**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2013-485-000995**
**[2013] NZHC 2811**

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| IN THE MATTER | of Section 134 of the Companies Act 1993 |
| BETWEEN | JOHN HOWARD FISK and JEREMY MICHAEL MORLEY as Liquidators of LUXTA LIMITED (In Liquidation)<br>Plaintiff |
| AND | JAMES ANDREW FAWCET<br>First Defendant |
| | THE PARTNERS IN BRANDONS AS AT 10 MAY 2010<br>Second Defendant |

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| Hearing: | 17 October 2013 |
| Appearances: | J Toebes for Plaintiff<br>M H Morrison and B Gustafson for First Defendant<br>A McIntyre for Second Defendant |
| Judgment: | 25 October 2013 |

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**JUDGMENT OF ASSOCIATE JUDGE MATTHEWS**

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[1] The plaintiffs are the liquidators of Luxta Limited (Luxta). The first defendant (Mr Fawcet) was one of its directors. The liquidators say that in undertaking a certain transaction, which I will describe, Mr Fawcet breached the duty imposed on him by s 131 of the Companies Act 1993.

[2] This provides:

> **131. Duty of directors to act in good faith and in best interests of company**
>
> (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.

[3] Subsections (2), (3) and (4) contain provisions about subsidiary companies and companies carrying out joint ventures.

[4] The second defendants were partners in a law firm (Brandons) at the date of the transaction undertaken by Luxta at the instance of Mr Fawcet, and acted on his instruction in carrying out certain legal work to give effect to the transaction. The liquidators say that Brandons gave dishonest assistance to Mr Fawcet in his breach of the duty he owed to Luxta under s 131(1).

[5] The liquidators seek summary judgment on their claims against each of the defendants. In respect of each, the liquidators must show that the defendant does not have an arguable defence to the claim.[1] The onus of establishing this rests at all times on the liquidators.[2] However, if the liquidators establish a basis upon which it could be found that liability is established, it is for each defendant to put material before the Court to demonstrate a sound basis for a defence that defendant raises.[3] Both defendants have taken this course, but there is no onus upon either to prove there is a defence. The onus is on the liquidators to establish that neither has a defence.

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1 High Court Rules, r 12.2.
2 *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).
3 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986.

**Facts**

[6] Mr Fawcet was one of two directors of Luxta from its incorporation in September 2005 until January 2011, when he became sole director on the resignation of Mr W F Huxford. Luxta is one of several companies directed by Mr Fawcet which are engaged in business including land development. He described them generically as the Globe Group.

[7] Since April 2007 Mr Fawcet has also been the sole director and shareholder of Contorto Limited (Contorto), a company included by him within this description.

[8] Between 2006 and 2010 Luxta subdivided an area of land into approximately 83 separate titles. It contracted to build and sell 76 townhouses.

[9] On 7 May 2010 Luxta agreed to sell to Contorto two of the completed townhouses, numbers 2 and 41 Saddleback Grove, for $422,500 and $435,000 respectively. In each contract it was stipulated:

(a) Possession was to be given on execution of the agreement.

(b) The balance of the purchase price was to be paid or satisfied on the settlement date which was to be 1 September 2010.

(c) On the settlement date, a transfer instrument in respect of the property was to be provided in registrable form.

For the purposes of this case the liquidator accepts that the properties were transferred at market value.

[10] Had the terms of the written contracts been followed, possession would have been given on 7 May, the purchase price would have been paid in cleared funds on 1 September (that being the settlement date) and title would then have been transferred to Contorto. In fact, however, Luxta transferred the properties to Contorto on 12 May. On that day Contorto paid to Luxta only the sum of $45,000. No part of the balance of the purchase price was paid then, nor has Contorto paid the balance or any further sum on account of the purchase price to Luxta.

[11] It is contended for Mr Fawcet that three other substantial payments have been made to Luxta by other companies in the Globe Group which should be regarded as having been made on account of the purchase price, but this is not accepted by the liquidators. Luxta became embroiled in an arbitration with a contractor involved in the development. It incurred legal expenses of $79,901, was liable for arbitrator's costs and disbursements in the sum of $65,178.98, and was required to pay $250,000 to the contractor concerned. All these sums were paid for Luxta by other companies in the group.

[12] On 12 May 2010 Contorto raised a mortgage on the properties from ASAP Finance Limited (ASAP) in the sum of $500,000. Contorto transferred this money to other companies in the Globe Group.

[13] Contorto has subsequently sold one of the properties, and retains the other.

[14] By the time the sale of these properties to Contorto took place Luxta was indebted to the Inland Revenue Department for a sum in excess of $2m for GST and penalties. It was under some pressure to pay. In May 2011 another company in the group, Evolo Limited, was undertaking a separate development and it gave a guarantee to the Inland Revenue Department that it would pay outstanding GST and use of money interest up to the time of payment, the GST arrears at that time, alone, being $1,839,301.

[15] Brandons acted for Luxta and Contorto on the sale transaction. They did not prepare the agreements for sale and purchase, but they were given them by Mr Fawcet. At the time Mr Fawcet and Mr Huxford were also looking at Mr Fawcet's trust buying out Mr Huxford's shares in Luxta. Brandons formed the view that Mr Huxford must be independently advised in relation to the proposed shareholders' agreement, given that it acted for Mr Fawcet and for the group of companies of which Luxta was part, and Mr Martin of Brandons also informed Mr Huxford that Brandons could not act for both Contorto and Luxta on the real property sale unless Mr Huxford received independent advice in relation to this transaction as well as the proposed share purchase agreement.

[16] Mr Huxford subsequently delivered to the offices of Brandons the required A & I form to enable registration of the transfer from Luxta to Contorto to proceed. His signature had been witnessed by a solicitor at a separate firm. He led Mr Martin to believe that he had received independent advice. When he saw Mr Martin when delivering the A & I document he was again told that he should take independent advice in relation to the shareholders' agreement, and Mr Martin was satisfied from his discussions with Mr Huxford that he was well aware of the need for taking separate advice.

[17] In the meantime Brandons had received instructions from a firm of solicitors which acted for ASAP, instructing it to take certain steps in relation to the mortgage documentation for the advance by ASAP to Contorto, and it subsequently acted on relevant parts of that transaction resulting in the loan being advanced. Brandons completed registration of the transfer of the titles to Contorto, and the mortgage to ASAP.

[18] On 18 May Brandons (by Mr Martin) wrote to Luxta confirming settlement of the sale, enclosing a copy of the settlement statement and its account and reporting:

> We confirm that title was transferred on 12 May 2010 but that payment does not fall due until 1 September 2010. This, of course, is a most unusual arrangement but reflects the agreement with the purchaser – this was the primary reason for our requiring that Wayne Huxford obtain his own separate legal advice.

[19] There is no specific information before the Court on why title to the properties was transferred to Contorto in advance of payment. The written contract required otherwise.

[20] In October Luxta agreed to sell lot 2 to a different purchaser. On 27 October a senior associate with Brandons wrote by email to Mr Fawcet and Mr Huxford pointing out that lot 2 had been sold by Luxta to Contorto, and transferred to that company in May, with payment to be made on 1 September. He said the solicitor for the new purchaser was requiring a copy of a deed of nomination, as the solicitor put it, "to link the vendor under the sale and purchase agreement with the registered

proprietor". In the event a new agreement for sale and purchase was drawn up, with Contorto as the vendor. However, in the email, the solicitor asked Mr Fawcet and Mr Huxford to confirm that Contorto had paid the purchase price to Luxta, so they could prepare a deed of nomination. They were asked, in the alternative, what arrangements were in place between these companies so that appropriate documentation could be prepared. To this they received a simple response from Mr Fawcet:

> We will account to Luxta in terms of any proceeds here internally.

As this was after 1 September, Contorto had not paid the balance of the price on the settlement date.

[21] After Luxta was placed into liquidation on 3 April 2012 the liquidators investigated its affairs and made enquiries in relation to the transaction I have described. In a letter from Mr Fawcet's solicitor to the liquidators' solicitor, responding to the liquidators' demand that he pay the purchase price for the two units to the liquidators, the solicitor for Mr Fawcet advised:

> ... the transaction was a transfer for good consideration. At the time of transfer Luxta was indebted to Lachlan Property Management for approximately $1.18m for, largely, accrued but unpaid charges for services provided during the development ...

which were then listed in broad terms. The solicitor went on to say that the mortgage funds borrowed by Contorto were advanced to Globe Holdings, and paid by Globe Holdings to Lachlan Property Management, reducing the debt Luxta had with Lachlan by that sum. He said "this was an agreed aspect of the transaction".

[22] However, in his affidavit in opposition to this application, Mr Fawcet gives a different account. He says that the loan by ASAP to Globe was used to fund Globe Group's ongoing business activities including the Evolo development, which would relieve Luxta of its liability to the Inland Revenue Department. He then listed the financial support of Luxta by way of payments of indebtedness of Luxta to third parties, which I have described ([11] above).

[23] Neither Luxta nor Evolo has paid any sum to the Inland Revenue Department in respect of GST liabilities of Luxta.

[24] In the year ending 31 March 2008 Luxta reported an annual operating loss of $934,501. Since February in that year it has failed to pay any GST. It incurred an operating loss of $135,494 in the following financial year and on 25 June 2009 it failed to pay the contractor referred to above, the sum of $683,714.25. In the year ending 31 March 2010 it reported an annual operating profit of $294,143 but by 30 June 2010 owed GST to the Inland Revenue Department of $3,042,729.12. In the year to 31 March 2011 it reported an annual operating loss of $832,973. On 26 July 2011 the final award of the arbitrator on a dispute with the contractor required Luxta to pay $931,271.23. It could not pay this. In the year to 31 March 2012 Luxta reported an operating loss of $631,785.

[25] No financial information about Contorto is given, apart from the fact that having taken title to the land without making any payment for it, it then borrowed $500,000. At that point it had equal assets and liabilities, but it then transferred $500,000 to other members of the Globe Group. One of those companies, Seaside Haven Limited, made two advances to Luxta and paid its legal expenses on the arbitration, but there is no evidence linking that money in any way to the contractual obligation of Contorto.

[26] The explanation given by Mr Fawcet for the sale of the properties to Contorto, and for Contorto raising money on the properties, is that "this was a way to raise finance to continue to fund Globe Group's business". He goes on to mention it being a way to pay money to Luxta. He does not say why Luxta could not retain the property and borrow from ASAP itself, which would appear to be a more direct way for Luxta to receive money. He then says that the sale and mortgage were necessary to assist in funding the Evolo Limited development, but again, there is no evidence as far as I can ascertain of the borrowed funds going to Evolo, at least directly. As I have said, they went to other companies.

**Discussion**

[27] In *Sojourner v Robb*,[4] a claim was made against the directors of Kut Price Yachts under s 131 of the Companies Act based on their decision to sell the assets of the company to a new company which took over the staff of the former company and continued the business which it had previously operated. Some trade creditors of the old company were paid from monies received from its debtors, and it subsequently went into liquidation. Mr Sojourner, the first plaintiff, was an unsecured creditor, as was Sailing Cat Cruises Limited, their debts arising from contracts they held with Kut Price Yachts Limited to build vessels for them, these contracts being the principal cause of the company's financial failure. No payments were made to them.

[28] Fogarty J first cited *Nicholson v Permakraft (New Zealand) Ltd (in liquidation)*,[5] in which Cooke J said (at p 249):

> (iii) The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency.
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> ...
>
> In a situation of marginal commercial solvency such creditors may fairly be seen as beneficially interested in the company or contingently so.

[29] Fogarty J then said:

> [102] In this context, the standard in s 131 is an amalgam of objective standards as to how people of business might be expected to act, coupled with a subjective criterion as to whether the directors have done what they honestly believe to be right. The standard does not allow a director to discharge the duty by acting with a belief that what he is doing in the best interest of the company, if that belief rests on a wholly inappropriate appreciation as to the interests of the company. If a director believes that the duty to act in the best interests of the company is a duty always to act in the best interests of the shareholders, and never in the interests of the creditors, in a situation of doubt as to the solvency of the company, the director cannot be said to be acting in good faith. Creditors are persons to whom the company has ongoing obligations. The best interests of the company include

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4 *Sojourner v Robb* [2006] 3 NZLR 808 (HC).

5 *Nicholson v Permakraft (New Zealand) Ltd (in liquidation)* [1985] 1 NZLR 242 (CA).

> the obligation to discharge those obligations before rewarding the shareholders.

[30] Fogarty had no doubt that the directors of the company were in breach of s 131 in selling its business to the new company, which they also owned. As he put it ([107]):

> The new company did so taking all the benefit of the valuable intangible assets of the old company for no consideration.

[31] The passage cited from *Sojourner v Robb* was applied in *Blanchett v Keshvara*,[6] upheld on appeal in *Keshvara v Blanchett*.[7]

[32] Mr Fawcet operated his business through a number of companies, of which he identified five, and which he described as Globe Group. It is clear on the evidence that whilst certain specific developments were, at least in name, undertaken by specific companies (Luxta undertook the Karori development, Evolo, another apartment development in Wellington) both their administration and their finances were intermingled.

[33] The Karori development started in 2003. Mr Fawcet says:

> In 2003 Globe Group began developing and implementing a plan to purchase, develop, subdivide a for(sic) a block of land in Karori, Wellington.
>
> In 2006 Luxta, a company incorporated as a special purpose vehicle to develop the block of land in Karori, Wellington, purchased that land.
>
> Between 2006 and May 2010 Luxta subdivided the block of land in Karori into approximately 83 separate titles and contracted to build and sell over 76 townhouses (Subdivision). Luxta had no employees in this period and relied on other members of the Globe Group to plan and administer the completion of the Subdivision and sale of the properties in the Subdivision.

[34] Mr Fawcet goes on to say how the Globe Group provided project management, general management, sale and marketing services and funding to develop the subdivision. It introduced Luxta to several of its external consultants, such as planners and engineers, with whom it had longstanding relationships.

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6 *Blanchett v Keshvara* [2011] NZCCLR 34 (HC).
7 *Keshvara v Blanchett* [2012] NZCA 553.

[35] Globe Group is not an entity. Mr Fawcet's description of its activities in these terms is therefore vague, but plainly shows that various companies within this generic description actually carried out tasks required for Luxta to achieve subdivision of the land which it owned, and provided the money to do so. Examples of the way that monies were transferred between companies within the group are provided by the evidence of payments made by Seaside Haven Limited, a member of the group, of liabilities that Luxta had at the time, which are described by Mr Fawcet as advances.

[36] Mr Fawcet's approach to corporate governance clearly emerges from the following passage from his evidence:

> By May 2010 there were only seven properties left in the Subdivision to sell and/or settle. One such property was due to settle on 23 June 2010. None of the other properties were due to settle until mid-November 2010 (at the earliest) ...
>
> At this time there was a need for cashflow to complete the Subdivision and to try and provide cashflow for other Globe Group developments, including an apartment development another member of the Globe Group, Evolo Limited (Evolo) was undertaking in Wellington.

[37] After describing the sale of the properties to Contorto, Mr Fawcet continued:

> The $857,000 was not paid to Luxta on settlement and Contorto lent the $500,000 (Loan) to other members of the Group to fund the activities of the Globe Group.
>
> The Loan was used to fund Globe Group's ongoing business activities that including(sic) the Evolo development that crucially would relieve Luxta of its liability to the IRD. Luxta also received the following direct financial support from Globe Group post May 2010 ...

Mr Fawcet then described the advances from Seaside Haven, the payment of $45,000 into Luxta's bank account, and the payment of Luxta's legal expenses.

[38] The liquidators do not level criticism at this means of operating a business, of itself. Their focus is on a transaction undertaken in the course of carrying on business this way by which a substantial asset of one company in the group was transferred from that company but not, they say, paid for. Had it been paid for, the movement of an asset from one company to another at fair value would in all probability have met the test enunciated by Fogarty J, the objective standard as to

how people in business might be expected to act. However, that did not occur. Apart from the immediate payment by Contorto of $45,000, Contorto has not paid for either property. It had cash of $500,000 which it could have used to make a substantial payment but it did not. Those monies went elsewhere within the group. Later, it sold one of the properties. Again, no part of the sale proceeds went to Luxta. No mortgage security was given by Contorto, nor, on the evidence, any acknowledgement of indebtedness beyond the contractual obligation to pay contained in the agreements for sale and purchase. There is no evidence that any interest was paid to Luxta for the outstanding sum, nor that any obligation to pay interest was acknowledged (the agreements for sale and purchase do not provide for a payment of interest for late settlement).

[39] Further, various other payments for the benefit of Luxta by other members of the group, apart from Contorto, are described in evidence as "advances". The explanations given by Mr Fawcet – disparate as they are, see [21], [22] and [26] - amount to an assertion of an entitlement to shift funds around members of the group as needs demanded seemingly on the basis that, overall, this was in some way for a common good. This, however, does not in my view meet the required standard of the director of Luxta imposed by s 131. That section does not permit the interests of a number of companies carrying out various businesses under common control to outweigh the interests of the company whose actions are under review, and the interests of that company's creditors, the most significant of which at all material times was the Inland Revenue Department.

[40] Neither am I persuaded that Evolo's guarantee of Luxta's indebtedness to the Department for GST can properly be seen as constituting satisfaction of the consideration Contorto undertook to pay to Luxta when it received a transfer of Luxta's property. At best, the guarantee delayed the day of reckoning with the Inland Revenue Department, but interest continued to accrue on the debt at Luxta's expense. In my opinion s 131 requires the Court to concentrate on the parties to the transaction in order to determine, objectively, whether the director, whose conduct is under review, met the required standard. Arranging transfer of assets from one company to another company within a group without full payment, even if that is done in the general expectation that other companies within the group, might assist

later with advances to meet debts or with a guarantee of liability to a creditor, does not meet that standard. The position is akin to that in *Paul A Davies (Aust) Pty Ltd v Davies & Anor*;[8] in the following passage from the judgment of Waddell J in the Supreme Court of New South Wales, reference to the interests of other companies within Mr Fawcet's group may be substituted for the references to the directors' private interests:

> It is, in my opinion, to be concluded from the evidence that the defendants were able to obtain the company's money for their own private use only because, as directors, they had control of the company's affairs. This is merely another way of saying that they did in fact use their position as directors of the plaintiff to obtain its moneys for the Mt Broughton project. In doing so they could not be said to have acted bona fide in the interests of the company. Further, they put themselves in a position where their obligation as directors to manage the plaintiff's affairs for its benefit was in conflict with their own interest in securing money for their own private purposes. Further, it is correct to say that they used an asset of the company, namely its money, for their own private profit-making venture.

[41] Mr Fawcet expresses his view of his actions in subjective terms:

> The allegation against me is that in May 2010 I did not act in good faith and in what I believed to be the best interests of Luxta when I transferred and mortgaged the Saddleback Properties. I totally reject that accusation. From the very beginning of Luxta's development it used the financial resources of the Globe Group to carry out the Subdivision and when there were significant cost overruns by CCL that, because of the slowdown in the market, could not be passed onto consumers, this effectively turned the Subdivision from a profitable to an unprofitable development.
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> The sale and mortgage of the Saddleback Properties in May 2010 was a way to raise finance to continue to fund Globe Group's business and this included paying over $470,000 of money to Luxta and was necessary to assist in funding the Evolo Limited development, which if successful, would have relieved Luxta of the $2 million dollar IRD debt.

[42] As Fogarty J said, the standard does not allow a director to discharge a duty by acting with a belief that what he is doing is in the best interests of the company if that belief rests on a wholly inappropriate appreciation as to the interests of the company. In my opinion, that phrase is apt to describe the belief expressed by Mr Fawcet. The passage quoted encapsulates his approach to the operation of the companies he regarded as a group, and thus to his governance of Luxta, but as a

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8 *Paul A Davies (Aust) Pty Ltd v Davies & Anor* (1981) SC (MSW) 1982, ACLC 66.

director he owed the duty set out in s 131(1) to Luxta, and separately to each of the other companies he directed.

[43] Section 131(2)(3) and (4) set out circumstances where the interests of other companies may be considered, but these are confined in their terms to subsidiary and joint venture companies, and are of no application. The inclusion of specific provisions relating to directors of multiple companies in those circumstances serves to underscore the point that the duty in s 131(1) is owed to the company which undertakes the transaction under review. I have a clear view that the belief expressed by Mr Fawcet rests on a wholly inappropriate appreciation of the interests of Luxta as a separate entity to which he owed specific statutory duties.

[44] I conclude without hesitation that Mr Fawcet breached his duty to Luxta under s 131(1).

**Claim against Brandons**

[45] The principle to be applied by this Court in considering this application is enunciated in *Westpac New Zealand Ltd v Map & Associates Ltd*.[9] Starting at [37], the Court reviewed *US International Marketing Ltd v National Bank of New Zealand Ltd*[10] and referred in particular to the judgment of Tipping J. The case concerned certain actions by a bank, but the principles of dishonest assistance identified by Tipping J are equally applicable in the present case. In *Westpac* the Court of Appeal said:

> [42] Tipping J then identified the elements of dishonest assistance, with reference to the decisions of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* ([1995] 2 AC 378) and of the House of Lords in *Twinsectra v Yardley* ([2002] AC 164). He noted that subjective and objective elements were incorporated: a person's conduct is assessed objectively, but against the background of what he or she actually knew at the relevant time.

The Court then cited the following passage from the *International Marketing* judgment:

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9 *Westpac New Zealand Ltd v Map & Associates Ltd* [2010] NZCA 404.

10 *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA).

> In light of the necessary legal approach I consider it helpful to introduce into the present arena the concept of the reasonable banker and to look at the circumstances known to the bank in question through objective eyes. The principle thus becomes that a bank is entitled to freeze its customer's account entirely or pro tanto if, but only if: (1) in all the circumstances actually known to the bank; (2) a reasonable banker would know it was dishonest to pay the funds in question to or to the order of its customer and (if *Twinsectra* is adopted) (3) the bank itself appreciates that to be so.

[46] After reviewing the judgments of the members of the Court in *US International Marketing*, the Court of Appeal then said:

> [46] Accordingly, we consider that a bank will be liable for dishonest assistance where it has actual knowledge of the circumstances of the transaction (the subjective element) such as to render its participation contrary to normally acceptable standards of honest conduct (the objective element). In assessing whether its participation is contrary to such standards, the concept of the reasonable banker may well prove helpful. In this context, factors such as the significance or unusual nature of the transaction, the customer's banking practices, banking practices within the relevant industry and statutory reporting requirements will be relevant.

[47] Applying this principle to the present case it is necessary to consider the evidence on two points:

(a) What actual knowledge of the circumstances of the transaction did Brandons have, and

(b) did this knowledge render its participation contrary to normally acceptable standards of honest conduct?

In examining the latter question the concept of a reasonable solicitor may well prove helpful.

[48] In relation to the first of these, Mr P W Martin of the defendant firm had the senior role in effecting the transaction in question, though other members of the firm junior to him appear to have assisted. Earlier in this judgment I have described the work the firm undertook, including the stance it took in relation to the perceived conflicting interest of Mr Huxford, resulting in their requiring him to be separately advised before they would act on this and another transaction. This, and the fact that the sale was recorded on a standard form REINZ/NZLS contract with which Mr Martin, with some 40 years experience specialising in property related work, would

have been familiar leads me to conclude that he would have known that effecting the transfer of the property prior to the date on which the obligation to pay arose, and prior to payment being made, was contrary to the terms of the written contract. He expressly accepted that this was a "most unusual arrangement". He would have known that the services of his firm in carrying out the steps required to effect a transfer of the title through the land registration system did enable the transaction to be effected. He also knew that Contorto was raising $500,000 in cash immediately after the transfer was effected and that the firm did not hold any instructions to pay all or any part of that sum to Luxta (the sum of $45,000 paid by Contorto to Luxta on 12 May was transferred by Contorto to its own bank account).

[49] Mr Martin says that he did not know that Luxta was insolvent at the time. He understood the Karori development to have been a success and that not only was Luxta solvent but also that it was profitable as a consequence of the development. He says there was no reason known to the firm at that time which would suggest that Contorto would be unable or unwilling to account for or to pay the purchase price on the agreed date of 1 September 2010. He was aware that the bulk of the indebtedness to Westpac in relation to the development had, by that stage, been repaid, and neither he nor the firm were privy to the financial circumstances of Luxta or indeed the Globe Group as a whole. He does not refer expressly to whether he did or did not know of the debt to the Inland Revenue Department.

[50] Secondly, it is necessary to consider whether this knowledge of the circumstances of the transaction was such as to render the firm's participation in it contrary to normally acceptable standards of honest conduct, an objective element. Mr Toebes says that it was clear that it was not in Luxta's interests to transfer the property without the purchase money being paid as required by the contract, yet the firm acted for both vendor and purchaser allowing one company to gain at the expense of the other. The position was exacerbated by the fact that there was $500,000 coming to the purchaser which could have been used as a substantial part of the purchase price. Mr Toebes says that even without knowledge of the insolvency of the company, as he described it, this conduct still amounted to dishonest assistance as it was contrary to normally acceptable standards of honest

conduct. He emphasises the acknowledgement that it was a most unusual transaction, in the firm's reporting letter.

[51] Acknowledging that this is an application for judgment on a summary basis, and that in order for liability to be established, it is necessary to prove that the firm's conduct fell below normally acceptable standards of honest conduct, Mr Toebes says that no more documents would be produced at trial, and although experts might be called in relation to normally acceptable standards of conduct within the legal profession, in the *Westpac v Map* case the Court was prepared to proceed without such evidence.

[52] For Brandons, Mr McIntyre says the case is not an appropriate case for summary judgment as it involves allegations of actual dishonesty and also involves disputed factual issues.

[53] In *Parbery v Parbery*[11] the Court said:

> In *Sime v Bale* (HC Whangarei CP34/95, 15 February 1996), it was noted that where allegations of fraud are made, the proceeding may be inherently unsuitable for resolution by way of summary judgment. All the more so, in my view, where the Court is invited to draw inferences in order to establish a fundamental element of the conduct under review. In my view the evidence in this case must be tested at trial for the result to be safe.

[54] Mr McIntyre says that the liquidators are asking the Court to infer that at the time of the transactions Brandons knew that Luxta was insolvent or in a financially parlous state and had significant outstanding creditors, and that Contorto would be financially unable or unwilling to pay the settlement sum to Luxta when it fell due for payment in September. He says there is no direct evidence from the liquidators in relation to either of these central points, as he describes them, whereas there is evidence from Brandons that it had no knowledge in relation to either.

[55] Mr McIntyre then identifies six areas where he says there are factual disputes, thus:

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[11] *Parbery v Parbery* HC Christchurch CIV-2011-409-001678, 15 March 2012.

(a) The liquidators say the written agreement required that the transfer of title was to occur on payment on 1 September, which was also standard practice, but Brandons' position is that the written agreement was varied between the vendor and the purchaser to the effect that transfer of the title to the lands was to occur on 12 May with payment of the purchase price delayed to 1 September.

(b) The liquidators say Brandons acted for both Luxta and Contorto in relation to the transaction, but whilst that is correct, Brandons took appropriate steps to ensure that Mr Huxford, the director and, through a trust, shareholder of Luxta, obtained independent advice on it, and informed consent was obtained.

(c) The liquidators maintain that Brandons were aware or must have been aware of the circumstances by which the sale and purchase of the lands constituted a breach of duties owed by Mr Fawcet to Luxta, but Brandons say they had no knowledge of any circumstances whereby the sale of the lands by Luxta to Contorto might breach the duties that Mr Fawcet had to Luxta.

(d) Mr Morley, liquidator, says in his affidavit that Brandons knew or must have known that Luxta was insolvent, but Brandons say they had no knowledge of Luxta's financial status beyond its own internal assessment that Luxta's Karori project had been a financial success.

(e) The liquidators say Brandons acted for Luxta in relation to creditors' claims by Paragon Builders and Capital Construction, but Brandons say their knowledge of and involvement in those matters was only as instructing solicitors. Their involvement was limited but they were aware that Luxta contested the claims.

(f) The liquidators say Brandons had reason to believe that Contorto would not pay Luxta the purchase price, but Brandons said they had no reason to believe that Contorto would be unwilling or unable to pay Luxta on 1 September. It had no knowledge of the financial status of Contorto.

[56] The first of these points is not a dispute on the facts. The agreement did contain the provision relied on by the liquidators; Brandons acted otherwise and could only have done so on the instructions of their clients, which amounted to a requirement that the terms of the written contract not be complied with. Reference in Mr Martin's affidavit to the transfer of title before payment reflecting the agreement of the purchaser raises, at least arguably, the prospect that there was an oral agreement by the parties to vary the written contract.

[57] The second point is not a factual dispute either, but the third, fourth, fifth and sixth points are.

[58] Mr McIntyre also submits that Brandons acted consistently with the standard of a reasonable honest person; there is no general rule that a solicitor cannot act for both parties where their interests might conflict so long as they obtain informed consent.[12] What constitutes informed consent will depend on the precise services the solicitor is required to provide: *Clark Boyce v Mouat*.[13] He notes that in *Clark Boyce* the Privy Council found that as the firm had advised one side of the transaction to obtain independent advice, after explaining the legal consequences of the transaction to that party, the solicitors were found to have done all they were reasonably required to do. Here, Mr Huxford was informed of the legal consequences of the sale and purchase agreements and its effect, including the early transfer of title, Brandons insisted that he receive independent legal advice, and they believed he had. Mr McIntyre notes that no expert evidence had been proffered by the liquidators calling into question the conduct of Brandons on this transaction.

[59] For the following reasons I am satisfied that summary judgment cannot be entered against Brandons. First, there are disputes in relation to material facts, as noted in [54] and [55].

[60] Secondly, although Brandons undertook their part in effecting the transaction with full knowledge of the transaction, part of the conflicting evidence relates to the extent of their knowledge of the financial position of Luxta and Contorto at the time

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12 *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*, r 6.1.3.
13 *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 647.

of the transaction, and in my view findings on this may well be material to the question of whether their conduct was or was not contrary to normally acceptable standards of honest conduct.

[61] Thirdly, there is no evidence before the Court in relation to whether this transaction might fall within or outside normally acceptable standards of conduct by solicitors. Fourthly, whilst it is for the Court to assess honesty, there are inherent and, frequently insuperable, difficulties in the Court doing so on the basis of written material only, particularly when the finding must be made in the context of some facts which are in dispute. On the information presently before the Court I find myself well short of forming the view that the actions of Brandons fell below normally acceptable standards of honest conduct. Certainly they participated in a transaction which left one of two related parties unpaid on its divestment of two significant assets, but the party retained a contractual right to payment and it is not established that there were any reasons for Brandons to form a view that the contractual right might be difficult to enforce, or might not be honoured. Part of the context in which the assessment of Brandons' conduct would be made at trial is the manner in which Mr Fawcet chose to operate his businesses, as I have summarised, and the extent of Brandons' knowledge of the way Mr Fawcet chose to operate is in my view material to whether their participation in effecting this transfer might be considered reprehensible.

[62] The evidence and argument for the liquidators falls well short of satisfying me that Brandons does not have an arguable defence to the claim for summary judgment.

**Outcome**

[63] I enter summary judgment for the liquidators against Mr Fawcet pursuant to s 301 of the Companies Act in a sum of $812,500.

[64] The application for summary judgment against Brandons is dismissed.

[65] The liquidators are entitled to costs against Mr Fawcet on a 2B basis together with disbursements fixed if necessary by the Registrar.

[66] Brandons is entitled to costs against the liquidators on a 2B basis together with disbursements fixed if necessary by the Registrar.

[67] The proceeding against Brandons is adjourned to a case management conference to be arranged by the Registrar, at which the Court will make directions to take the case through to trial.

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J G Matthews
Associate Judge

**Solicitors:**
JT Law, Wellington.
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DAC Beachcroft, Wellington.