IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2004-485-1846

UNDER	The Securities Act 1978
BETWEEN	BT FUNDS MANAGEMENT LTD First Plaintiff
AND	BT FUNDS MANAGEMENT (NO 2) LIMITED Second Plaintiff
AND	PETER WORGER AND OTHERS Defendants

Hearing: 2 December 2009

Counsel: B A Scott and G K Rippingale for Plaintiffs

Judgment: 2 December 2009

ORAL JUDGMENT OF MACKENZIE J

---

[1] In this proceeding, the plaintiffs seek relief orders under s 37AI of the Securities Act 1978 in respect of certain non compliance with the requirements of s 37 of the Act in terms of failing to comply with the requirements in the relevant exemption notices to file documentation with the relevant New Zealand authorities. The proceedings originally affected a much larger number of subscribers, in fact some 38,000. Many of those did not object, and relief orders were made under s 37AC in respect of those subscribers. A number of subscribers did object, and processes were put in place for a representative defendant to represent their interests and that was a helpful means of addressing the issues for the comparatively large number of subscribers who were then involved. There were arrangements between counsel for addressing a number of what were anticipated as common questions

which might arise. In a judgment delivered on 14 December 2006, I dealt with a number of questions relating to the way in which the objections were to be addressed. At that stage, there were 56 or 58 objectors. Subsequent discussions between counsel lead to agreement on a course of action for pursuit of the objections. I made orders by consent on 24 June 2008 for those processes. Those orders ended the appointment of the representative defendant and required service on the individual objectors. The intention was that the individual objectors would each have to establish its own case and the role which the representative defendant could, and did, fulfil on a more general basis had come to an end. One of the orders I made at that stage provided for the hearing of an application by the representative defendant for an order that the plaintiffs continue to meet the costs of the defendants. That was heard on 19 September 2008 and on 13 October 2008 I gave judgment refusing that application.

[2] All of the individual objectors have now been served with the proceedings. There remain 56 objectors. Of those four have filed statements of defence and will have to be the subject of a further hearing. This application is concerned with those 52 objectors who have been served with the proceedings but have not taken any steps. The plaintiffs now seek judgment by default granting relief orders against those objectors.

[3] The plaintiffs also seek certain ancillary directions. Those ancillary orders, numbered 1, 2 and 3 in the plaintiffs' application dated 23 October 2009, are all matters of a procedural and routine nature and it is appropriate to grant orders accordingly. I need not discuss those. There will be orders in accordance with paragraphs 1, 2 and 3 of the application.

[4] The substantial question is whether relief orders should be made. Under s 37AI(2) the Court must make a relief order if the contravention has not materially prejudiced the interests of the subscriber. The various breaches of s 37 are described in paragraph [2] of my judgment of 14 December 2006 and it is unnecessary to repeat those here. The nature of the various categories of prejudice which might be alleged were also considered at some length in that judgment. That judgment makes it clear that it would be for individual objectors to make out, on an individual basis,

any prejudice. As I have noted, s 37AI(2) provides that the Court must make a relief order if the contravention has not materially prejudiced the interests of the subscriber. The onus is on the plaintiffs, as applicants, to satisfy the Court that subs (2) applies. However, it would be unreasonable to impose on the plaintiffs an evidential onus which required them to negative the existence of material prejudice to the interests of a subscriber. As my earlier judgment makes clear, that is an individual question which depends on the circumstances of the individual subscriber. It will be for the subscriber to advance grounds which might constitute material prejudice to that subscriber. In the absence of such grounds the plaintiff may more readily meet the onus of proof.

[5] Mr Scott has, in a very careful memorandum, set out the position of each of the objectors based on their original objections, having regard to the four categories of grounds of objection which were identified for the purpose of the earlier hearing in 2006 and discussed in my judgment of 14 December 2006. It is unnecessary for me here to do more than describe very briefly the points which are made in the memorandum.

[6] The first category of objections is what were termed 'reliance subscribers'. That is objectors who said they would not have invested with the plaintiffs had they known that the plaintiffs were not complying with the law. Objections of that sort were considered by Clifford J in *Henderson Global Funds v The Securities Commission* [2009] NZCCLR18; (2009) 10 NZCLC 264,477 and by myself in *Goldman Sachs JBWere Managed Funds Limited v Coulthard and Ors* HC Wellington CIV-2007-485-2473, 31 July 2009. I remain of the view expressed there that in the absence of some evidence that the decision to invest might have been different had the circumstances of the non compliance 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. Here there is no evidence from the objectors that the decision to invest might have been different.

[7] The second category is those which are described as 'non provision of or access to information'. That is, objectors who argued that they were deprived, by the

failure to comply with the filing requirements, of access to particular information. The various requirements of the exemption notice which were not complied with related to the filing of documents as a matter of public record. They did not require the service of individual objectors with particular documentation. Accordingly, any objector who claimed material prejudice from the non filing would need to adduce some evidence to establish the objector would have had regard to the public registers. There is no evidence of that sort from any objector. If there were any breach of a requirement to serve individual objectors with particular documentation that would not fall within s 37, so it would not be within the scope of the present application. Any failure in that regard will not be granted relief by any order in these proceedings.

[8] The third category of objectors is those who contend that when the contraventions became known there were difficulties or uncertainties about the best course of action to take regarding the transfer of the investments and that that has caused them loss. The plaintiffs point out that the securities involved are not securities traded on a secondary market. An investor who wishes to realise the security has the option of redeeming the interest direct from the issuer and the redemption price will be based on the underlying value of the assets, not on a market perception of the value of the securities themselves. Again, in the absence of any evidence of any prejudice in this regard I do not consider that any material prejudice is in a general way demonstrated.

[9] The fourth category that was dealt with in the judgment were those objectors who had not provided sufficient details to fall into any of those categories. While the onus is on the plaintiff to establish an absence of prejudice, that is, as I have already noted, essentially an obligation to prove a negative. I do not think that where the objector has not particularised the grounds of prejudice the Court should be astute to assume some prejudice. It is relevant to this category of objectors, and indeed to all of the objectors, that during the phase when the proceedings were conducted by the representative defendant all of the possible objections were canvassed at some length and in some detail. That stage of the proceedings gives additional comfort that, had any prejudice been identified for any particular objectors, or category of objectors, that might have been expected to come to light. So in those circumstances I do not

consider that it is incumbent on the Court, at this stage, to examine the possibility of material prejudice in respects which have not been advanced.

[10] I also take into account that the Securities Commission which has throughout this proceeding fulfilled a helpful role has not suggested any particular aspect of possible prejudice which may need investigation. Counsel for the Commission has filed a memorandum advising that the Commission takes no position on the merits of the application for default judgment.

[11] In those circumstances, I consider that the plaintiffs are entitled to judgment by default as moved. There will be orders in terms of paragraph 4 of the plaintiffs' application.

[12] Mr Scott does not seek costs against any of the unrepresented objectors. I consider that that is appropriate. I did discuss the relevant issues as to potential costs at some length in my judgment of 13 October 2008 and in the circumstances I need simply note that there will be no order as to costs.

"A D MacKenzie J"

Solicitors: Chapman Tripp, Wellington, for plaintiffs
Minter Ellison Rudd Watts, Auckland, for the representative defendant
L Mason, Securities Commission, Wellington