shareholding. He is entitled to such dividends as are lawfully declared by HJL.

As to the second cause of action, such appears to be based on two broad grounds. One is a "mechanical" claim; failures to provide accounts, and matters of that kind. Whatever the merits of that, accounts have now been supplied. And any breaches seem to me to be of a minor character and are unlikely to be such as would sustain by themselves a S.209 application. The matter of greater substance, and one which seems to have given rise to considerable concern on Mr Dixon's part, is a suggestion that HJL performed well below Mr Dixon's expectations. He says an

operation of the kind being run by HJL should yield 10% on turnover, whereas only 4% had been achieved. Even assuming figures of that order could be sustained by evidence, it would be an unusual - and perhaps a unique - use of S.209 to use it as a weapon vis-a-vis alleged poor performance per se. In my view, at the least as matters presently stand, that ground falls a long way short of a good arguable case for Mareva injunction purposes.

The heart of the claimants case for present purposes, and I did not understand Mr Middleton to dissent from this in argument, has to be what was agreed (or necessarily implied on the usual tests) between the parties in or about September 1996. The heart of the case between these parties is what was actually agreed between them. But it is impossible now to adjudicate on the merits of this contract dispute. What is in dispute is what was (allegedly) orally agreed to, with all the difficulties presently attendant at an interlocutory stage of such an exercise. The general tenor of what was to happen is clear enough, but important detail is clearly highly contentious. To take a simple example. There is nothing in the September letter as to Mr Dixon's expenses, if there ever was any agreement thereon, and what is to be made of this point depends upon the Court's ultimate assessment of the witnesses' evidence on that point.

I pause here, in passing, to note that it may be that some of what is now alleged by the defendants contravenes the parol evidence rule. There is the age old problem of how far the September agreement was the whole

agreement of the parties. And what, if anything, was subsequently agreed to, either expressly or by conduct, and whether whatever might have been agreed to was really administration to give effect to the September agreement. However the matter is analysed, it cannot be said at this time that the claimants have a strong case. But do they have a *good* arguable case? Such must be more than a prima facie case. I refer in that connection to **The Titiangela** [1980] 2 W, L.R. 193 and the New Zealand authorities set out in **McGechan on Procedure** at Appendix 10 5-159.

Doing what I can with what is in front of me at the moment, and this **is** only an interlocutory application, it appears to me that the Mareva claimants' arguments on the contract point are not at all strong. As I have noted, the general tenor of the written argument is clear. Putting it into effect gave rise to practical difficulties which understandably the parties sought to resolve in a practical way. But to my mind Mr Middleton's belated attempt to set up two completely separate agreements seems strained. The probabilities of the matter are with the HJL version of events. And that when the accounting was done Mr Dixon, who came out on the short end, has sought to have added in claims for expenses and the like; and, also in an endeavour to head off a shortfall accruing on his account, he then made a somewhat belated counterclaim. But in any event, as matters stand on the application before me, it is for the Mareva claimants to demonstrate a good arguable case; in this instance this has not been done to my satisfaction.

There is too a further problem. Even if the contractual framework was as alleged by the Mareva claimants, it does not appear to me that the Dixon interests losses can be anything like the quantum of this claim. The claim for losses of goodwill is of the wild-eyed variety; the basis for a loss of profits claim to the Dixon interests has not been made out to a good arguable case basis. It is quite inconsistent with the whole tenor of the arrangement whereby Mr Dixon became an employee of HJL. It appears to me that if these Mareva claimants have a claim at all, it is of a relatively limited accounting variety. At best for the claimants it is unlikely to extend beyond items (i) to (iv), or say, $35,000 (rounded off).

As to the risk of dissipation of assets, there can be no dispute that there is a real possibility of a transfer of some at least of the assets of the business of HJL. But it is necessary to ask the question, what would the result of such a transfer be? An examination of HJL's accounts (which have been exhibited) reveals (as to the assets) that if the usual 10% or so for bad debts is allowed, the accounts receivable and payable come quite close together. The most significant asset in HJL appears to be the item of inventory in a sum of , rounded off, $184,000. The net assets of the company as at 31 March 1996 stood at $172,453. Assuming an entity, which I will designate as 'X', purchased the assets of HJL either there would be an accretion to cash or bank balance or, if money remained owing for the purchase, there would be an outstanding balance on that sale which would still be due to HJL and which would be an asset of that

company. In very general terms therefore, on a sale of assets HJL's position is no worse, and indeed, in one sense, it could even be better to the extent that those assets were liquid. That of course assumes a sale of assets at an appropriate sale price and not an under-hand fire sale to HJL directors. That would of course be highly objectionable, but there is no evidence that has or is about to happen. If HJL were to be wound up after a sale of assets, Mr Dixon of course has his 25% shareholding in the company. In the usual way, he would be entitled on a winding-up to a return on his shareholding.

It is of course also possible to dispose of the business of a company by a sale of shares. But that would seem to be highly improbable in this instance. A purchaser of a business would surely wish to purchase **all** the shares. Because Mr Dixon holds 25% of the shares he could thwart any such enterprise, simply by refusing to transfer his shares.

If this analysis is correct, it follows that it has not been demonstrated that on a sale of assets the position of HJL would necessarily be worse, and there is presently no evidence of any intention to wind HJL up. It may be that following the prospective meeting (which Mr Dixon is obviously entitled to attend along with his advisor) further issues might arise. However, as matters presently stand before me what appears in prospect is assets being realised, as opposed to dissipated.

This necessary ground for the application has also not therefore been made out.

It follows therefore that the present application must be dismissed. I add only this. With respect, this dispute seems to have got somewhat out of hand. The summary judgment application by HJL was highly unlikely to succeed on the facts of this case. Likewise, the present application to the Court was substantially misconceived, or is at least premature. What is at issue between these parties is more of an accounting dispute than a legal one. I would have thought it resolvable, and relatively shortly, with the aid of an experienced independent senior accountant, or possibly an arbitrator. I appreciate that mediation has not succeeded. But I have to observe that the amounts in issue in this dispute are not great. The available funds, which are also not great, will get eaten up in legal costs in the event that the matter proceeds further in this forum. Further, on a merit hearing of claims which in my view do not likely exceed something like $50,000 or so either way, neither party is going to get anything more than District Court costs in this forum. The hard fact of the matter is that this is a dispute which would be better resolved by a negotiated compromise with some independent accounting assistance to both parties. I make those observations for whatever assistance they may provide to the parties.

The present application is refused. I allow HJL costs of $500, together with disbursements as fixed by the Registrar on the application.

R.G. Hammond J