

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2009-404-000900**

UNDER the Companies Act 1993

BETWEEN ROBERT PARKINSON AND MARY  
ARUNDEL PARKINSON  
Applicants

AND JAMES PRODUCTS LIMITED  
First Respondent

AND KLASSE PROPERTIES LIMITED  
Second Respondent

Counsel: A W Johnson for applicants

Judgment: 27 February 2009 at 4:30pm

---

**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

---

*This judgment was delivered by me on 27 February 2009 at 4:30 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Martelli McKegg Wells & Cormack, PO Box 5745, Auckland 1141

[1] Robert and Mary Parkinson are shareholders in James Products Limited and Klasse Properties Limited. They have had issues with management and administration of the companies for some time. They wish to have an investigator appointed in respect of each of the companies pursuant to s 179 of the Companies Act 1993. They have applied without notice for leave to seek the order by way of originating application pursuant to Part 19 of the High Court Rules. They also apply for directions as to service.

[2] The application is supported by an affidavit of Robert Parkinson setting out in summary the nature of the applicants' concerns and relevant background. It is clear from this background that there has been dissension between the applicants and the majority shareholder of the company for some time. This has led to two civil proceedings in this Court:

- a) A claim by James Products Limited against the applicant Robert Parkinson and related interests, alleging breach of a joint venture agreement and of fiduciary duties. That claim is being heard this week.
- b) A claim by the applicants for rectification of the share register of both James Products Limited and Klasse Products Limited. That claim was determined by a judgment on 3 September 2008 ordering that the names of Mr and Mrs Parkinson be entered on the share register of the respective companies. The judgment has been appealed. Mr Parkinson says that no steps have yet been taken to prosecute the appeal. There is no mention of any stay of the judgment.

[3] Mr Parkinson says that the applicants were not able to seek appointment of an investigator until their position as shareholders was determined by the judgment of September 2008. One of the matters raised in the application for rectification of the share register was the applicants' wish to pursue their concerns about the management of the company and to make the present application.

## **Application for leave**

[4] The application is not one that is expressly authorised to be brought by way of originating application (under rr 19.2–19.4). Accordingly, the present application for leave is made under r 19.5 of the High Court Rules, which reads:

### **19.5 Court may permit proceeding to be commenced by originating application**

- (1) The court may, in the interests of justice, permit any proceeding not mentioned in rules 19.2 to 19.4 to be commenced by originating application.
- (2) The court's permission may be sought without notice.
- (3) The proposed originating application must be filed with an application for permission under this rule.

[5] The only criterion for an application for leave is that it be in the interests of justice to commence by originating application. As there does not appear to be any clear precedent for bringing this particular application (under s 179 of the Companies Act 1993), it is appropriate that the application be brought ahead of the substantive application and in conjunction with an application for directions as to service: *McGechan on Procedure* HR 19.5.01

[6] The grounds for the application include:

6. The matters in issue between the parties are such that the application should be able to be determined on the papers. On that basis it would seem just and equitable that the proceedings be able to be commenced by way of originating application with accompanying affidavits.
7. There is also urgency in the matter in that the applicants have concerns as to the legitimate management of the two companies, and also the financial position of the companies and the true asset positions.
8. The applicants have previously sought documentation referred to in the application and the respondent companies have failed to provide that information. The information is that which should reasonably be available to a shareholder.
9. The application is made in good faith and the proposed investigator is independent of the applicants as appearing in the affidavits filed in support of this application.

[7] I am satisfied that the affidavit of Robert Parkinson filed in support of the application provides prima facie support for these grounds.

[8] However, I need to decide first whether the application for leave can and should be determined without notice. There is clearly jurisdiction to do so under r 19.5(2), although I do not read that rule as dispensing with the usual need to satisfy the Court that the application meets one of the general criteria for applications without notice under r 7.46 of the High Court Rules.

[9] The matters of complaint raised by the applicants, if established, give reason for concern about the management of the company. I accept that it is important, and in the interests of all parties, that the matters being raised by the applicants be addressed as soon as possible.

[10] I consider that it is also in the interests of all parties to address the applicants' concerns substantively rather than in an argument on the issue of leave. In my view the nature of the dispute warrants proceeding with the application for leave without notice, either on the basis of undue delay or prejudice, or under the general interests of justice (r 7.46(3)(a) or (e)).

[11] The applicants say that the matters are capable of being advanced and answered by way of affidavit evidence, and will not need oral evidence. On the papers before the Court I expect that will be the case.

[12] This does not pre-empt the Court's power to direct the parties at a later date to file a statement of claim and of defence under r 7.9(2) of the High Court Rules if respondent parties raise matters which warrant definition by formal pleading.

[13] I take into account the fact that there is an extant appeal against the judgment ordering rectification of the share register. As there is no stay in place, I do not consider that that should pre-empt any decision on leave. The civil proceeding currently under way in this Court does not appear to be relevant either to the application for leave or the intended substantive application.

[14] Weighing the above factors I am satisfied that there is a proper basis for proceeding without notice, and for granting leave to the applicants to bring their application under s 179 of the Companies Act 1993 by way of originating application.

**Directions as to service**

[15] The applicants have also sought directions as to service. They propose that the application be served on the two companies that will be the formal respondents to the application, as well as the majority (75%) shareholder of those companies, Klasse Asia Limited. The only shareholder, City Nominees Limited, is aware of the intended application and has advised the applicants that it does not wish to be heard.

[16] I direct that the application be served on the respondents James Products Limited and Klasse Properties Limited and on Klasse Asia Limited.

---

**Associate Judge Abbott**