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MEDIUM PRIORITY

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 236/97

BETWEEN	ENTERPRISE NATIONALE DER SIDERURGIE
	Plaintiff
AND	FRANK CASPER LOUIS JAQUES MESTROM
	First Defendant
AND	ALEXANDER PIETER VAN HEEREN
	Second Defendant
AND	MICHAEL LAWRENCE CURTIS
	Third Defendant
Hearing:	22 & 23 April 1999
Counsel:	J Carter & B O O'Callahan for plaintiff C J Hodson QC for first and third defendants A R Galbraith QC for second defendant
Judgment:	1 June ~~May~~ 1999

RESERVED JUDGMENT OF CARTWRIGHT J

Carter & Partners, Auckland, for plaintiff
Bartlett Partners (Wellington) for first and third defendant
Jones Fee (Auckland) for second defendant

The applications

The first and third defendants seek orders dismissing or staying the substantive proceeding pursuant to Rule 477 of the High Court Rules. The second defendant files an appearance pursuant to Rule 131(1) of the High Court Rules under protest to the jurisdiction of this Court to hear and determine the proceeding against him.

Preliminary issue

The plaintiff sought to introduce the affidavit of Patrick Delhaye. Counsel for all defendants opposed its introduction. The affidavit annexed translation from French to English of part of the minutes of a meeting between the second defendant and representatives of the plaintiff. There is some force in the defendants' submission that the minutes should be translated in full in order to ensure that all relevant material is clearly before the Court. I have not therefore considered the contents of Mr Delhaye's affidavit in the course of determining the issues presently before me.

Background

The plaintiff is a steel manufacturing company owned by the Algerian Government, incorporated under the laws of, and with its registered office in that country.

Prior to its dissolution in July 1991 the first defendant was the secretary of Prime International Limited, a New Zealand registered company (Prime) and the second and third defendants were directors of the company. In 1996 under separate proceedings filed under M No. 261/96 the plaintiff sought orders restoring Prime to the Register of Companies. Ultimately, the application was withdrawn and new proceedings against the three defendants personally as officers of the company were filed.

The present proceeding seeks damages against the second defendant for negligence, breach of a fiduciary relationship, agency, unconscionable conduct, knowing receipt of improper distributions, alienation of property with intent to defraud creditors and, with the other two defendants, conspiracy to commit wrongs and fraudulent distributions. The plaintiff also seeks damages against the first and third defendants in negligence.

Underlying these claims for damages against the three defendants personally is the allegation that in May 1991 Prime increased its authorised capital by the creation of 235,000 redeemable preference shares of $1.00 each, all of which were issued to the second defendant. Shortly thereafter the company declared that it had ceased to operate and had discharged its liabilities other than those owed to its members. It is the plaintiff's claim that at that time Prime owed it approximately US$4,967,744 which when coupled with delay damages for late and non-payment totaled approximately US$12 million. It is the plaintiff's fundamental allegation that the three defendants knowingly or negligently dissolved the company at a time when it was owed a significant sum.

The plaintiff submits that were Prime still to be in existence it would be able to obtain judgment against it in Algeria because the proper law of the unpaid contract is Algerian law. The unpaid contracts contained clauses conferring jurisdiction of the Algerian Commercial Court in Algiers and Algerian law has a 15 year time limit in which a plaintiff can bring a claim for breach of contract.

While the defendants do not necessarily accept that there were steel trading contracts entered into between the plaintiff and Prime nor that any such contracts were governed by Algerian law, they nonetheless submit that there was a dispute between the two companies as to the balance payable under any such contract which would enable Prime should it still exist to counterclaim for non-performance. Of significance in their submission is the allegation that all dealings concerning the steel took place out of New Zealand. Moreover since the dissolution of Prime a Belgian company, Prime Pacific NV acknowledges a continuing obligation to the plaintiff in place of the now defunct company. Prime Pacific NV is registered in Belgium where the second defendant, who is its principal is now said to live. As Prime Pacific NV accepts liability, in the submission of the defendant, Belgium is the proper forum for resolving what would effectively be a dispute over the amount, if any, due by it to the plaintiff. Coupled with the submission that the causes of action pleaded against the three defendants have limited chance of success, they argue that the substantive proceeding ought to be struck out or stayed pending resolution of any dispute over debt between the plaintiff and Prime Pacific NV.

As the option to litigate its claim against Prime in the Commercial Court in Algiers no longer exists, the plaintiff looks to the former directors and officers of the company. The plaintiff, however, disputes the defendants' assertion that novation has occurred whereby Prime Pacific NV Ltd has, with the consent of the plaintiff, assumed Prime's obligations. If novation has not occurred and that is clearly a factual matter, then Belgium cannot be the forum conveniens. The only possible connection with that country is the fact that the second defendant, who resided in New Zealand during the period when the plaintiff and Prime were still trading in steel is now said to reside in Belgium. If the defendants (on whom the burden falls) are unable to persuade the Court that novation has occurred then New Zealand is the appropriate forum for the resolution of the dispute. Two of the three defendants reside here. The plaintiff asserts that in fact the second defendant has retained a number of interests in property in New Zealand and as a permanent resident of this country continues to discharge his obligations as Honorary Consul for the Netherlands to New Zealand and for New Zealand to the Belgian District of Flanders. Prime therefore submits that the second defendant has retained close links with this country.

The issues

Under Rule 131 the question is whether this Court should exercise jurisdiction over the second defendant.

Under Rule 477 the issues are whether a reasonable cause of action has been disclosed, or whether the proceeding is an abuse of the process of the Court to the extent that it ought to be struck out or stayed. Novation, whether the plaintiff had a good arguable case against the three defendants, and the proper forum for resolving the dispute are the primary issues.

Novation

In summary, if novation has occurred then the case against the three defendants as those secondarily liable to the plaintiff for its losses melts away. On the face of it there would be no good arguable case against them and at the least it would be appropriate

to stay the substantive proceedings pending resolution of the dispute between the plaintiff and Prime Pacific NV Ltd. That dispute would properly be heard and determined in Belgium where Prime International NV Ltd is registered. The question of whether novation has occurred is therefore central to the defendants' case.

In his affidavit dated 1 April 1998, Mr Van Heeren refers to discussions with an officer of the plaintiff whereby it was advised that Prime was "closing down." Mr Van Heeren asserted that the plaintiff's representatives accepted the position and in a letter dated 8 May 1992, on behalf of Prime Pacific NV, he confirmed that company would accept Prime's responsibilities. Mr Van Leemput, a Belgian lawyer, drafted the letter at Mr Van Heeren's request. Mr Veld who was financial controller of Prime Pacific NV at the relevant time confirmed this. In response, Mr Benmaamar, a senior officer of the plaintiff denies that any such understanding was reached between the plaintiff and the second defendant or Prime Pacific NV. There is a strong inference to be drawn from Mr Benmaamar's sworn statement that he believes the letter of 8 May 1992 to have been concocted by Mr Van Heeren or not sent. He claims not to have heard of Prime Pacific NV until the present litigation was well underway, when in November 1997 "Mr Van Heeren's counsel produced the alleged letter 8 May 1992." This is a matter which cannot be resolved in the absence of fuller exploration of the facts. There are unsatisfactory aspects to the claims and denials, and direct issues of credibility arise. For example, the officer of the plaintiff with whom Mr Van Heeren claims to have discussed his plan for Prime Pacific NV to take over any liability has not himself given an affidavit. Even more critical is the fact that the discussions were said to have taken place some months after Prime went out of existence. Above all, there is an overwhelming lack of evidence upon which to base a finding of novation. Prime which maintains it has a counterclaim exceeding the claim brought by the plaintiff against it has produced minimal documentation of a novation or of its counterclaim.

Assent is central to the concept of novation. While the consent of a party may be inferred, there is insufficient reliable evidence in the present matter for that stage to be reached. I am therefore not satisfied in the context of the present applications that the defendants have established novation of any contracts between the plaintiff and Prime.

Good arguable case

In the absence of a clear finding of novation, it remains for the defendants to persuade me that the plaintiff has no good arguable case, an essential prerequisite if a New Zealand Court is to assume jurisdiction where a defendant challenges jurisdiction. Applying the principles developed under the former Rule 48 of the Code of Civil Procedure concerning applications for leave to serve proceedings outside the jurisdiction, the Court ought to be satisfied that the plaintiff has a good arguable case. **Biddulph v Wyeth Australia Pty Ltd** [1994] 3 NZLR 49. The term "good arguable case" requires more than would be needed to survive an application to strike out under Rule 186. (**Biddulph v Wyeth Australia Pty Ltd** at page 58). **Kuwait Asia Bank EC v National Mutual Life Nominees Ltd** [1990] 3 NZLR 513.

The essential factual issues are sharply in contrast between the plaintiff and the defendants. Much of the basis upon which the plaintiff seeks remedies against the three defendants rests on its assertion that it had contracted with Prime, that it did not receive payment for some of the goods supplied in pursuance of those contracts, that it owes no substantial sum to the now defunct company under any purported counterclaim and that the company was dissolved at a time when the defendants as secretary and directors of Prime knew that a substantial sum was due and owing to the plaintiff and nonetheless a declaration to the contrary was completed. If the trier of fact ultimately determines that the discussions to which Mr Van Heeren refers and which are confirmed by his letter of 8 May 1992 in fact occurred, then the outcome may be a finding of novation. If the Court finds however that the evidence concerning the discussions and the letter are unreliable then the causes of action alleging negligence would seem viable. As has been foreshadowed in the earlier proceedings brought to restore Prime to the Register, it could be that the defendants satisfy the Court that there were in fact no contracts between the plaintiff and Prime which could give rise to a debt due to the plaintiff. As information has begun to emerge in the context of the present proceedings, however, that defence appears to be rather less tenable than it was at the outset of the dispute.

Nonetheless, it is necessary briefly to consider whether any of the plaintiff's claims at this preliminary stage cannot hope to succeed.

Negligence – first cause of action against the first, second and third defendants respectively

The defendants' submission that the plaintiff lacks a good arguable case loses much of its strength in the absence of any finding of novation. The plaintiff nonetheless has a formidable barrier to overcome. In order to reach a point where it can succeed on any of its causes of action it must satisfy the Court that there was a sum owed under its contracts with Prime, successfully fend off a counterclaim and prove that, but for its dissolution, Prime would have been able to meet the debt due. Having reached that point, then it must further satisfy the Court that the company was dissolved in the knowledge of a debt due by it, knowledge which is attributable to one or more of the defendants. If that stage is reached, then the plaintiff must have a good arguable case in negligence against the defendants and moreover be in a position to prove loss. While the defendants argue that any duty of care which might arise is "inconsistent with the fact that the parties are in an arm's length commercial transaction" that overlooks the fact that the allegations relate not to the commercial transaction between the plaintiff and Prime, but to the duties of its officers, if it can be proved that the company was dissolved at a time when they knew or ought to have known that there was a sum due to the plaintiff. The plaintiff has an arguable claim in negligence.

Negligence Hedley Byrne principle; second cause of action against the second defendant

The plaintiff claims that the relationship with the second defendant was one whereby Mr Van Heeren assumed a position of power or responsibility which gives rise to a duty of care to it in tort: **Hedley Byrne & Co v Neller & Partners Ltd** [1964] AC 465 at 528-9 per Lord Devlin. And that the second defendant held a special skill or knowledge upon which the plaintiff relied. **Henderson v Verrett Syndicated** [1995] 2 AC 145 at 180.

Counsel for the second defendant seeks to narrow the basis for this cause of action, submitting that it is a distortion of well settled principles to extend the Hedley Byrne

principle beyond reliance on one who has a special skill and undertakes to use it for another. There is however room for argument that the plaintiff was in a peculiarly vulnerable position, the second defendant knew that this was so and knew that the plaintiff relied on him to exercise skill and care in the exercise of his power. This cause of action is arguable.

Deceit – third cause of action against the second defendant

The claim in deceit against the second defendant falls into a similar category. The plaintiff intends to prove that the second defendant knew that Prime did not have a valid counterclaim against it (except possibly for a relatively small sum). In continuing to negotiate after Prime had been dissolved he knew that neither he nor he nor Prime had any intention to settle the company's debt to the plaintiff. Consequently, it is alleged that Mr Van Heeren was not honest in his dealings with the plaintiff and moreover, that the negotiations conducted by him continued with the intention of preventing the plaintiff from filing proceedings against Prime until after it had been dissolved. The plaintiff here pleads that the second defendant's conduct was fraudulent, that he knew the plaintiff would rely on representations made by him and has suffered damage as a consequence. The facts as pleaded by the plaintiff encompass the elements of the tort of deceit and give rise to an arguable case.

Breach of fiduciary duty; fourth cause of action against the second defendant

The second defendant submits that the claim that he owed a fiduciary duty to the plaintiff to refrain from conducting himself in a manner contrary to its interests cannot survive as a cause of action. In **Hospital Products Ltd v United States Surgical Corporation** (1984-85) 156 CLR 41 at 70 Gibbs CJ said:

> ... the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as an important, if not decisive, in indicating that no fiduciary duty arose.

On the facts as pleaded however the plaintiff submits that the losses suffered by it are not those arising out of a usual commercial relationship. The second defendant continued to negotiate with the plaintiff on a basis of faithfulness knowing that the

plaintiff relied on his standing, reputation and promises. It is not without significance that the commercial activities between the plaintiff and Prime began following the introduction of the second defendant as a member of an official New Zealand trade delegation to Algeria. The plaintiff is owned by the Algerian Government and might therefore assume that commercial dealings between it and Prime would be conducted with the utmost good faith.

The plaintiff submits that the usual approach to determining whether there is a fiduciary relationship in a commercial context is to decide whether certain characteristics are present. In **Commercial Equity: Fiduciary Relationships**, Glover, 1995 at 3.9 the learned author suggests that there are four primary characteristics:

1. An undertaking to act in the interests of another, described as the "pivotal element and sine qua non of fiduciary relationships."

2. That the relationship was a consequence of something entrusted by the trusting party.

3. One of reliance between the parties.

4. The party trusted has the right to exercise powers or discretions which can alter the legal or practical interests of another.

The plaintiff submits that all four are present. Given the manner in which the commercial relationship was established between the plaintiff and Prime the reposing of trust and reliance by the plaintiff would seem to pose no major difficulty of proof. More arguable is the question of whether the pivotal characteristic of undertaking is present. The plaintiff submits that various promises of cooperation between the second defendant and the plaintiff comprised an undertaking to act with such cooperation in mind, the inference being that the second defendant undertook to refrain from conducting the affairs of Prime in such a way that the plaintiff's position

was undermined. In counsel's submission this is not a simple question of undermining: by the time meetings took place concerning payment of debts the plaintiff said were due to it the second defendant had dissolved Prime, thereby defeating the plaintiff's claim altogether.

The plaintiff may face difficulty in persuading a Court that the second defendant had a right to exercise power or discretion in relation to it. In the plaintiff's submission because of the relationship between the second defendant and the plaintiff, Van Heeren had:

> ... a special opportunity to exercise the power or discretion to the detriment of [the plaintiff] who was accordingly vulnerable to abuse by the fiduciary of his position.

(**Hospital Products Ltd v United States Surgical Corporation** per Mason J at pages 96-97.) The underlying factual allegation is that, holding himself out as a respected and responsible person, the second defendant negligently or fraudulently failed to advise the plaintiff that the company of which he had control was no longer in existence, thereby defeating the plaintiff's claim against it. That amounted to a special opportunity to exercise power or discretion to the plaintiff's detriment. These allegations do not in my view fit squarely into the notion of a fiduciary relationship between the second defendant and the plaintiff. Certainly if proved, the allegation concerning the second defendant's behaviour places his activities well outside those of a normal commercial dealing. But that is a different matter from suggesting that there is a relationship as close and responsible as that of a fiduciary. The plaintiff may have made certain assumptions about the second defendant's honesty in the New Zealand commercial community, but an inference cannot readily be drawn that the plaintiff was owed a special fiduciary duty by him.

The fiduciary obligations of directors have long been limited. In **Bath v Standard Land Company Limited** [1911] 1 Ch 618, a case in which the company was a trustee of the plaintiff's estate, Cozens-Hardy MR said at page 67:

> I base my decision upon the broad principle that directors stand in a fiduciary position only to the company, not to the creditors of the company, not even to individual shareholders of the company, still less to strangers dealing with the company. This principle applies equally whether the relation between the company

> and the stranger is one purely of contract, such as principal and agent, or is one of trustee and cestui que trust.

The only exception to this would be if a director had taken trust property for his or her own personal gain. At page 625-626 he said:

> It is of course true that a company acts through its directors. But that does not involve the proposition that if a breach of trust is committed by a company, acting through its board, a beneficiary can maintain any action against the directors in respect of such breach of trust. Of course I except the case where trust property can be followed into the hands of a director, or of any stranger with notice. No such point arises here.

In **Re Wincham Shipbuilding, Boiler, and Salt Company (Poole, Jackson and Whyte's case)** 9 Ch 322, Jessel MR stated at p 328:

> But directors are not trustees for the creditors of the company. The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company. They have only those statutory rights against the members which are given them in the winding-up.

In the recent case **Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia and Others** [1998] 2 BCLC 485, Toulson J held that a creditor cannot sue a director for breach of the fiduciary duty owed by the director to the company. The director in that case had removed funds from the company account with the intention of avoiding payment of the judgment sum to the plaintiff in the event of an adverse outcome in pending litigation. There was a clear breach of fiduciary duty to the company, but that breach was not actionable by the plaintiff creditor.

And in **Kuwait Asia Bank EC v National Mutual Life Nominees Ltd** [1990] 3 NZLR 513 at 529 the Court stated:

> Two general principles may first be stated. (1) a director does not by reason only of his position as director owe any duty to creditors or to trustees for creditors of the company. (2) A shareholder does not by reason only of his position as shareholder owe any duty to anybody.

In summary, the plaintiff has such major difficulties in satisfying the Court that there is a fiduciary duty owed by the directors of Prime to the plaintiff that it seems unlikely to succeed under this cause of action.

Allegations concerning the second defendant's fraudulent or negligent actions can be disposed of under other causes of action in the statement of Claim. Consequently, I rule that this cause of action must be struck out.

Agency: fifth cause of action

The plaintiff's case is that the second defendant either personally or through two employees of Prime, at meetings with the plaintiff in October 1991 and April 1993 represented Prime or had authority to act on its behalf. As a result the plaintiff was induced to delay issuing proceedings against Prime thereby sustaining loss. The underlying allegation is one that the second defendant or employees with Prime's ostensible authority caused loss to the plaintiff.

Counsel for the second defendant submits that there is no cause of action in agency. **Bowstead & Reynolds on Agency** (1996) 17th edition gives the following definition of apparent (ostensible) authority at p 366:

> Where a person by words or conduct represents or permits it to be represented that another person has authority *to act on his behalf*, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.[Emphasis added.]

According to the principle of apparent or ostensible authority a principal will be bound by the actions of his or her agents. During the negotiations Prime was the principal and the second defendant and employees were its agents acting either with actual or apparent authority. As a consequence only Prime can be responsible for any loss suffered by the plaintiff. In order to have a cause of action against the second defendant the plaintiff would have to demonstrate that the employees were agents of the second defendant (not of the company) and that the second defendant was acting in his personal capacity rather than as an agent of the company. The facts as pleaded do

not disclose a basis for this cause of action. As the plaintiff does not therefore have an arguable case, this cause of action must be struck out.

Unconscionability – sixth cause of action

Unconscionability has been defined in Youdan (ed) Equity, Fiduciaries & Trusts by P D Finn in "the fiduciary principle":

> In its primary setting, its concern is with relationships (ordinarily, though not necessarily, culminating in contractual outcomes) in which both parties would, as a matter of course, be expected to look after their own interests in their dealing *inter se*, but in which one party, because of his own circumstances or because of the relative positions of both, is in fact unable to conserve his own interests. That person is vulnerable to exploitation, and on occasion, to manipulation at the hands of the other. At least where that other knows or has reason to know that vulnerability, the Courts will countenance claims that the other should be held responsible in some measure for the protection of the vulnerable party's interests in dealing between them.

The disadvantage under which the plaintiff laboured in the present circumstances is that Prime was dissolved without notice to it, the plaintiff could not realistically have learned of its dissolution and a declaration was made indicating at dissolution that the company owed no debts to any relevant entity. Thus, the second defendant as the controlling officer of Prime had a duty not only to notify the plaintiff as a creditor of the company (even if as the second defendant asserts there was a counterclaim against the plaintiff which would exceed the plaintiff's claim) but in making or permitting the declaration to be made at dissolution the second defendant acted in a manner which was unconscionable. In **O'Connor v Hart** [1985] 1 NZLR 159, 171 Lord Brightman said:

> "Fraud" in its equitable context does not mean, or is not confined to, deceit; "it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties"; **Earl of Aylesford v Morris** (1873) 8 Ch App 484, 490. It is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances.

This dictum was adopted in **Nicholls v Jessup** [1986] 1 NZLR 226 (CA) per Cooke P. at 227 and is one upon which the plaintiff may base an arguable case against the second defendant. The claim for equitable damages is based on the plaintiff's inability,

due to the second defendant's unconscionable conduct, to participate in Prime's liquidation. On the facts pleaded, this is an arguable cause of action.

Knowing receipt of improper distributions and alienation of property with intent to defraud creditors: seventh and eighth causes of action against the second defendant

These allegations are directed at the assets which the plaintiffs claim, but for Prime's dissolution would have been available for payment of its debts for steel trading. Provided the plaintiff establishes the second defendant knew of the existence and extent of the debt due to it, in the light of the first defendant's amended statement of claim that "distributions were made from the assets of Prime to its shareholders and/or to persons or companies nominated by the second defendant" the plaintiff has an arguable case for seeking damages against him.

The remaining causes of action are against all defendants jointly:

1. **Conspiracy to commit wrongs**

The wrongs complained of are those in negligence, deceit and unconscionable conduct. While conspiracy is notoriously difficult to prove, it is open to the plaintiff on the pleaded facts to do so. The cause of action alleging conspiracy does not add anything new to the fundamental claims against each of the three defendants in negligence, but in so far as it draws the first and third defendants into the allegations of deceit or unconscionable conduct made primarily against the second defendant, it can stand as an independent cause of action.

2. **Fraudulent distributions**

The allegation here is that all defendants jointly participated in fraudulent distributions in breach of a duty as directors or controllers of Prime to refrain from knowingly or recklessly preferring the shareholders to the plaintiff. This cause of action is based on the assertion that the plaintiff as an unpaid creditor should not have been relegated when distributions which dissipated profits, money or capital of Prime were made. It is a cause of action which is available to the plaintiff.

3. **Distribution in breach of fiduciary duty: twelfth cause of action**

The final cause of action against all defendants jointly that distributions were made in breach of a fiduciary duty does not survive the striking out of the primary allegation against the second defendant personally. It too will be struck out.

Forum non conveniens

The second defendant submits that New Zealand is not the appropriate forum for the resolution of the dispute, primarily on the grounds that novation has occurred and, as a result, the Courts in Belgium ought properly to determine the issues. In the absence of a finding of novation, the present dispute which is between Enterprise Nationale Der Siderurgie and the secretary and two directors of Prime has no connection with Belgium. The contract to supply steel (if there was one) was between an Algerian company and the New Zealand registered company of which the three defendants were officials.

The fundamental principle underlying an application for stay of proceeding on the ground that some other forum was more appropriate extends beyond the concept of mere convenience as implied by the term "forum non conveniens." In his speech in **Spiliada Maritime v Cansulex Ltd** [1986] 3 All ER 843 at 854 Lord Goff of Chieveley summarised the principle:

> ... a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The New Zealand Court of Appeal adopted this principle in **Long Beach Holdings v Bhanabhai & Co Limited** [1994] 2 NZLR 28 at 35 and further stated that:

> The burden of proof of that rests on the defendant. Relevant considerations will be convenience and expense, the places where the parties respectively reside or carry on business, the law governing the transaction, what is the "natural forum", ie, that with which the action has the most real and established connection and whether a New Zealand forum offers the plaintiff a legitimate personal or juridical advantage.""

When considering the factors of convenience and expense, the plaintiff concedes that the cost of calling its witnesses who are based primarily in Europe or North Africa would be more moderate were the dispute to be tried in Belgium. Nonetheless, it submits that the issues concerning the debt are relatively simple and for the most part will be proved by documentary evidence. Moreover, the overall expense and convenience of the trial is not a factor which should be given much weight in determining the second defendant's application for a stay. It is the plaintiff which will require most of the witnesses and who will therefore bear the expense and inconvenience. The latter factor is undoubtedly correct. However, should the plaintiff be successful in its claim then the prospect of an award of costs against any of the defendants is a factor which I must take into account.

It is also necessary to consider the impact of convenience and expense on the defendants. Two clearly reside in New Zealand and one retains substantial links with this country. It can be assumed that a number of their supporting witnesses such as professional advisors would reside in this country.

I also bear in mind that although the second defendant presently appears to reside in Belgium he maintains very strong connections with this jurisdiction, both at a commercial and personal level. There is not therefore the same need to protect him and ensure that he is not brought to Court in a State whose laws and customs will be unfamiliar to him.

A further factor which is of importance whether a Belgium or New Zealand Court determines the issues in dispute, is that the Court will need to consider the application of Algerian law. If the matter were to proceed to hearing in Belgium, however, that Court would be obliged in addition to consider the application of relevant New Zealand law. Cost and convenience factors favour the New Zealand forum.

When considering whether New Zealand offers a legitimate personal or juridical advantage the plaintiff submits that should it be successful orders against the defendant will readily be enforceable. In particular the second defendant although now apparently residing in Belgium retains New Zealand assets. It submits further that

were this claim to be litigated in Belgium there is a possibility that the Courts there would not recognise the liability of the defendants, a situation which would arise if the Belgium Court chose to apply Belgium law. If that occurred it appears that the limitation period applicable has now expired. These factors indicate that the dispute should properly be determined in New Zealand.

Summary

1. The causes of action solely against the second defendant for which the plaintiff has demonstrated an arguable case are: 1, 2, 3, 6, 7 & 8.

2. Causes of action solely against the second defendant which are struck out are: 4 & 5.

3. Causes of action in negligence against the first and third defendants survive the defendants' application.

4. The plaintiff has an arguable case in respect of the causes of action against all defendants: conspiracy to commit wrongs and fraudulent distributions.

5. The third cause of action against all defendants – distributions in breach of a fiduciary duty is struck out.

6. New Zealand is the appropriate forum for the resolution of the dispute. Convenience and expense factors favour the plaintiff. The defendants all reside or have substantial links with this jurisdiction and the applicable law is New Zealand law. In the circumstances of this claim, New Zealand presents a more natural forum than the Belgium Courts and moreover provides certain legitimate advantages to the plaintiff. The application for stay of proceeding on the grounds that New Zealand is not the appropriate forum for resolution of this claim is declined.

Costs

Costs are fixed in favour of the plaintiff in the sum of $7,000 with disbursements as approved by the Registrar.