IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-2472

UNDER	the Securities Act 1978
BETWEEN	GOLDMAN SACHS JBWERE MANAGED FUNDS LIMITED Plaintiff
AND	TRUDY COULTHARD First Defendant
AND	JOBAL ACTIONS LIMITED Second Defendant
AND	ROBIN AND GLENIS ROBINS Third Defendant

Hearing: 24 July 2009

Appearances: V L Heine for plaintiff
L D Mason for Securities Commission

Judgment: 31 July 2009 at 12.45pm

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 12.45pm on the 31st day of July 2009.

RESERVED JUDGMENT OF MACKENZIE J

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[1] This is an application for relief orders under s 38AI of the Securities Act 1978.

[2] The plaintiff is the responsible entity of a number of Australian registered managed investment schemes offered to the public in New Zealand and as such was required to comply with s 37 of the Act. From 1999 to 2003 the plaintiff was

exempted from s 37(1) of the Act on condition that it complied with the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 1999. That required the plaintiff to lodge various documents with the Registrar of Companies in Wellington. From time to time between 14 May 1999 and 23 October 2003, there were filing delays in respect of some documents. Those delays meant that the plaintiff had not complied with the exemption notice and was no longer protected from the voiding effect of s 37 of the Act.

[3] The plaintiff sought relief orders. It first sought relief under s 37AC and gave notice of that application to all subscribers in the form approved by the Court. Four objections to the intended application for relief orders were received. One of those was subsequently withdrawn. Relief orders were made under s 37AC in respect of all subscribers who had not objected, including the one subscriber whose objection had been withdrawn. That order was made on 31 March 2009.

[4] The plaintiff has subsequently given notice to the three objectors of its intention to apply for a relief order under s 37AI. Those proceedings have been served on the defendants, the three objectors, and affidavits of service have been filed. None of the objectors has taken any steps in relation to the present application before the Court. The plaintiff seeks entry of judgment under r 15.12 of the High Court Rules.

[5] The plaintiff must satisfy the Court that it is entitled to the making of a relief order. The absence of an appearance by the defendants does not obviate the need for that. It is appropriate for the Court to subject the application to appropriate scrutiny to ensure that the plaintiff is entitled to relief.

[6] To establish its entitlement to relief, the plaintiff must establish that the contravention of s 37 was caused solely by a failure to comply with the exemption notice under s 37AI(1). Under subs (2) the Court must make a relief order if the contravention has not materially prejudiced the interests of the subscriber. It is appropriate, in considering that aspect, to consider what each of the defendants have said in their original objection.

The first defendant

[7] Ms Coulthard's original letter of objection, dated 25 July 2008 said:

> I invested NZ$5000 in each of your Global Health and Biotech and Emerging Leaders Funds.
>
> When sold, I lost NZ$1025 in Global Health and Biotech and NZ$100 in Emerging Leaders Funds.
>
> I am not qualified to determine whether your breach of Section 37 materially affected my investment. …

[8] The fact that the investor has suffered a loss is not sufficient to establish material prejudice in terms of the section. There must be a causal connection between the loss, and the non compliance. There is nothing in the material supplied by the first defendant that suggests that the decision to invest in the particular securities might have been different if the requisite documents had been filed. There is no suggestion that the first defendant had regard to the documents which were in fact filed. In the circumstances, I consider that the plaintiff has established, on the balance of probabilities, and in the absence of any evidence from the first defendant, that the first defendant was not materially prejudiced by the non-compliance.

Jobal Actions Limited

[9] The managing director of Jobal Actions Limited, in a letter dated 20 March 1008, expressed the ground for objection in the following terms:

> As for the grounds for our objection to your company's proposed application to the High Court, I note that one of the important documents which the issuer of the securities failed to register in accordance with its legal obligations under the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 1999 is the constitution for each of the funds in which Jobal holds units. I am a long term investor as is evidenced by the fact that these units have been held since 1999, although they were transferred from my personal interests into the name of Jobal Actions Limited (which is a family company under my control) in the year 2000.
>
> At the time the investment was made, no documents were provided to me which gave any indication that the manager of each of these funds had a total discretion to terminate the funds by written notice to the unit holders at any time without prior reference to the unit holders. Whilst I accept that there

> may be circumstances in which it is appropriate to terminate funds of this nature, I do not believe that this power should be exercised at the complete discretion of the manager without consultation or reference to the investors.
>
> I note that your company issued a letter on 28 February 2008 (received on 3 March) informing me that a decision had been made to terminate the funds with effect from 29 February 2008 (i.e. I received this letter after the funds had been terminated without prior reference to me or any of the other investors). From the point of view of a long term investor such as Jobal Actions Limited, the timing of this decision seems rather inappropriate, coming as it does at a time when I would have thought markets are at a very low point (in fact probably at their lowest since the time I made the original investment). I think there is a connection between this action and the proposed application to validate breaches of the Securities Act. In simple terms, the manager appears to have lost interest in the management of these funds but realised that there was a risk in proceeding with termination of the funds without attempting to contemporaneously "whitewash" breaches of the securities legislation which occurred well before the new legislation permitting applications of this type came into effect in 2004.
>
> I would never have invested in these funds had I known that the manager had the right to terminate the fund at any time without reference to the unit holders. As indicated above, I am a long term investor who has always wanted to have an opportunity to participate in any decision making process which may have the effect of realising losses at an inopportune time. For that reasons, I do not wish to be exposed to arbitrary decisions on the part of a fund manager. Accordingly, I wish to record my strong objection to the application to the Court.

[10] The essence of those objections has been maintained in subsequent correspondence.

[11] The first point for consideration is the proposition that no documents were provided which gave any indication of a discretion to terminate the funds. That information should have been contained in an investment statement required under s 37A of the Act. There is no evidence currently before the Court from which I can make a finding one way or the other, on the balance of probabilities, as to whether or not Jobal did receive an investment statement before subscribing for the security. I was initially concerned as to the ability of the Court to make a relief order under s 37AI if the possibility of a breach of the Act in relation to an investment statement had not, on the balance of probabilities, been excluded. Section 37AI applies to a contravention of s 37 in connection with the allotment of a security if that contravention is caused solely by a failure to comply with the Exemption Notice. My concern was however answered by Mr Mason, counsel for the Securities Commission, who helpfully appeared to assist the Court, and for whose assistance I

am most grateful. He pointed out that s 37AI is concerned only with breaches of s 37. Thus, a breach of s 37A, as distinct from s 37, would not take the matter outside the ambit of s 37AI. Also, any relief granted under s 37AI(2) would relate only to the breach of s 37, and would not have the effect of validating the security if there had also been a breach of s 37A. I am satisfied that Mr Mason is correct on that point. For this reason, I do not consider that it is necessary for me to resolve whether or not there may have been a breach of s 37A. The position of the parties in respect of that possibility will not be altered by the making of a relief order in this case.

[12] Whether Jobal's complaint, about the existence of the unilateral ability to terminate the fund, is a matter which has materially prejudiced the interests of Jobal is dependent upon whether, had the contravention of the Exemption Notice not occurred, information on that aspect which was not otherwise available to Jobal would potentially been available. There are six relevant subscriptions to securities by Jobal. In each case, the default in filing under the Exemption Notice was that a compliance plan had not been filed. In the case of one of the subscriptions, there was also outstanding a copy of the constitution. Neither the compliance plan nor the constitution is a document which contains, or is required to contain, the detailed conditions of the investment. The terms and conditions would be expected to be disclosed in the prospectus, which is also required to be filed. There was not, at the date of any of the subscriptions, any default in filing of a prospectus.

[13] For these reasons, I find, on the balance of probabilities, that Jobal has not been materially prejudiced by the non compliance.

Robins

[14] The third objector expressed its original objection in a letter dated 4 April 2008 in the following terms:

> GSJBW are professional fund mangers. They should conduct all aspects of their business in a prompt, efficient, professional & ethical manner consistant with recognised best practise, or at least acceptable practice. Failure to comply with NZ law over three & A half years cannot be glossed

> over by describing it as "GSJBW has not complied with some technical filing requirements of the Securities Act".
>
> If I had known of this I would have consulted my advisor with a view to redeeming these units because my confidence in GSJBW's competance would have been eroded. I do not believe aspects of their business are independent – if part is defective all is suspect.

[15] That objection falls into a category of objections which was considered by Clifford J in *Henderson Global Funds v Securities Commission* (2009) 10 NZCLC 264,477**.** He described an objection of that type as a "reliant objection". He discussed that type of objection in paragraphs [77] to [84]. Like Clifford J, I consider that, in the absence of some evidence that the decision to invest might have been different if the circumstances of the non-compliance had been known, the theoretical possibility that the decision to invest may have been different if the investor had been aware of the non-compliance does not amount to material prejudice in terms of the section. Accordingly I find, on the balance of probabilities, that the third defendant was not materially prejudiced by the non-compliance.

[16] For these reasons, I consider that the plaintiff has established that it is entitled to the making of relief orders, and that the Court must make those orders. There will be relief orders accordingly in respect of the securities of all three defendants.

[17] As to costs, the statement of claim seeks costs, but Ms Heine did not advance that claim in her submissions. A relief order is in the nature of an indulgence, so that an order for costs in favour of the plaintiff would not be appropriate. There will be no order as to costs.

"A D MacKenzie J"

Solicitors: Chapman Tripp, Wellington for plaintiff
L D Mason, Securities Commission, Wellington