IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-6299

	BBI NETWORKS (NEW ZEALAND) LIMITED First Applicant
AND	BABCOCK & BROWN INFRASTRUCTURE LTD Second Applicant
AND	BABCOCK & BROWN INVESTOR SERVICES LIMITED Third Applicant

Hearing: 4 December 2009

Appearances: D J Cooper for the first to third applicants

Judgment: 10 December 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 11.30 am on Thursday 10 December 2009

Solicitors:
Bell Gully, Auckland david.cooper@bellgully.com

[1] The applicants apply by way of originating application for relief orders under ss 37AC and 37AH of the Securities Act 1978 (the Act). The applications relate to securities issued by the applicants to five investors in 2006 and 2007.

[2] At the time of allotting those securities the applicants inadvertently failed to comply with the requirements of the Securities Act (Prime Infrastructure Networks (NZ) Ltd) Exemption Notice 2004. The effect of such non-compliance is that the securities are deemed to be invalid and the issuer and its directors are liable to repay the subscriptions.

[3] However ss 37AA to 37AL of the Act provide for relief to be granted in certain circumstances. Where such relief is granted the securities are not deemed to be invalid and the subscriptions are not repayable.

[4] If none of the affected subscribers objects then s 37AC requires the Court to grant mandatory relief. If there is an objection from one or more subscribers, s 37AH empowers the Court to grant relief in the exercise of its discretion.

Background

[5] BBI Networks (NZ) Ltd was previously known as Prime Infrastructure Networks (NZ) Ltd. Babcock & Brown Infrastructure Ltd is an Australian public company limited by shares. It was previously known as Prime Infrastructure Management Ltd. Babcock & Brown Investor Services Ltd is an Australian public company, also limited by shares. It is the responsible entity of the Babcock & Brown Infrastructure Trust and brings the application in that capacity.

[6] The shares in Babcock & Brown Infrastructure Ltd and the units in the Babcock & Brown Infrastructure Trust are stapled, so that each share and unit must be dealt with together, and traded as a single security. The Stapled Securities comprise ownership interests in the investment structure known as Babcock &

Brown Infrastructure. They are quoted on the Australian Securities Exchange and the New Zealand Stock Exchange.

[7] The application arises out of the conversion of debt securities issued by BBI Networks (NZ) Ltd to Stapled Securities in 2006 and 2007. In 2004 and 2005 that company had issued debt securities known as Subordinated Prime Adjusting Reset Convertible Securities (the Bonds). The terms of the Bonds provided for the Bond holders to give a conversion notice in certain circumstances; upon receipt of a conversion notice BBI Networks (NZ) Ltd could elect to redeem the Bonds in question for cash and/or convert them to Stapled Securities, or arrange for a combination of the two.

[8] Where election is made to convert the Bonds to Stapled Securities, an allotment of a new security arises. The requirements of the Act therefore apply. Section 37(1) of the Act requires that no security be allotted unless at the time of subscription, there is a registered prospectus relating to the security. But under s 5(5) the Securities Commission can exempt any person from compliance with the requirements of the Act. The Exemption Notice to which I have earlier referred was issued by the Securities Commission in 2004. It exempted the applicants by clause 7 of the notice from compliance with certain provisions of the Act, in respect of any Stapled Securities allotted upon conversion of the Bonds.

[9] Among the provisions from which exemption was so granted were ss 37, 37A and 51-54. But the exemption was subject to a number of conditions. In particular clause 8(f) of the notice provided that before allotment of any Stapled Securities and before the exercise of any conversion right conferred with the Bonds, copies of the most recent audited financial statements of BBI Networks (NZ) Ltd must be sent to every person at that time registered as a Bond-holder in respect of which new Stapled Securities were to be allotted, or a conversion right might be exercised.

[10] At the material time, five Bond-holders elected to convert their Bonds and BBI Networks (NZ) Ltd elected to exchange those Bonds for Stapled Securities. But at the time of allotting the Stapled Securities, the applicants inadvertently failed to comply with clause 8(f) of the Exemption Notice, in that they failed to send copies of

the most recent audited financial statements to every bond-holder (including the five converting bond-holders) before allotment occurred. The consequence of that failure is that the exemption in the Exemption Notice did not apply; the allotment of the bonds was therefore in breach of s 37(1) of the Act.

[11] It followed that by virtue of s 37(4) the allotment of the Stapled Securities to the five subscribers in question was deemed to be invalid and of no effect, and under s 37(6) the issuers were required to refund the subscriptions together with interest.

Jurisdiction to grant relief

[12] Section 37AB of the Act provides that s 37(4) does not apply to the allotment of the security if a relief order under s 37AC, s 37AH or s 37AI is made in respect of the application of s 37 to the allotment of the security.

[13] Section 37AC(1)(e) provides that the Court must grant relief where the issuer of the security gives notice to subscribers in a form approved by the Court and the subscribers do not object. In order for an objection to be valid, it must include:

> … a description as to how the contravention has materially prejudiced the interests of the subscriber.

[14] In the absence of a valid objection, relief is mandatory. In *Re Perpetual Investment Management Ltd* (2006) 9 NZCLC 264,207 the Court held that some causative nexus between the contravention and the material prejudice must be described and established by an objector. It is therefore not sufficient for an objector simply to allege that a loss has arisen which would not have occurred, had the technical and procedural oversight not arisen.

[15] I accept also that even where a more detailed description is given, but the description or reasons given are not cogent (in that they cannot logically give rise to the prejudice claimed) then the objection should not be treated as valid, and mandatory relief must be granted.

This proceeding

[16] On 29 September 2009, Potter J granted the applicants leave to commence this proceeding by way of originating application, and to prove the form of notice required to be given under s 37AE(3) of the Act. By memorandum dated 5 October 2009 counsel for the Securities Commission indicated that it agreed that the draft notice filed with the application complied with the requirements of s 37AE and further advised that the Commission did not wish to propose any conditions of approval or advices for additional information in terms of s 37AE(5).

[17] Thereafter the applicants served the affected subscribers and the Trustee in respect of the Bonds, namely the NZ Guardian Trust Company Ltd. The applicants also effected publication of the approved Notice in daily newspapers pursuant to s 37AF(1)(b).

[18] There was one objector. By letter dated 13 October 2009, A M Kilpatrick Ltd wrote to the applicant's solicitors as follows:

> Re: **Notice in Relation to BBI Stapled Securities issued to A M Kilpatrick Ltd on 21 August 2007**
>
> The Company acknowledges receipt of Babcock & Brown Infrastructure's letter of 1 October 2009 enclosing the notice in relation to the 10,072 BBI stapled securities allotted to A M Kilpatrick Ltd on 21 August 2007.
>
> A M Kilpatrick Ltd hereby gives notice that it objects to the relief order being sought by BBI on the grounds that had BBI issued either the financial statements or the prospectus as required, disclosing the information that it ought to have, A M Kilpatrick Ltd would not have elected to the allotment of the 10,072 securities.
>
> BBI, by failing to comply with its obligations under the Securities Act has deprived A M Kilpatrick Ltd of the opportunity to be fully informed before making its fully informed decision as to the allotment of BBI Stapled Securities.

[19] On 18 November 2009 the applicant's solicitors wrote to the solicitors for the objector, pointing out that if the objector wished to oppose the application for relief orders, it was required, in terms of the order made by this Court on 29 September 2009, to file and serve its notice of opposition and any affidavits by 30 November 2009, in advance of the hearing scheduled for 3 December 2009.

[20] By letter dated 24 November 2009, the objector's solicitors advised that:

> … our client does not intend to instruct us to file and serve a notice of opposition in this matter.

[21] When this proceeding was called in Court on 3 December 2009 there was no appearance on behalf of the objector.

Disposal

[22] Given that the initial objection has not been pursued by way of formal opposition at the hearing of the application, and having regard to the objector's bare assertion that it was prejudiced by what occurred, I am not satisfied that it is a valid objection for the purposes of the present application. It lacks the requisite degree of cogency.

[23] Accordingly, the application must be treated as unopposed, and the Court must make the order sought. I therefore make a relief order pursuant to s 37AC. In consequence the provisions of s 37(4) to (6) do not apply to the allotment of the securities that are the subject of the application.

[24] There will be no order as to costs.

C J Allan J