IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2008-409-001406

AND BETWEEN	BROMLEY INDUSTRIES LIMITED (FORMERLY GRAN-MARBELLO INTERNATIONAL LIMITED) Plaintiff
AND	MARTIN AND JUDITH FITZSIMONS LIMITED First Defendant
AND	MARTIN RICHARD FITZSIMONS JUDITH ANNE FITZSIMONS Second Defendants

Hearing: 20 & 21 October 2009

Appearances: O G Paulsen for Plaintiff (20 October 2009)
S E Goodwin (on behalf of O G Paulsen) for Plaintiff (21 October 2009)
J Moss for Defendants

Judgment: 21 October 2009

ORAL JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] The first defendant seeks an order under r 4.56 joining the director of the plaintiff company as a counterclaim defendant.

[2] Rule 4.56 provides:

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—

…

(b) the name of a person be added as a plaintiff or defendant because—

(i) the person ought to have been joined; or

(ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[3] The joinder application is opposed, primarily on the grounds that the proposed claim against the director is so untenable as a matter of law it cannot possibly succeed.

[4] The key issue is: in what circumstances can a director of a limited liability company, acting in the scope of his authority, be personally liable in tort for inducing a breach of contract by the company?

Factual background

[5] Gran-Marbello International Limited, now known as Bromley Industries Limited, is a manufacturer of solid surface bench tops.

[6] In May 2005, it entered into a distributorship contract with Martin and Judith Fitzsimons Limited. Under the agreement, Bromley appointed Fitzsimons as a distributor to sell its product in the Christchurch region. The agreement was expressed to be for a five-year term, with rights of renewal.

[7] From the outset, Bromley suffered substantial losses under all its distributorship contracts, including the Fitzsimons agreement.

[8] In February 2008, its founder, Mr Trevor Bills, resumed day-to-day control of the company as a director. He was not himself a shareholder. However, his family trust was a significant creditor.

[9] In May 2008, Mr Bills moved to change the quoting system which he claimed had resulted in Bromley seriously underpricing the products it was

supplying to its distributors. According to Fitzsimons, the change had the effect of significantly raising its prices to between 40 and 135 per cent higher than previous.

[10] Between 5 and 14 May, Mr Bills issued a series of memos to all distributors outlining the changes and also expressing concern about the sustainability of the distributorship model. The memoranda included statements that he was not prepared to accept any more personal losses, and also made statements such as:

> … "with the present methodology", then there is very little I can do about it, I certainly am not going to sit here ***continuing*** to employ people ***for the sake of it*** just to provide product at, ***below our cost*** "out of my personal pocket," ***as I have stupidly been doing for 3 years!***
>
> Those days are ***definitely over*** and you can also put a ring around the fact that we are ***not going out of business.*****!** We therefore either continue together, or we may just have to go our separate ways. My first preference is of course to see if we can make the status quo work, ***if we can't*** then, I'm afraid there are very ***few choices left.***

[11] Then followed a critical meeting, on 3 June 2008, at which Fitzsimons says Mr Bills told Mr Fitzsimons that Fitzsimons could either walk away or work for Bromley as an employee. According to Mr Fitzsimons' affidavit evidence, the conversation was to the following effect:

> Bills:
>
> *"I have got to be direct Marty, we are going to have to go direct. The Distributors are charging too much and I am not making any money. The Distributors have to be replaced and we have to work direct with the installer."*
>
> [Mr Fitzsimons]:
>
> *"You know we cannot survive the price increases. You will put me out of business."*
>
> Bills:
>
> *"You have two options, walk away or start working for Gran-Marbello".*

[12] Under the distributorship contract, it was an express term that Bromley was obliged to set standard retail prices at "extremely competitive" rates. Fitzsimons claims the raising of the prices was a breach of that express term, and that at the meeting in June, Mr Bills made it clear Bromley had no intention of continuing to perform the agreement according to its terms. In those circumstances, Fitzsimons

says it had no choice but to stop trading. Its solicitors claim Bromley repudiated the agreement at the meeting, entitling Fitzsimons to cancel. Fitzsimons closed its doors on 16 June 2008.

[13] What happened next is that Bromley issued summary judgment proceedings against various distributors, including Fitzsimons, seeking payment for products supplied prior to termination of the distribution agreement. Fitzsimons defended the summary judgment application. Fitzsimons contended it would have made a profit if the distribution agreement had been allowed to run its full term. Fitzsimons sought to set off its claim for lost profits against Bromley's claim.

[14] In December 2008, an Associate Judge dismissed Bromley's application for summary judgment.

[15] Following release of the Associate Judge's decision, Fitzsimons filed a statement of defence and counterclaim the same month, in December. The counterclaim was against the company only, and the amount sought was damages in a sum not less than $450,000.

[16] On 8 June 2009, Fitzsimons applied to have Mr Bills joined as an additional counterclaim defendant. It appears that what prompted the application was primarily a concern about Bromley's ability to meet a damages claim, given the extent of its indebtedness to the Bills Family Trust.

[17] Meantime, Bromley had appealed the Associate Judge's decision declining to grant it summary judgment.

[18] The appeal was successful. The Court of Appeal held that although there was an arguable case Bromley had repudiated the agreement and Fitzsimons had cancelled, a set off defence was precluded by the express provisions of the distribution agreement. The Court of Appeal accordingly entered summary judgment in favour of Bromley for the full amount sought, namely $137,914.07.

[19] Subsequently, Fitzsimons filed an amended counterclaim, increasing the amount sought to $643,380.00. For its part, Bromley has now filed another claim for more product allegedly obtained but not paid for.

The proposed claim against Mr Bills

[20] I turn now to consider the nature of the proposed claim against Mr Bills.

[21] Fitzsimons seek to bring a claim personally against Mr Bills in tort for inducing what it says was the breach of contract by Bromley.

[22] It was common ground that the elements of the tort are as set out in Todd *The Law of Torts in New Zealand* (5ed 2009) at 13.2:

> (1) There must have been a legally enforceable contract in existence.
>
> (2) The defendant must have known of the contract and deliberately intended to interfere with it, in order to harm or bring pressure to bear on the plaintiff.
>
> (3) The interference may have been occasioned either by direct persuasion or interference or indirectly, but if the latter some independently unlawful means has to be shown.
>
> (4) The interference must have been without lawful justification.
>
> (5) The interference must have occasioned loss to the plaintiff, or if an injunction is sought, there must have been clear indication that such loss would occur.

[23] A draft amended counterclaim filed in support of the joinder application pleads the statements and actions of Mr Bills as I have outlined them and states:

> 37. The Second Counter Claim Defendant knew that raising the Plaintiff's prices to well above the competitive rates by competing organisations in the area, and making it clear that the Plaintiff did

not intend on performing its obligations under the Distribution Agreement, were a repudiation of the Distribution Agreement by the Plaintiff.

38. There was no lawful justification of causing the breaches and repudiation of the Distribution Agreement.

39. The breaches of the Distribution Agreement and repudiation caused the First Defendant's loss.

Grounds of opposition to joinder

[24] The notice of opposition opposes the joinder of Mr Bills on three grounds:

i) the application for joinder has been made out of time.

ii) the tort of inducing breach of contract is materially different, both in fact and law, to the cause of action relied upon by Fitzsimons in its counterclaim.

iii) inducing breach of contract is untenable as a matter of law and cannot succeed.

Discussion

[25] At the hearing, counsel for Bromley, Mr Paulsen, did not address the first two grounds in submissions. I am satisfied that neither would be a proper ground for denying joinder. The two claims arise out of the same set of facts and there is no reason in principle why one claim could not be in contract and the other in tort. Further, the mere fact Fitzsimons did not file an action against Mr Bills at the time of first filing its counterclaim is not of itself fatal to joinder now. This is not a situation where joinder would mean having to reschedule a fixture. Discovery and inspection are still being undertaken, and any delay occasioned by joinder will not be prejudicial.

[26] Accordingly, I am satisfied that if Fitzsimons has a tenable cause of action against Mr Bills, it is preferable for it to be heard in the same proceeding as the claim

against Bromley. The key issue, of course, is whether or not it does have a tenable cause of action.

[27] In support of its argument the claim cannot succeed, Bromley relies on a rule known as the rule in *Said v Butt* [1920] 3 KB 497. The rule is to the effect that if a servant or agent "acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken."

[28] The rule in *Said* has been followed in New Zealand and approved by the Court of Appeal as recently as 2005 (*Winchester International (NZ) Ltd & Anor v Cropmark Seeds Ltd* CA226/04, 5 December 2005):

> [55] But it is not every tort of intention that carries liability for the director in addition to that of the company. In *Said v Butt* [1920] 3 KB 497 McCardie J held that where a company breaches a contract the company employee whose conduct within the scope of employment is ascribed to the company is not usually personally liable for inducing breach of that contract. The decision was followed by Salmond Jin *Henderson v Kane* [1924] NZLR 1073 and also in Canada, Australia and the United States: see *Root Quality Pty Ltd v Root Control Pty Ltd* (2000) 177 ALR 231,263 per Finkelstein J. The position will be otherwise where the conduct is performed for the purpose of injuring another: *Root Quality* at 268. In Lord Steyn's phrase, the result must achieve practical justice.

[29] See also *Trackers Communications Limited v Taxi North Shore Society Limited & Ors* HC Auckland CL53/91, 1 November 1991, Barker J and *Cook Strait SkyFerry Limited & Ors v Dennis Thompson International Limited & Ors* HC Auckland CP60/92, 1 September 1992, Master Kennedy-Grant.

[30] My reading of the authorities is that under the rule, if the deliberate actions of a director in extricating his company from a contract are done in the best interests of the company, then he is immune from tortious liability, regardless of whether the elements of the tort are otherwise satisfied. Thus, under the rule it will not be enough for Fitzsimons to show Mr Bills knew and intended his acts would amount to a breach of the contract between Bromley and Fitzsimons, or even that he intended to inflict harm on Fitzsimons in the sense that he knew one consequence of his actions would be to cause Fitzsimons loss. There must be something more, and the

something more must be a lack of good faith, or that Mr Bills was outside the scope of his authority.

[31] I accept the rule is difficult to reconcile with the approach taken in other tort cases, notably the intellectual property cases where directors have been found personally liable notwithstanding the fact their actions were for the benefit of their company.

[32] However, I am satisfied the weight of authority means the rule is still good law in New Zealand, and that I am bound by it. In particular I do not accept Mr Moss's submission that the Court of Appeal decision in *Body Corporate 202254 & Anor v Taylor* [2008] NZCA 317 can be regarded as having overruled *Said*. *Taylor* was a case about negligence, and the rule in *Said* was not discussed. Further, different policy considerations may apply given the underlying rationale for the rule is a concern about multiplicity of actions and floodgates. Such issues are for another day and for another forum.

[33] Under this analysis, the draft pleading does not disclose a tenable cause of action against Mr Bills. That, on the authorities, means an order for joinder should not be made. However, Mr Moss advised me that he intends to amend the pleading so as to include an allegation of lack of good faith. As I understand it, the pleading will be that Mr Bills put his personal interests ahead of Bromley.

[34] Mr Paulsen submitted that even if the pleadings were amended to include an allegation of bad faith, joinder should still not be permitted, because of the lack of any evidential basis for the allegation. He pointed out that the allegation has not been raised before in correspondence, or any of the affidavit evidence and referred me to the decision of Potter J, *O'Sullivan & Anor v New Zealand Ostriches Limited & Ors* [2000] 14 PRNZ 593.

[35] I accept the force of these submissions. Fitzsimons will need to take care in continuing this line of argument. However, for the purposes of a joinder application I prefer the view taken in *Bridgeway Projects Ltd v Webb* HC Auckland CIV-2003-404-001965, 7 July 2003, Randerson J. It should only be in rare cases that an

application for joinder will be dismissed for lack of evidence. In my view, this is not one of those rare cases.

[36] I am therefore prepared to grant the application to join Mr Bills as an additional counterclaim defendant, but on condition that Fitzsimons files an amended counterclaim so as to reflect the rule in *Said v Butt*. The amended counterclaim is to be filed within 10 working days of today's date.

[37] As a general rule, a party who succeeds in a contested application is entitled to costs. However, in this case the state of the pleadings was such that opposition was fully justified. In those circumstances, I consider the fairest approach is to let costs on this application lie where they fall.

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