IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-6640

BETWEEN	JOHN DOUGLAS WILSON First Plaintiff
AND	ADELE JOY WILSON Second Plaintiff
AND	TRACEY MICHELLE WHITE Third Plaintiff
AND	JOHNATHAN BRIAN IRVINE First Defendant
AND	FELICITY JANE IRVINE Second Defendant
AND	TIMOTHY MALCOLM IRVINE Third Defendant

Hearing: 13 February 2009

Appearances: Mr S McAnally for plaintiffs
Mr M C Black for defendants

Judgment: 3 April 2009 at 4.30 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***03.04.09 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:

Keegan Alexander, P O Box 999, Auckland

Mr M C Black, P O Box 4039, Auckland

[1] This proceeding concerns a property development project at Taupo. The defendants were the initiators of the project. The plaintiffs came on the scene later. There were a total of four company entities created for the purposes of the project. Mr Black has helpfully prepared a chart of the companies and it is annexed to this judgment. The plaintiffs were brought into the project by means of their executing an accession deed. Under that accession deed, they became parties to a shareholders agreement which had been executed on 14 October 2003 ("the shareholders agreement"). The deed of accession was executed 19 December 2003 and was the means by which the Wilson interests acquired the shares in the various companies referred to in the accompanying chart.

[2] Subsequently, the arrangements between the plaintiffs and defendants came to an end when the parties executed a deed of termination of joint venture ("termination deed") on 17 August 2007.

[3] At the point when the termination deed was executed, the project was in serious financial difficulties and receivers were appointed later that year.

[4] The plaintiffs have brought proceedings to recover the sums of $337,500 on account of the sale to the defendants of shares in Terraces Ventures Limited ("TVL"), $1 arising from the sale of shares in GPK Lake Taupo Limited ("GPK") and $1,462,499 for repayment of loans made to the joint venture entities. The defendants were also obliged to pay to the plaintiffs on 31 October 2007 the sum of $1,780,000 in repayment of loans made to the joint venture entities.

[5] GPK was set up to manage the hotel, food and catering business. The shareholders in that company included Mr Dominic Parat, a restaurateur who was brought into the venture because of his expertise in that business. His interest in the venture was limited to shares in GPK, as the company chart indicates.

[6] When the total amount that the plaintiffs claimed to be owed, $3,580,000, was not paid, they issued these proceedings. As part of those proceedings the plaintiff seeks summary judgment against the defendants. The defendants have filed

a defence that takes myriad points. I do not intend to cover all the points raised but will confine myself to those that appear to have some substance.

[7] In overview, the defendants' complaints against the plaintiffs are linked to the part played in the Taupo venture by a company called Pacific Bridge Limited ("Pacific Bridge"), an entity owned and controlled by a Mr O'Kane. Mr J D Wilson, the first plaintiff, had had business dealings with Mr O'Kane and he says that he persuaded Mr O'Kane to agree to Pacific Bridge becoming the project managers of the venture at Taupo. Mr Wilson was very much of the view that it would be advantageous to the joint venturers to secure Pacific Bridges's participation because of that company's expertise.

[8] The defendants now claim that there were objectionable features of the business relationship between Mr Wilson, Mr O'Kane and Pacific Bridge. They say that from the point where the plaintiffs joined the joint venture, Mr Wilson gradually began to exercise a dominant influence in the course and direction taken by the joint venture. It is alleged that Mr Wilson interacted with Pacific Bridge in a way that favoured his and the other plaintiffs' interests; that the defendants were disadvantaged by the co-operation between Pacific Bridge and the plaintiffs; and that features of those dealings amounted to breaches of the fiduciary duties that the plaintiffs owed to the defendants. It is further alleged that because of his relationship with Pacific Bridge in its capacity as project manager, in the latter half of 2007, Mr Wilson acquired knowledge about the financial state of the project.

[9] As I understand the defendants' case it is to the following effect:

a) Because of his relationship with Pacific Bridge, Mr Wilson obtained information which was not available to Mr Irvine that the financial position of the development was much less favourable than had earlier been assumed, in that there had been serious rises in the cost of the development. He contrasted the financial information that was available to the parties which Mr Irvine distributed in July 2007 (BD 55) against that prepared in September 2007 (BD 212). The later document shows that a firm of quantity surveyors, as well as Pacific

Bridge, had carried out reassessment of the budgeted amounts that would be required for various aspects of the construction and the overall effect was that the expected construction costs had risen. In the case of Pacific Bridge they had risen by very large amounts. Based on this evidential platform Mr Black says that it is possible for the defendants to argue the following:

b) Because he had taken over running the project and because of his connection with Pacific Bridge Mr Wilson knew that there had been a significant deterioration in the financial prospects for the development by September 2007;

c) He obtained this information but no-one else did because he had a more favourable line of communication with Pacific Bridge;

d) That he knew this information before he negotiated the termination deed;

e) The termination deed was negotiated by the parties on the basis of more favourable figures – more in line with document 055 than the document which followed it some two months later, 212.

f) By taking advantage of this information, Mr Wilson had breached the fiduciary obligations that he owed to the other participants in the project.

[10] There are other issues that have been raised by the defendants. They claim that they did not receive the benefit of the covenant in the termination deed of the promised shares in GPK that they were to receive. They assert that this was because the plaintiffs failed to procure a waiver on the part of Mr Parat to his pre-emptive rights to participate in the sale of the shares on the plaintiffs' departure from GPK. Whether or not Mr Parat had any such rights and whether the defendants have rights of action against the plaintiffs arising out of the alleged failure to deal with the pre-emption rights are matters that I will deal with in this judgment.

[11] A further matter that arises is an allegation that the plaintiffs did not provide a guarantee of certain liabilities undertaken by the joint venture members in substitution for that of a Mr Colin Reynolds and his corporate vehicle, which apparently withdrew from the joint venture prior to the deed of accession being signed by the plaintiffs.

[12] A number of other issues were raised in what was a discursive amended notice of opposition but which I understand are not proceeded with. The notice of opposition was rightly characterised by Mr McAnnally as being of the 'shotgun' type. This is a feature of the defence which has not made it easy to analyse the true issues that are being raised in the proceeding.

Principles applicable to summary judgment applications

[13] In *Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185, Somers J said that the obligation of the plaintiff to demonstrate that the defendant had no defence amounted to an "absence of any real question to be tried" and that the defendant must provide sufficient particulars to show that there is an issue worthy of trial.

General allegation that Mr Wilson breached obligations of Joint Venture

[14] The defendants' notice of opposition in paragraphs 1 & 2 raises broad allegations of breach of the shareholders agreement and constitution of the TVL joint venture company, which was formed for the hotel development project and the adjoining apartment block.

[15] In paragraph 2 of the amended notice of opposition there are set out numerous alleged financial failings on the part of the plaintiffs – and in particular the First Plaintiff, Mr Wilson. The first part of the allegations essentially alleges that Mr Wilson acted fraudulently in conjunction with Mr O'Kane so as to cause misdirection or misapplication of funds, which should have been channelled into the development. The second part of the allegations (in paragraph 2 of the amend notice of opposition) alleges a failure on the part of Mr Wilson to exercise proper

stewardship of the financial aspects of the project, failure to prevent cost overruns. All of this was alleged to have caused the insolvency of the project – a state of affairs which was extant when the plaintiffs entered into the deed of termination with the defendants by which they withdrew from the project on 17 August 2007. It is alleged that the plaintiffs failed to disclose financial discrepancies, cost overruns, etc when negotiating the deed of termination and were therefore in breach of their fiduciary and contractual obligations to the defendants. Lastly, it is alleged that for the foregoing reasons, Mr Wilson was in breach of his duties as a director.

[16] These are serious allegations of misconduct against Mr Wilson, and are very wide-ranging. So far as they depend upon apparent breaches of duty and omissions on the part of Mr Wilson, they appear to assume that he owed responsibilities for financial management to the joint venture entities and to his fellow shareholders and directors. It would appear that the defendants assert that these duties arose from the fact that he was instrumental in introducing the project manager – Pacific Bridge - to the project and that he was the friend of the principal of Pacific Bridge, Mr O'Kane. I will consider these arguments in the next part of this judgment.

[17] Mr Irvine in his affidavit 16.04.08 said:

> "I believe that Plaintiffs...knew or ought to have known, of the precarious financial position of the company...at the time they negotiated and signed the deed [of termination]. Mr Wilson and his trust interests, thereby purported to derive their equity knowing of the insolvent position that the company otherwise faced. This fact was withheld or not disclosed for the various reasons I have outlined above."

[18] The defendants attach significance to two documents that I was told went to the heart of the financial problems experienced by the joint venture. The first document was a summary of what it was going to cost to complete the development, which Mr Irvine prepared and sent to Pacific Bridge on 3 July 2007, with a copy to Mr Wilson. This document apparently contained a prediction based on figures supplied by the quantity surveyors that the construction was going to cost $11,858,502 to complete. The second document is a further budget prepared on 3 October 2007 that showed that the cost to complete construction was $18,400,000. From these bases the defendants seek to construct an argument that the plaintiffs

were in breach of their fiduciary obligations or a contractual obligation of good faith to the other joint venture members, the defendants.

[19] The argument, apparently, is that Mr Wilson had got himself into a dominant position in the joint venture and from that had used his resulting influence to install Pacific Bridge, which was the business of a friend of his, as the project manager. From this, it is apparently argued that as a result of that influence he became responsible somehow for what is alleged to have been Pacific Bridge's mismanagement of the finances of the joint venture. Further, he had a responsibility to the other joint venture members and failed to procure or ensure that Pacific Bridge provided accurate information to the joint venturers about the state of the finances of the joint venture around August 2007, when he was negotiating his withdrawal (the joint venture termination deed was signed on 17 August 2007).

[20] The two financial documents which I have just referred to are said to disclose a more benign picture as at July 2007 when the figures were created, by comparison with the seriously negative position that the joint venture finances seemed to be in as reflected in the second document of 3 October 2007. It is the defendants' position that this material, when considered in conjunction with the relationship between Mr Wilson and Mr O'Kane of Pacific Bridge, discloses a pattern of dealing of the part of Mr Wilson which was in breach of the obligations that I set out above.

[21] I have to say that this alleged defence is wholly unconvincing. First, there is no evidence that Mr Wilson and Mr O'Kane were friends. They had done business together and Mr Wilson apparently had high regard for Mr O'Kane's abilities – a judgment that in retrospect may have been erroneous. Further, the attempts to show that Mr O'Kane and Mr Wilson were in league are not supported by any evidence.

[22] Overall, the allegations about connivance between Mr Wilson and Mr O'Kane are considerably deprived of force by the consideration that it was the decision of all of the joint venture parties to engage Mr O'Kane's business as the project manager, and not simply a unilateral decision by Mr Wilson.

[23] Next, in order to properly appraise the submission for the defendants, it is necessary to look more closely at the alleged facts. The first point to be noted is that there were two statements of financial position which the defendants urged me to compare. The first of these was prepared by Mr Irvine and not by Mr Wilson, so if anyone in the joint venture was under a misapprehension concerning the real position of the joint ventures finances as at July 2007 it was not as a result of any statement of position that Mr Wilson prepared. Further, the second set of figures is relied on to show that there had been deterioration by the time that Mr Wilson was seeking to extricate himself from the joint venture. But the second set of figures is some two months after the deed of termination had been executed. It does not tell us what the state of finances was at the time when the termination deed was signed. It does not tell us either what Mr Wilson knew about the subject at the time when he negotiated the termination deed.

[24] I am afraid that I regard this entire attempt to fasten some wrongdoing on Mr Wilson from these two documents as being fanciful. It seems to me that it is just as possible that the Wilsons made their own independent judgement that they wanted out of the joint venture without relying on inside information as suggested by the defendants. After all, serious problems with the joint venture's finances had revealed themselves at least as far back as July. Creditors were not being paid in full and judgements were being made about which of those would be paid in full and which should be put off: (see, for example, email from Mr Irvine to Pacific Bridge 3 July 2007). I also consider that there is force in what Mr McAnnally submitted to me, which was that the Irvines throughout had been closely involved in managing the finances – and there were a number of documents showing calculations by Ms Jane Irvine during 2007 which show just that. Other correspondence shows the anxiety on the part of Mr Irvine to placate ASB, the financier of the project. On 6 June 2007 Mr Irvine, for example, spoke of being in 'damage control mode' in his dealings with an ASB officer who had returned from holiday and had apparently been concerned about what had filtered back to him. All of this is far from showing a picture of the defendants being dependent upon Mr Wilson for financial information and Mr Wilson somehow misrepresenting the position to his advantage so as to facilitate an exit on favourable terms.

General responsibility of Mr Wilson for failing to oversee the financial state of the Joint Venture

[25] In his affidavit 16.04.08 Mr Irvine further stated that he had a good defence to the claim for the following reasons:

> The failure of the Plaintiffs (particularly Mr Wilson) to disclose and account for significant financial payments, disbursements and other transactions involving funds drawn-down for the development. This involved substantial cost overruns of $8.86 million. He also failed to ensure that a full accounting in a transparent manner could be kept by not complying with an agreed and separate trust account process.

[26] In my view this statement represents a misinterpretation of Mr Wilson's role – at least so far as the evidence on this summary judgment application is concerned. It is not enough for the defendants to make assertions of this kind without showing that there is some evidence upon which they are based. The propositions in the above quotation from Mr Irvine's affidavit involve assumptions about what, if any, responsibility Mr Wilson owed to the other partners when it came to financial management of the project. Pacific Bridge was, of course, the project manager and payments were channelled through their accounts. This included money that was drawn down from the financiers. The defendants have not referred to any evidence which shows that Mr Wilson agreed to accept either parallel responsibility for the financial management of the joint venture with the project managers or that he accepted some obligation to supervise the project managers to check their work and generally keep them up to the mark when it came to financial dealings. At a minimum that would be required before this part of the claim against Mr Wilson could get off the ground. Certainly, responsibilities of this kind cannot be imputed to Mr Wilson if their sole foundation is that he promoted Pacific Bridge as a potential property manager to the project.

[27] Nor do I understand why Mr Wilson should be accountable for Pacific Bridge's mistakes arising from his introduction of Pacific Bridge. As I have noted already in paragraph [22], it was not Mr Wilson on his own who engaged Pacific Bridge's project manager. That was a decision made by the joint venture partners as a whole. They may have come to rue that decision but that does not make Mr

Wilson responsible for any adverse consequences that flowed from the appointment of Pacific Bridge.

[28] It is not for the Court to attempt to construct a defence from the slew of allegations the defendants have made against Mr Wilson but which are woolly in their outlines. In my view these allegations do not establish the existence of an arguable defence.

The allegation that Mr Wilson continued as a director until September 2007 when he should have stepped down in August and as a result, the Joint Venture's liabilities increased.

[29] The substance of Mr Irvine's complaint is set out in the following passage of his affidavit:

> "[The Deed of] Termination (clause 2.2) required that Mr Wilson resign as directors of ventures, hotel and apartments and GPK Lake Taupo on the closing date (which was the 20th of August 2007). This did not in fact occur and Mr Wilson remained a director and in a controlling role of those entities up until he eventually resigned on the 30th of September 2007 (Exhibit "P"). This was a clear breach by Mr Wilson of this term of the deed. It also had other consequences.
>
> 31. By Mr Wilson remaining as director, he precluded early and necessary dialogue with the ASB the first mortgagees over a rescue package or additional funding for the development, until the project had advanced further into October 2007. From early September David Jones the company's lawyer told Mr Wilson, myself and Mr Bothwell that we must meet with ASB because of the precarious financial position with a plan however Mr Wilson insisted that we do not do this as Pacific Bridge had it all under control (see Exhibit "O" regarding an email from Mr Wilson on this matter). This had the effect of further debt being incurred over that interim period and where creditors were increased by a further $1.5million (approx.) and the company's solvency position became worse. Accordingly, by Mr Wilson wrongfully remaining a director for this period, the company incurred additional (if not considerable) liabilities towards its creditors of which a number of them I had personal guarantee too."

[30] The reference to the exhibit given in the above passage appears to be mistaken and I understand that what was intended was reference to an email that Mr Wilson sent to Mr Irvine 28 September 2007 which read:

> Johnathan,
>
> Bruce called me yesterday afternoon suggesting you were very concerned that ASB might not agree to the drawdown.
>
> I meet with Dave Askew [of Pacific Bridge], who, as you know, is really in charge of the project. He tells me that there are a few questions from ASB that need resolution but no suggestion that they are not going to release money. They have even set the next QC visit which is October 17th. I have been over the building this week after my return from USA and am dazzled at progress. The scaffolding is coming down on grid lines up to 9 this coming week with the external painting completed there and inside painting has begun.
>
> At the same time there are many parallel activities going on to explore a full sale and additional funding. These are synergistic with ASB and eventually some dialogue with them may be needed but not until the project has advanced further.
>
> So I would suggest that you meet with Dave again to settle you (sic) concerns and we all await the ASB …

[31] The termination required Mr Wilson to resign as a director on 20 August 2007 and he did not provide a resignation to his lawyer until 30 September 2007.

[32] The consequences that Mr Irvine would seek to attribute to this late tendering of the resignation as director seem to be improbable. He apparently is of the view that the combined fact that Mr Wilson had not supplied a resignation, and the fact that Mr Wilson gave some advice in an email two days before his resignation somehow prevented Mr Irvine and the remaining other director of the various corporate entities from going to speak to the financier, ASB. That seems to me an improbable consequence of the email.

[33] As well, if it is true that the defendants refrained from speaking to the ASB when they might have done so, that would seem to have been a disproportionate response to an email in which Mr Wilson did no more than suggest that they hold off talking to the ASB. In any event, even if the defendants considered they were being forbidden by another director from speaking to the ASB, it should not be overlooked that Mr Wilson only remained a director for another two days – Mr Irvine accepting that he resigned on 30 September. It is not credible that in that time because of an apprehended inability on the part of Mr Irvine to go and talk to the ASB that creditors increased by a further $1,500,000, the solvency position deteriorated and

somehow Mr Irvine and the defendants suffered very substantial loss. This suggested defence is simply not arguable.

The claim that Mr Wilson failed to transfer shares in GPK because of Mr Parat's right of pre-emption.

[34] One of the complaints that the defendants made concerns their contractual right to acquire the plaintiffs' shares in GPK in terms of the deed of termination.

[35] The deed was relatively laconic concerning the GPK shares. It provided at 2.2 that Mr Wilson would resign as a director of GPK. Then at 2.2.3:

> 2.2.3 Ridgefield shall provide to Irvine and Frankleigh an executed transfer of all its shares in the capital of GPK Lake Taupo Limited (1902793) to Irvine of a party nominated by Irvine.

[36] Then under a section headed '3.0 payments' it was provided that the defendants would pay to Ridgefield, inter alia:

> 3.1.1.2 As to $1 for the shares in GPK Lake Taupo Limited, …

[37] In the amended notice of opposition which the defendants filed they stated:

> 4. The deed of termination (Clause 3) expressly provided that the shares in GPK Lake Taupo Limited be transferred to the defendants which shares were worth not less than $800,000. The plaintiffs were in breach of that clause and unable to transfer those shares to the Defendants due to pre-emptive rights in favour of another shareholder (Mr Parat).

[38] Mr Irvine in his affidavit said that the effect of the deed of termination was that the defendants should own the GPK shares previously owned by Mr Wilson, and that the value of those shares was approximately $720,000. He sets out a calculation which he says supports that value. Significantly it is based upon 'a budgeted net profit' for the company of $800,000 per annum with completion of the apartment development. No other evidence of share value was provided. Mr Wilson in his affidavit does not comment on the matter of the value of the shares in GPK. His counsel Mr McAnnally confined himself at the hearing before me to pointing out that the consideration attributed to the shares was $1 and, apparently based upon that consideration, he argued that the value of the shares must be $1.

[39] In response to an email from the plaintiffs' solicitor concerning the shares in GPK, Mr Irvine replied 24 August 2007:

> I will be back in the office and I will get a waiver from Dom regarding the pre-emptive rights and also try and get the Company key from him.

[40] That email appears to indicate that Mr Irvine saw it as his responsibility to obtain the waiver. But it is not clear that he was contractually bound to do so. That is because the deed of termination did not make it the responsibility of any particular party to obtain a waiver from 'Dom' (that is, Mr Parat).

[41] Mr Irvine has further deposed that he later learnt that Mr Parat had not agreed to waive or forfeit his pre-emptive rights. He produced an email from Mr Parat dated 10 October 2007 which said in part:

> It would have been great for me to have been offered extra shares as I would have been interested in purchasing them to acquire better control of my brand.

[42] I observe that the email does not in fact seem to state that Mr Parat refused to consent. The response seems to suggest that Mr Parat thought he had to wait to be offered the shares rather than having the right to insist on his rights of pre-emption. Second, the equivocal nature of this evidence raises some doubt as to whether or not Mr Parat would, if asked, decline to waive the rights of pre-emption. I will accept though, that for the purposes of summary judgment, that that is a live issue.

[43] A number of further issues arise. The first is whether the obligation to obtain the waiver of the pre-emption rights was the obligation of the plaintiff or the defendant. The terms of clause 2.2.3 suggest that all that the plaintiff had to do was provide a signed transfer – the deed being silent as to who had to take the subsequent steps to implement the transfer. It seems at least arguable that thereafter it was over to the defendant to take whatever steps were necessary to secure to themselves the benefits of having a signed transfer of the shares.

[44] Further, it might be that the minimal value attached to the GPK shares reflect that risk that consent might not be forthcoming.

[45] Another issue is, assuming that the risk of the non-waiver occurring had not been allocated by the contract to either party, whether the contract might be said to be frustrated by the failure to obtain approval. Unfortunately on the current state of the pleading, and the lack of evidence on the subject, it is impossible for the Court to resolve these issues.

[46] My conclusion is that it must be arguable on the part of the defendants that the plaintiffs had the obligation to obtain the waiver and, that not having done so, they are therefore in breach of the contract resulting in the defendants suffering loss.

[47] The next question concerns the consequences of this conclusion. I am sceptical about the assertion that, based upon the budget, the shares were worth $720,000. At the time the termination agreement was entered into, the hotel venture was in peril of failing and in fact later events proved that it was not viable. In all those circumstances it seems most unlikely that a valuer could arrive at a valuation of $720,000 for the shares in the catering company which would apparently own nothing more than the catering rights for the site. On the other hand, the shares must have been worth something. I do not accept Mr McAnnally's argument that because the shares were valued at $1 by the contract that that is the limit of the potential damages that the defendant could claim. The correct measure of loss would focus on what advantage the defendants would have obtained had the contract been properly performed. Arguably if it had been performed, they would have acquired a parcel of shares worth something – almost certainly more than $1.

[48] The impact that conclusion that I have come to in this section of the judgment may have on the plaintiffs' claims overall is a matter I return to a paragraph [65] and following.

The Colin Reynolds Guarantees

[49] In the course of his submissions Mr Black raised an issue about an alleged failing on the part of Mr Wilson to sign a replacement guarantees in replacement of those given by a previous director, Mr Colin Reynolds, who had resigned from the venture.

[50] There is nothing in this point. Even if there was a binding obligation to give such a replacement guarantee, it appears from an email dated 2 July 2007 that Mr Wilson in fact had given the guarantee.

Is the liability of the defendants under the termination deed limited to the assets of the trust?

[51] The next issue concerns the question of whether the liability of the trustees in the Frankleigh Trust should be limited to the assets of that trust in the case of Ms F J Irvine and Mr T M Irvine.

[52] The original shareholders agreement, which was signed on 14 October 2003, included as parties Mr Irvine and the Frankleigh Trust. The Frankleigh Trust was a trust associated with Mr Irvine and of which he was trustee. There were two other trustees, Ms F J Irvine and Mr T M Irvine. The shareholders agreement contained a limitation of liability clause in these terms.

> 48.0 Felicity Jane Irvine and Timothy Malcolm Irvine enter into this Agreement as trustees of the Frankleigh trust and not personally their liability hereunder shall be limited to the assets of the Frankleigh trust.

[53] When the termination agreement was signed it stated that the parties included Mr Irvine and the 'Frankleigh Trust'. The termination agreement provided the obligations to make payments were imposed on 'Frankleigh' and 'Irvine' (the latter being the way in which Mr Irvine was described by convention in the document). Mr Wilson's trust 'Ridgefield' was required to provide executed transfer of shares in the companies to 'Irvine and Frankleigh'.

[54] The termination deed contained this clause as well:

> 8.7 Entire Agreement: This Deed is the complete and entire agreement between the parties relating to the subject matter of this Deed and supersede (sic) all prior agreements, understandings or representations, the express or implied, between the parties relative to the subject matter of this Deed.

[55] The Deed was executed by, inter alios, 'Frankleigh Trust by the trustees' with three signatures appearing opposite that designation: Mr Irvine, Ms F J Irvine and Mr T M Irvine. Mr Irvine also signed in his own capacity. Mr Irvine does not dispute that he is personally liable on the deed. The two trustees do.

[56] The defendants now assert that the effect of the deed was to limit any liability of Ms F J Irvine and Mr T M Irvine to the assets of the Frankleigh Trust.

[57] The plaintiffs contest this construction of the termination deed. Mr McAnnally points out that there was no limitation of the liability of the trust deeds to the assets of the trust inserted into the termination deed as there had been in the original joint venture agreement.

[58] One significant feature that both parties referred to was the fact that Mr Irvine signed the agreement in two parts, once as a trustee and once in person. Mr Black rhetorically asked why he needed to do so if there was no question of the liability of Ms F J Irvine and Mr T M Irvine being restricted to the assets of the Frankleigh Trust.

[59] Both counsel referred me to various authorities which it is not necessary to deal with any depth. The state of the law was summarised by Baragwanath J in *NZHB Holdings Limited v Bartells* (2005) 5 NZCPR 506 at paragraph [41] in the following terms:

> So in New Zealand law, and in that of England and of New South Wales, in the absence of more limiting language the description of a contracting party simply as 'trustee' renders that party personally liable. There is a presumption in favour of personal liability which must be refuted if a person contracting as 'trustee' is to be relieved of liability beyond the extent of the trust assets.

[60] I respectfully adopt that as a correct statement of the law. As well, that authority made it clear that a trust has no independent legal existence at law.

[61] In the end it seems to me a question of construing the document in the usual way. As part of that function, I would not attribute any significance to the fact that the original joint venture agreement contained a limitation of liability of Ms F J and

Mr T M Irvine to the trust assets. The fact that such a limitation was intended on one occasion does not logically entail the conclusion that it may have been intended on a latter occasion some years later. Quite apart from anything else, when the first document was signed there may have been more than adequate assets in the trust to reassure the opposite covenanting party, whereas that position could well have changed over the intervening years.

[62] Mr Black thought it was significant that Mr Irvine signed the termination deed in his own right, that is, without any endorsement as "trustee". Why, he asked, would Mr Irvine have executed the deed in this significantly different way from the trustees unless the intention was that the liability of Mr Irvine, on the one hand, and the trustees, was to be different in character? But Mr Irvine undertook other liabilities under the deed that the trustees did not. Any example is the indemnity he gave Mr Wilson in clause 5.5 of the deed – an obligation over and above those that were to be binding on the trustees.

[63] Mr Black also made some inventive and interesting submissions on possible application of the doctrine of contractual mistake. He raised the possibility that the defendants as well as the plaintiffs might have been mistaken on the issue of whether the defendants were to be personally liable on the termination deed. The problem with the submission, in the end, though is that such a conclusion is not open on the evidence – even by the limited requirements that must be met on a summary judgment application.

[64] In my view the defendants, having signed the termination deed, are caught by the presumption that they are personally liable on it. There is no basis on which I would be justified in ignoring the law as stated in *NZHB Holdings.* It was not suggested, for example, that there is any evidence that the defendants could use as a basis for arguing that the deed ought to be rectified. To conclude, they are personally liable under the termination deed.

Changes to summary judgment rules

[65] After I drafted this judgment it became apparent that changes brought about by the new High Court Rules may have affected the Court's power to give judgment on part of the plaintiffs' claim.

[66] The summary judgment Rule in its original form read as follows:

> **[136 Judgment where there is no defence or where no cause of action can succeed**
>
> (1) The Court may give judgment against a defendant if the plaintiff satisfies the Court **that the defendant has no defence to a claim** in the statement of claim or to **a particular part of any such claim**.
>
> (2) The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed.] (My emphasis)

[67] The Rule in its present incarnation (High Court Rules 2008) reads as follows:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has **no defence to any cause of action** in the statement of claim or **to a particular cause of action**.
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.
>
> Compare: 1908 No 89 Schedule 2 r 136 (My emphasis)

[68] In the original Rule, a distinction was made between 'claims' and 'causes of action'. In the current Rule, the reference to 'claims' has not been repeated.

[69] The term 'claim' was not defined in the old Rules. In the context of the Rule, what was referred to as a 'claim' is contextually defined as something to which one could have a defence to. One could also have a defence to a 'particular part of any such claim'. For present purposes it would seem that a 'claim' or 'particular part of

any such claim' had a wide enough meaning to include the form of relief or a remedy sought in the proceeding. The defendant would need to establish that he had, in whole or part, an answer to what the plaintiff sought in his proceedings. If the plaintiff could demonstrate that he had a viable route to a judgment for any part of what was sought in the proceedings, then he could obtain judgment. A defendant could defeat a claim or a particular part of a claim by showing that there was an argue that the cause of action as a whole was not viable or, even if that were not so, the plaintiff could arguably be prevented from obtaining part of all of the relief or remedy pertinent to the cause of action. In such a circumstance the defendant would have an arguable defence to a 'particular part of any … claim' in terms of Rule 136. But the defence would be efficacious only in respect of that part of the claim to which there was a defence. It would not defeat the other parts of the claim and the Court could give judgment for a particular part of the claim.

[70] The new Rule has made some substantial changes. It is solely concerned with causes of action. The plaintiff now has to demonstrate that that the defendant has no defence to a cause of action.

[71] It is necessary to give brief consideration to the concept of a "cause of action'. In his well known judgment in *Letang v Cooper* [1965] 1 QB 232; [1964] 2 All ER 929, Diplock LJ said (at p 935) :

> The Judicature Act, 1873, abolished forms of action. It did not affect causes of action; so it was convenient for lawyers and legislators to continue to use, to describe the various categories of factual situations which entitled one person to obtain from the court a remedy against another, the names of the various "forms of action" by which formerly the remedy appropriate to the particular category of factual situation was obtained. But it is essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person.

[72] In the present case, however the plaintiffs' cause of action might be described, it will be essential for them to establish the cumulative circumstances that result in the defendants being indebted to them, so that they may establish their right to the remedies sought. Any defence – even one which would disentitle the plaintiff

to part only of the remedies sought - would seem to literally constitute a defence to the cause of action.

[73] An equitable set-off will constitute such a defence: *Grant v NZMC Ltd* [1989] 1 NZLR 8. In *Grant* Somers J in his judgment at p 12 made the following reference to the authority of *Rawson v Samuel*:

> The locus classicus about equitable set-off before the Judicature Acts is *Rawson v Samuel* (1841) Cr & Ph 161 in which Lord Cottenham LC said:
>
> > "We speak familiarly of equitable set-off, as distinguished from the set-off at law; but it will be found that this equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand. . . .

[74] The Court of Appeal in *Grant* therefore concluded that an equitable set-off was a defence to a claim for summary judgment.

[75] Also relevant is the judgment of the Court of Appeal in *AGC v McBeth* 4 PRNZ 544. In that case, the Court was concerned with the Rules in their former state. Greig J for the Court said (at p551):

> We think this is to place too much emphasis on the cause of action and not on the claim or particular part of such claim which are the very words of rr 136 and 137. We see no reason to prevent judgment being given for an amount which is indisputably due and owing but which is only part of the claim and therefore not the whole of the relief sought under the particular cause of action.

[76] In this case, the plaintiffs sue on the termination deed. That deed arguably required the plaintiffs to assign the shares in GPK to the defendants. I consider, although I have not had the benefit of argument on the point, that the potential claim arising from the alleged failure to transfer the GPK shares provides the defendants with a defence to any claims that derive from the termination deed. That is because under the present rules the Court is required to enquire whether there is a defence "to the cause of action". If there is, the Court must disallow the summary judgment application. There are only two possible answers, "yes" or "no". It is apparently not possible to enquire to what extent the defence is an answer to the relief sought and give judgment for the remaining portion. The balance owing (after allowance for

deduction on account of the set-off) can no longer be treated as "part of the claim" to which the defendant has no defence as might have been the case under the old Rule 136.

[77] When I sought further submissions from counsel on the effect of the amendment to the rules, only limited reference was made to the possible effect of Rule 12.12:

> 12.12 Disposal of application
>
> (1) If the court dismisses an application for judgment under rule 12.2 or 12.3, the court must give directions as to the future conduct of the proceeding as may be appropriate.
>
> (2) If it appears to the court on an application for judgment under rule 12.2 or 12.3 that the defendant has a counterclaim that ought to be tried, the court—
>
> (a) may give judgment for the amount that appears just on any terms it thinks just; or
>
> (b) may dismiss the application and give directions under subclause (1).

[78] It is difficult to come to any firm view about how this rule meshes in with 12.2. A counterclaim, however, is not the same thing as an equitable set-off. A counterclaim may or may not constitute an equitable set-off. I consider that r12.12 is directed at the situation where there is a counterclaim which does not constitute a defence. In that circumstance, the Court can prevent the plaintiff from recovering all that it claims in disregard of the counterclaim.

[79] My conclusion is that with the defendant having a defence of equitable set-off to the cause of action based on the termination deed, the result must be that the application for summary judgment is dismissed.

[80] This is not the result that I would have preferred to come to, but it is unavoidable because of the current drafting of the relevant Rules.

[81] I order that the parties are to carry out the steps now set out within the specified number of days from the date of this decision:

a) The defendants are to file and serve statements of defence within 21 days;

b) The parties are to file and serve affidavits of documents within 42 days;

c) Inspection of documents is to occur within 63 days:

[82] The Registrar is to allocate a further case management conference by telephone at the expiration of the timetable period.

[83] I would expect the parties to agree the matter of costs. If they cannot, they should advise the Registrar and I will allocate hearing time to resolve that issue.

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J.P. Doogue
Associate Judge