IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-000316

	BETWEEN	ROSSOD HOLDINGS LTD Plaintiff
	AND	MICHAEL ROBERT DOSSOR Second Plaintiff
	AND	RICHARD WILLIAM PRICE Defendant

Hearing: 27 May 2009
(Heard at Rotorua)

Appearances: I Thorpe for the Plaintiffs
H Fulton for the Defendant
M Fisher for SWE Swap (proposed defendant)

Judgment: 4 June 2009

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
04.06.09 at 12.00 noon, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

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Overview

[1] The plaintiffs have applied to join Theresa Lynette Price (Mrs Price) and Stephen William Earle Swap (Mr Swap) as defendants. The former is the wife of the defendant (Mr Price). All three, including Mr Price, are trustees of Mr Price's family trust. It is not challenged that from about the time Mr Price acquired a 20% shareholding in Hunter Grain Limited (the company) in about January 2006, those shares were transferred to the family trust. In their capacity as trustees it is intended to join Mr Price, Mrs Price and Mr Swap as second defendants (the intended defendants).

[2] In January 2008 Mr Price sold those shares to the first plaintiff (Rossod) for $710,814. The plaintiffs sue to recover that sum claiming that at the time of the sale Mr Price was in breach of:

a) Certain duties he had as a director and employee of the company; and

b) A shareholders agreement which restrained him (among others) from operating "in a competitive nature to the company".

[3] The plaintiffs claim they have only discovered Mr Price's breaches since his shares were purchased from him and paid for.

[4] Because the shares were owned by Mr Price's family trust that trust would have received the proceeds from sale. The plaintiffs, if successful in this proceeding, wish to have recourse to Mr Price's family trust's assets, if necessary, in order to obtain recovery. The plaintiff says that due to an error their proceedings did not name the intended defendants as defendants.

The third party joinder application

[5] By the overview just concluded there appears nothing remarkable in the plaintiffs' application for joinder. Although the application for joinder is made under the old High Court rules there is nothing arising as to the transition to the new

rules, the provisions being materially the same. There are two circumstances under rule 4.56(1)(b) where additional parties can be joined to a proceeding:

- Where the intended defendants ought to have been joined; or

- Where the intended defendants *"… presence … may be necessary to enable the Court effectually and completely to adjudicate upon unsettled questions involved in the proceedings…"*.

[6] *McGechan,* HR 4.56.07 summarises matters for usual consideration. I need not repeat those. There is no issue concerning them. From the overview presented it appears that the intended defendants are proper defendants and ought to be joined. They represent the assets of the trust which the plaintiffs wishes to enforce its judgment against, and for that reason are "necessary" parties. Further the Court takes a liberal approach to applications like this. Joinder is usual once jurisdiction is established. The plaintiffs state they simply have issued their proceedings against the wrong party and are seeking to remedy that error.

[7] But, there is nothing usual or regular about the issues between the parties as the notices of opposition disclose. Mr Price opposes, as does Mr Swap. Although there are aspects of their opposition that each takes in common with the other, there are also differences. Each challenges the basis upon which, as it is pleaded by the plaintiffs' draft amended statement of claim, a trustee could be accountable for duties which are personal to Mr Price as a director/employee of the company. In addition Mr Price pursues an abuse of process argument claiming the matters in this proceeding are, in reality identical to the issues raised in another proceeding. In connection with the abuse of process claim it is appropriate to review the allegations of breaches by Mr Price, and to consider the relationship of this proceeding with another brought by the company (and not as in this case by the company's shareholders) against him.

Litigation background

[8] In the statement of claim filed in this proceeding Rossod claims the difference between the fair value (true value) and the price paid to Mr Price. In the first two causes of action it is claimed Mr Price's competition with the company is in breach not only to his obligations to the company but is in breach of the shareholders agreement. The third cause of action alleges breaches of fiduciary obligations. The fourth and fifth causes of action allege misrepresentation and misleading and deceptive conduct (consisting of apparently concealing breaches of duty).

[9] The second plaintiff's (Mr Dossor) cause of action relies upon an alleged breach of a shareholders agreement by Mr Price when he went into competition with the company.

[10] The portended amended statement of claim changes little in substance. I accept Mr Fulton's observation that in essence it transfers most breaches from Mr Price to the intended defendants, maintaining only two residual causes of action against Mr Price.

[11] The first cause of action remains the same but asserts the intended defendants had information material as to the value of the shares through Mr Price. The first cause of action alleges a breach of s149 Companies Act 1993. It pleads that the intended defendants by their representative, Mr Price, had the information (that Mr Price was acting in breach of his duties and in breach of the shareholders agreement), being information not otherwise available to the plaintiffs; that such information was material to the assessment of the value of the shares; that the price paid for the shares was more than they were worth – due to Mr Price's breaches impacting on the value of the shares.

[12] The second cause of action now alleges that because of Mr Price's breach of the shareholders agreement, and the consequent effect on the value of the company's shares due to the those breaches the intended defendants are liable and ought to repay as much as was overpaid for those shares. In short it pleads a breach by the intended defendants because of the breach of Mr Price.

[13] The third cause of action pleads that the intended defendants, through Mr Price who had responsibility for the day to day operations of the company, knew of Mr Price's breaches and therefore owed Rossod a fiduciary duty to impart that knowledge.

[14] The fourth cause of action alleges contractual misrepresentation. Again the emphasis in the change of pleading is to ascribe to the intended defendants Mr Price's failure in breach of his fiduciary obligations to tell Rossod of his breaches of his duties and of the shareholders agreement. In essence Rossod claims that failure to inform was a representation that Mr Price had not breached his duties and was not in breach of the shareholders agreement.

[15] The new fifth cause of action is of misleading and deceptive conduct. It pleads the intended defendants were engaged in trade and Mr Price's conduct in itself, and on behalf of the intended defendants, was wrongfully likely to, and did, mislead or deceive Rossod.

[16] A similar approach is adopted by Mr Dossor's pleaded cause of action against the intended defendants for breach of the shareholders agreement. Mr Dossor owned 10% of the shares of the company. He says in breach of the shareholders agreement the intended defendants through Mr Price, operated in competition to the company.

[17] The attempt by the portended amended statement of claim to link the intended defendants to Mr Price has drawn strong criticism in the oppositions submitted. Principally it is asserted that as trustees the intended defendants cannot be held liable or bound to account for the actions of another who was an employee and a director of the company. Even if the claims were proved against Mr Price the intended defendants say that does not mean they can at law be held to account.

Pleading issues raised by notices of opposition

[18] Of the first cause of action counsel complain it is not explained in the pleading how s149 of the Companies Act can apply to a trust where the duty, if any,

is imposed on a person who is a director. Counsel submit that s149 does not apply to a shareholder or to a person who is not a director or a "shadow director" of the company. How then could a trust as owner of shares assume a director's liability to sell for fair value only.

[19] The second cause of action pleads liability upon the intended defendants for Mr Price's breach of the shareholders agreement. Mr Fulton submits the pleadings are a "hopeless embrangle of extending allegations against Mr Price to others comprising the trustees". Mr Fisher notes the shareholders agreement was signed between initial shareholders. How then could it be binding on subsequent shareholders who have neither signed nor ratified the document.

[20] So to, with the third cause of action counsel submit that "the proposition that the trust itself owed the plaintiff fiduciary obligations as owner of the shares lacks any cogent particulars, is contrary to principle, and prima facie absurd". How, it is submitted, could a shareholder owe a fiduciary duty to other shareholders to disclose all information material to the value of the shares.

[21] Then, of the fourth cause of action how could it be claimed a shareholder owes a separate duty not to remain silent but to disclose all information material to the value of the shares. In this case it is to assert that a third party, the trust, is the misrepresentor.

[22] Concerning the fifth cause of action counsel assert that shareholders who hold shares as bare trustees and who otherwise take no part in the conduct of the affairs of the company cannot, merely by holding the shares, engage "in trade" for the purposes of the Fair Trading Act 1986.

[23] In summary, and in opposition, it is asserted that the proposed causes of action in the proposed amended pleading seek to impose a personal and unlimited liability on Mr Swap as a bare trustee of the family trust for the alleged misconduct of Mr Price in the affairs of the company even though Mr Swap took no part in the management of the company.

Considerations concerning the pleadings arguments

[24] Clearly, as Mr Fulton's analysis showed, there is little difference between the statement of claim which has been filed and the proposed amended statement of claim save to ascribe to the trustees of Mr Price's trust the same knowledge and breaches formerly directed against him. Opposing counsel submit the facts do not even provide a basis by which transposition could occur. When Mr Price bought the shares initially it was he who signed the shareholders agreement which included the covenant for non-competition. Sometime later, albeit a short time later the company's register recorded those shares that Mr Price purchased being owned by the intended defendants. Mr Price only had signed the shareholders agreement, the intended defendants never did, nor have they since ratified its terms.

[25] Both opposing counsel roundly reject any claim that the provisions in s149 of the Companies Act 1993, could apply to the trustees of Mr Price's family trust.

[26] Section 149 provides:

> "149 Restrictions on share dealing by directors…
>
> (1) If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director may acquire or dispose of those shares or securities only if, -
>
> (a) …
>
> (b) In the case of a disposition, the consideration received for the disposition is no more than the fair value of the shares or securities.
>
> (2) For the purposes of subsection (1) of this section the fair value of shares or securities is to be determined on the basis of all information known to the director or publicly available at the time.
>
> …
>
> (5) Where a director disposes of shares or securities in contravention of subsection (1)(b) of this section, the director is liable to the person to whom the shares or securities were disposed of for the amount by which the consideration

> received by the director exceeds the fair value of the shares or securities.
>
> …"

[27] Clearly the intended defendants were not directors nor do they claim to be. The pleading against them asserts only that they were aware of or are visited with the knowledge of Mr Price's breaches. Referring to the case of *Thexton v Thexton* (2001) 1 NZLR 237 (HC) and [2002] 1 NZLR 780 (CA) upon which the plaintiffs rely as supporting its cause, counsel point out the defendant was the son of the plaintiff mother who had bought her shares without disclosing information relevant to their value and thereby acquiring them at undervalue. When she filed her claim under s149 she was neither a shareholder nor a director. The present case is different because the plaintiffs own the company and therefore a claim under s149 is unnecessary as against Mr Price and quite incapable as against the trustees.

[28] Anticipating an argument for the plaintiffs that any pleadings imperfections are capable of pleadings amendment, the defendants argue the plaintiff has known for long enough what the objections are regarding its pleadings and should by now have finalised its pleading to deal with the objections raised.

[29] Dealing with that last submission, I do not agree the plaintiff has had an adequate opportunity to address the opposition's various pleadings complaints. Notices of opposition express criticism only generally. The detail of opposition submissions was only provided in writing the day before the hearing before me.

[30] Also, I think the opposition arguments about the authority of Thexton (supra) should not be confined in the manner submitted on their behalf. In that case the Court held that the minority shareholder did not have all the information material to an assessment of the value of the shares purchased by the majority shareholder and director of the company. Failure to disclose this information resulted in a breach of fiduciary duty. In the present case Mr Price in his position as a director, allegedly acted in a way which affected the company's share value position in circumstances when he did not disclose those actions to fellow shareholders to whom he sold his family trust's shares.

[31] When a proper basis for a breach of fiduciary duty exists then a claim for misrepresentation becomes clearer because there exists a duty to divulge ones knowledge. Clearly, silence can be a misrepresentation if there is a duty to speak. In this case Mr Price as a director and as an employee had duties of fidelity and loyalty to fellow directors and shareholders who were not at that time employees. Their allegation is that while negotiating a sale of his family trust's shares Mr Price was effectively undertaking to steal the business in order to transfer it to his new company. I accept in those circumstances it is arguable a fiduciary duty existed requiring Mr Price to inform the company of the business opportunity he was about to take up. In this relationship of confidence only Mr Price had the means of knowing what he did namely that the shares being sold to the plaintiffs were likely worth very much less and was being paid for them. Further as the shares being sold belonged to Mr Price's family trust the trustees were arguably using him as an agent for the sale. I accept Mr Thorpe's submission that the affect of his wrongful conduct cannot be avoided by the trust structure. Such a proposition is not tenable in equity. The injustice of it is obvious.

[32] The defendants submit the sale of shares was not an activity "in trade" to justify a claim pursuant to the Fair Trading Act. On the other hand it is alleged that in selling the shares the defendants were in trade to the extent that their sale was for the purpose of setting up another business. I am not prepared to exclude that proposition as a properly pleaded cause of action.

[33] Concerning the shareholders agreement it matters not I think that Mr Swap did not become the trustee until 18 months or so after the shares were purchased by the trust. Mr Swap says he has never in writing adopted the terms of the shareholders agreement. Therefore he could not be bound by the restraint of competition covenant. To the contrary I consider there is a proper pleading if, when there has been a breach of fiduciary duty, Mr Swap had become a trustee and acquired joint ownership of the trust's shares in the company and he took those shares subject to any equities which then existed. It follows that he couldn't claim that he was somehow free of those if the shareholders agreement was breached by a trustee acting in contravention of it. It must surely be arguable that the fellow trustees are liable.

[34] That said I accept there is room for improvement in the pleading to describe how Mr Swap is linked to the actions of Mr Price when he became a trustee.

[35] Likewise concerning the proposed pleading of a breach of s149. Clearly relief pursuant to that section is only available against a director and therefore, and to the extent to which relief is claimed against another then relevant particulars ought to be pleaded. Section 126 of the Companies Act 1993 sets out a very broad definition of directors and references that definition to s149.

[36] For our purposes the relevant parts of s126 are as follows:

> "1. In this Act, director, in relation to a company, includes –
>
> (a) A person occupying the position of director of the company by whatever name called;
>
> (b) …
>
> (i) A person in accordance with whose directions or instructions a person referred to in paragraph (a) of this subsection may be required or is accustomed to act; and
>
> …
>
> (d) For the purposes of sections 145 to 149… a person in accordance with whose instructions or instructions a person referred to in paragraphs (a) to (c) of this subsection may be required or is accustomed to act in respect of his or her duties and powers as a director."

Arguably that definition of a director as highlighted is sufficiently broad to include one member of a group of trustees, who was appointed to a board to represent trust interests, which it is argued happened in this case.

[37] Given that the shareholding in question is held by a family trust it is arguable that the trustees of the family trust could be classified as directors. Bearing in mind a background of allegations of breaches of fiduciary duty, and misrepresentation, whether or not Mrs Price or Mr Swap could be classified as directors is a decision that ought to be left to be determined at trial.

[38] In summary there are pleadings which do not adequately identify a link between the actions of Mr Price and the potential culpability of his co-trustees. It is

apparent from my comments that these are capable of amendment. Neither justice nor equity could accept the trustees as owners of the shares could not be held accountable for the actions of one of them if he, in breach of duties as a director and shareholder, has benefited his family trust as a result. He cannot say that although he may have done wrong and his family trust may have benefited from that that his family trust should not have to deal with the consequences.

[39] Although the claim of breaches by Mr Price are linked in this proceeding to the actions of Mr Swap's own company and its business, it is clear by the form of the pleadings that in the outcome of this proceeding and in that of the related proceeding by the company against Mr Price that any liability of Mrs Price or Mr Swap shall be limited to the extent of the assets of the trust. It is apparent from his notice of opposition that Mr Swap fears the plaintiffs seek to impose "a personal and unlimited liability" upon him. Of course if any judgment is visited upon a trustee then it is upon that person individually. But, unless attribution of liability is tainted with an element of fraud then usually a trustee has no liability beyond the assets of the trust. I consider Mr Swap may have miscalculated the extent of his exposure in the outcome – assuming that is he has no liability for actions that he might be otherwise personally accountable for.

Abuse of process

[40] I have previously indicated the issue in this argument. The present proceeding concerns a claim by shareholders against another whose share value they say was misrepresented to them – albeit by failure to advise them of information which would affect a proper understanding of that value. In essence this is the same cause of complaint raised by the other proceedings, that of the company against Mr Price.

[41] As Mr Fulton submits, the respective statements of claim are quite similar. I have already referred to that similarity. Mr Fulton submits that the present proceeding unashamedly borrows all causes of action of factual matters from the "related" company proceeding. He says it is indisputable that the same facts raised

by the company in its proceeding, give rise to the present litigation for which leave is sought to join the trustee's of Mr Price's family trust.

[42] The defendants have not filed a strikeout application. That does not matter. The joinder application will not succeed if the shareholders' claim is an abuse of process. The plaintiffs acknowledge the link. They accept that if Mr Price makes good the company's loss claimed in the other proceedings then Rossod would not have suffered any loss. They say however that that outcome does not entirely depend on the outcome of the other proceedings. If Mr Price is unable to pay the full amount of any judgment award against him then the company would not have been compensated for its loss. Therefore, there will still be a loss of value in the company, and therefore a loss to be recovered in these proceedings, where judgment may be enforced not only against Mr Price in his personal capacity, but against his fellow trustees.

Considerations

[43] The link between the two proceedings is clear. Equally it is clear that it is vexatious and oppressive for a party to sue concurrently in two proceedings. A defendant should not be required to meet a claim which is in substance and in reality the same claim already the subject of other litigation. It's a matter of looking for the substance of the issues for determination and the real identity of the persons involved: *(Thames Launches Limited v Trinity House Corporation Limited* [1961] 1CH 197.)

[44] Counsel cited a number of authorities as examples. Those from Mr Fulton identify different parties in different Courts pursuing what in reality was the same purpose. In his submission, correctly I believe, where there is a likelihood of abuse then res judicata overlaps with oppression but a decision whether res judicata would result if the case proceeded to judgment is not required. The court looks to what it will be asked to decide by reference to issues that are of the subject matter capable of being raised. In particular Mr Fulton refers me to *Wright v Bennett* [1948] 1ALL ER 227 at 230, and *Johnson v Gore Wood & Co* [2001] 1ALL ER 481 at 491 h and 492 b.

[45] In this case the company initiated proceedings, sought and obtained an Anton Piller Order and seized evidence as a result. The action was commenced to restore alleged losses to the company and asked to restore its share value or to improve it.

[46] Five days after filing an amended statement of claim that, Mr Fulton submits, did not materially alter the scope and purpose of the company's action, but added a fiduciary breach to claim an injunction, the plaintiffs in this proceeding commenced it for the principal purpose and the same objective as the company's proceeding, namely to restore the value of its shares. Mr Fulton submits that the plaintiffs in this proceeding must have known they were about to bring this action when they amended the company's statement of claim. Otherwise, if they had conceived they had independent rights for relief they could have and should have joined themselves as additional plaintiffs to the company's action. He submits there is no merit in the claim that the trust had been "overlooked" or otherwise are to be excused for not making proper allegations against the trust as shareholder.

[47] Of course the Court in *Johnson v Gore Wood* (supra) concerns an enquiry about whether in all the circumstances a party's conduct is an abuse. In that case a subsequent claim was not struck out but rather excused or justified by special circumstances. In that case a lack of available funding was, in the particular circumstances of the case an added factor in assessing the justifiability of further action. But, as Mr Fulton notes, it is a different situation where two claims are brought contemporaneously. Mr Fulton submits there is no substance in transferring obligations from Mr Price to a trust. Rather it is a vain attempt to find a debtor that might have more substance than Mr Price.

[48] In *Johnson* the plaintiff made it known that when his company's proceeding settled, he had his own claim to make at a future time, when he obtained the funding to bring it. The Court said there was no abuse. Mr Fulton submits it was clear that there would have been such if the proceeding was brought by the plaintiff at the same time as that brought by his company. Therefore, a relevant fact is to focus upon the time at which the respective proceedings are brought. In this context, if one looks at the claims of the company and separately of its shareholders Mr Fulton

submits it is clear that they are indistinguishable whether by reference to a claim under s149 or otherwise.

[49] Mr Fisher invites the Court to consider the current proceedings by comparison to those where it has been ruled there was not an abuse of process. Typically he says there is no abuse in the situation where a vendor sells to persons acquiring his shares when in the outcome they claim to have received under value and therefore have no other remedy than that they relied upon a shareholder's representation of value. That situation is to be contrasted with the present one where the persons who acquired the shares actually controlled the company and where the company is complaining about a breach of fiduciary duty.

[50] Mr Fisher contrasts the present case where at the core of the complaints is an allegation that Mr Price breached his fiduciary duty to fellow directors and to the company. Therefore he says the true plaintiff is the company. Therefore any claim of loss by shareholders should await (be stayed) until the company's claim is finalised. The defendants real concern is that of the ability of the shareholder to pursue another when the loss if any is that of the company. Obviously for one shareholder to owe a duty to another there must be a breach of duty to the other.

[51] In my view the approach taken by opposing counsel is technical rather than expansive. What is clear is that any attempt there might be by the plaintiff to merge the two sets of proceedings or to join the intended defendants to the company's claim, would be resisted by the same arguments as raised upon the joinder application. Rather the focus of the proceedings should upon the evidence and the circumstances that did, would have, or did not give rise to the fiduciary obligations at the heart of the respective claims.

[52] The shareholders' claim is made with an acknowledgement that the failure to join the trustees earlier was an oversight. Defendant's counsel are skeptical of that explanation in particular because the claim by the shareholders was brought so soon after the company filed an amended statement of claim. But, this case is different. The actions of Mr Price are very much at the forefront of the proceedings enquiries. If the plaintiffs' allegations are proved then Mr Price will be held to account to the

company. But, if he is not held to account to the extent that any judgment is irrecoverable against him then it is because his family trust has received the proceeds of the shares he transferred to the company. Those shares were later purchased by the other shareholders. If the company fails to recover against Mr Price then it's shareholders should not suffer if by those same actions and default the shareholders are precluded from recovery against that entity which benefited because of a trustee's intentional breaches.

[53] The opposition to the joinder application pursues an opportunity to oppose the means by which recovery, if it occurs, can be traced to the beneficiary of those actions by whom it has unlawfully benefited. All sorts of objections may as a matter of course be made to suggest action against trustees is precluded when liability attaches to a particular trustee whose actions primarily lie elsewhere. As a matter of substance if, in spite of those primary obligations, a person acts to benefit his beneficiaries then the assets of those beneficiaries ought to be held to account. If Mr Price is accountable to the company and if he cannot account then why should his beneficiaries not be accountable, if they can account.

[54] In the beginning the company's proceedings were brought against Mr Price in the form of an application for an Anton Piller order. In these proceedings abuse of process arguments arise in the nature of a strikeout claim. What is needed is some form of consolidation of the proceedings. The strikeout application precludes this. What is needed is a process which is proportionate to the extent of the alleged abuse concerning the actions of a single person.

Result

[55] The application for joinder is granted. I see no reason to stay the proceeding pending the outcome of the company's separate claim against Mr Price.

[56] I am adjourning this matter to a further case management conference by telephone to be scheduled not sooner than six weeks following the issue of this judgment. At that time there will be a discussion regarding costs upon the joinder

application. Also consideration will be given regarding management of this claim in conjunction with that of the company.

Associate Judge Christiansen