IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2012-409-000879
[2012] NZHC 1191

BETWEEN	CHRISTOPHER JOHN COLL First Plaintiff
AND	CHRISTOPHER JOHN COLL, JAN CHRISTINE COLL AND FRANK DOOLEY Second Plaintiffs
AND	HYDRO DEVELOPMENTS LIMITED First Defendant
AND	JOHN MONTGOMERY EASTHER Second Defendant
AND	ANTHONY RICHARD BLACK Third Defendant
AND	MATTHEW KIDSON Fourth Defendant
AND	CHARLES BRIAN KIDSON Fifth Defendant

Hearing: 29 May 2012

Counsel: A Forbes QC and O Peers for Plaintiffs
R Gordon for Defendants

Judgment: 31 May 2012

JUDGMENT OF WHATA J

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[1] Hydro Developments Limited ("HDL") resolved, by special resolution of the majority of directors to:

(a) Sell the company assets to NewCo; and

(b) Issue further shares to raise necessary funds to progress the company's hydro-electric project.

[2] Christopher Coll is a director of HDL and together with the Coll Family Trust owns a 25% shareholding in HDL. I will refer to them collectively as the Coll family. The Coll family oppose the sale and the share issue. The family says that the sale and issue are examples of oppressive and/or unfairly discriminatory and/or unfairly prejudicial conduct contravening s 174 of the Companies Act 1993 and thus trigger the discretion of this Court to provide relief.

[3] The Coll family seeks interim relief to preserve their position pending resolution of their substantive claims under s 174. This is in the form of interim orders preventing dealings with the company's assets and shareholdings. Alternatively, the family seeks the appointment of an interim liquidator under s 246(1) or pursuant to the Court's inherent jurisdiction on the basis that it is necessary or expedient to do so for the purpose of maintaining the value of the assets owned or managed by the company.

[4] HDL (and the majority of the directors and associated shareholders) contend that:

(a) Interim relief by way of an interim liquidator under s 246 is no longer available, or

(b) The criteria for appointment of a liquidator are not met in any event;

(c) Interim relief is unnecessary as HDL has abandoned the impugned resolutions; and

(d) The substantive application under s 174 has no prospect of success.

Facts

[5] HDL was formed to explore hydro generation opportunities. It initially had four shareholders: Mr Coll, Mr Black, Mr Kidson and Mr Howard. Mr Howard resigned as a director in January 2006 and the shares he had owned were redistributed amongst the other shareholders. In 2007 the bulk of shares were transferred to family trusts. Then in August 2008, Mr Easther joined the company as a director and shareholder with the result that the shareholding was divided equally between the four directors and their respective family trusts. The original shareholders have also provided advances in the form of cash injections and payments to and/or on behalf of HDL in the following sums:

(a) Mr Black $519,461

(b) Mr Coll $193,290

(c) Mr Kidson $509,047

[6] While it appears that Mr Easther did not advance money to the company, he has contributed services and/or will contribute services to HDL. The value of those services is said to be about $615,000. Mr Easther is not alone in providing services to the company. The Coll family also claim that about $41,000 is owed to Chris J Coll Surveying Limited.

[7] In 2011 the Coll family decided that they did not want to stay with the company. On 18 December 2011 they offered to sell their shares to the other shareholders for $1 million. The timing of this offer coincided with a grant of consent to develop a hydro project at Stockton. Apparently this offer was not acceptable to the other shareholders or the company. Instead, on 23 February 2012 a Board paper was circulated attaching a proposed resolution to sell HDL's assets to a new entity.

[8] Then on 1 March, the Coll family made a formal call for immediate repayment of their shareholder advance and for the fees owing to Chris J Coll Surveying Limited.

[9] HDL crystallised its position at a Board meeting on 7 March 2012, following notice of that meeting on 5 March. By a majority of 3:1 (Mr Coll voted against them in absentia) the Board made two key resolutions, the effect of which was:

(a) A fresh share issue to the shareholders, based on valuation of HDL assets, to be taken up either by cash payment or reduction of current accounts (including Mr Easther's debt for services rendered); and

(b) The sale of HDL's assets to NewCo, with the following principal terms of the sale:

- the transfer, assignment or other transfer of all right, title and interest in the assets and contracts associated with the Stockton Plateau Hydro Project, that are currently held by the Company;
- the sale price will be determined by an independent party, with experience in valuing this type of asset, based on the value of the company assets as at 23 February 2012;
- the transfer date will be as soon as documentation can be agreed;
- NewCo will assume the company's identified liabilities (creditors etc) as part of the sale price;
- the balance of sale price will be paid on (or immediately after) Financial Close, defined as the date upon which funding for the construction of the project is secured and available to [NewCo];
- the sale price will include interest calculated at the rate of 6% per annum, paid together with the sale price.

The claims

[10] The Coll family claims that the proposed resolutions, among other acts, were oppressive or unfairly discriminating or unfairly prejudicial thereby triggering s 174

of the Companies Act. Under s 174 this Court has general powers to grant any relief it thinks fit to remedy such conduct.

[11] The particulars of the claim include (in summary):

(a) Non-compliance with s 47 of the Companies Act, in that no decision or assessment has been made about the value of the consideration for the shares, and that the share issue will substantially dilute the family's shareholding interest;

(b) The special resolution does not meet the requirements of s 129 of the Companies Act in that essential terms and conditions of the asset transfer are not specified even though it significantly affects the family's interests;

(c) The Coll family has been illegitimately excluded from the management of HDL; and

(d) Mr Easther will substantially benefit from the transactions by, among other things, the capitalisation of his alleged debt of $615,150.

Procedural background

[12] An ex parte order was obtained by the defendants preventing further dealings with the company assets and shareholding. That order was then broadly confirmed on an inter partes basis as follows:

> The directors and shareholders of the first defendant company, Hydro Developments Limited, are hereby restrained from taking any of the following steps pending the hearing and determination of the application to appoint an interim liquidator:
>
> (i) selling, transferring or disposing of any of the assets or liabilities of the company to a third party or to any related entity;
>
> (ii) issuing any new shares or taking any steps to alter the current share ownership of the company as at the date of the filing of the interlocutory application for urgent interim injunction orders (as per

the Schedule attached to the interim injunction of Gendall J dated 8 May 2012);

(iii) taking any other steps or actions in the course of their running of the company's business other than in the ordinary course of that business.

[13] Relevantly Clifford J observed:

> [12] In that context I simply note that, on the basis the defendants are proposing a major transaction that the plaintiffs oppose, it does appear to me that the minority buy out rights provided by s 110 and following of the Companies Act 1993 provide a readymade framework for the resolution of that part of this dispute. They include provisions for the arbitration of value and like matters. Mr Gordon indicated that, in response to my comments, the defendant shareholders and directors will give consideration to reframing the resolutions for the transaction with Newco and the share issue. If that were to occur in a timely manner, and the plaintiffs voted against those transactions, the exercise of buyout rights would appear to be available. I make no further comment.

The present application

[14] It appears that Clifford J's observations have been taken to heart. Since the delivery of his judgment:

(a) The directors have resolved not to implement the special resolutions;

(b) The Coll family has amended their interlocutory application so that the primary relief is now an extension of Clifford J's injunction, or alternatively, the appointment of an interim liquidator or receiver.[1]

Resolution

[15] It quickly became apparent that the application for interim liquidator or receiver was very much a secondary option and not actively pursued by Mr Forbes QC for the Coll family. Mr Gordon also, reasonably in my view, accepted that I could consider the amended application for essentially injunctive relief.

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[1] Citing in particular *Cameron v Cropmark Seeds Ltd* HC Christchurch CIV 2009-409-1993, 7 December 2009.

[16] With the Board's proposed resolutions abandoned, the case for full injunctive relief, and certainly for appointment of an interim liquidator was substantially diminished. HDL was, in effect, back to square one. Indeed, the application now really had to focus on anticipatory non-compliance with s 174 of the Companies Act.

[17] Mr Forbes contended that given the prior conduct, including the resolutions that purported to, he said, enhance Mr Easther's interest in the company without cash injection, the minority shareholders still needed the Court's protection. Further, the underlying intention of the majority of directors to diminish the Coll family interests remained in place – even if the resolutions were now withdrawn.

[18] Mr Gordon, on the other hand, submitted that HDL was doing no more than securing necessary funds and positioning the company so that it could move forward into the next phase. I understood him to be saying that this Court's jurisdiction to intervene in the affairs of a company should only be exercised with considerable caution, citing Sir Thaddeus McCarthy in *Thomas v HW Thomas Ltd*:[2]

> I agree with Richardson J in particular that it is not necessary for a complainant invoking s 209 to prove a lack of probity or want of good faith in every case, though it may well be so in some. But the powers given by s 209 are ones which in my view should not be lightly exercised, especially so when a lack of probity or want of good faith is not established. These powers can invade the traditional rights of the shareholders to determine the management of their company according to their shareholding, and while few would deny the necessity for such provisions as those of s 209 in the interests of minorities, the danger of allowing minority interests to inflict serious damage to a company's structure can be quite real. All this is doubtless to say no more than Richardson J has already said, namely that fairness is not to be assessed in a vacuum or simply from one member's point of view: there must be a balancing of all the interests involved.

[19] The principles underlying injunctive relief are well known, involving an assessment of whether there is a serious issue to be tried, and where the balance of convenience lies.

[20] Mr Gordon's position is well made, to the extent that on the current facts to be tried it is difficult to see that there is a serious issue. With the resolutions abandoned, there is no proposal before me that might require injunction. But

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2 *Thomas v HW Thomas Ltd* [1984] 1 NZLR 686 (CA) at 697.

intended or not, the Board's resolution had the appearance of diluting the shareholding of the Coll family while at the same time benefiting another shareholder, Mr Easther. Apparently Mr Easther's alleged $615,000 debt is not recorded as "shareholder advances" that might fairly be offset against freshly issued shares. A transaction converting ordinary debt to capital might be expected to be conducted on a more considered basis, with Mr Easther's apparent conflict of interest properly addressed. I proffer this view tentatively, and within the confines of an application for interim relief. But it seems to me that there is a sufficiently serious issue of discriminatory conduct warranting interim relief of some description.

[21] Turning to the balance of convenience, Sir Thaddeus McCarthy's warning resonates strongly in this context. This Court should be slow to involve itself in the running of a company, particularly where it must seek further finance, while at the same time meeting shareholder expectations.

[22] It seems to me that the balance in this case does not lie with full injunctive relief. In the absence of the adverse resolutions, ongoing injunction would be manifestly disproportionate. However, the relief available from this Court to protect litigation interests is broader than injunction simpliciter. I explored the lesser course of a seven day notice period for actions affecting the assets and shareholdings with counsel. Mr Forbes took instructions and was able to consent to such orders. Mr Gordon was not able to secure consent, but did not vigorously oppose such an outcome – though emphasising that the base conditions for intervention under s 174 were still not made out.

[23] In those circumstances, I resolve that, in terms of the balance of convenience, limited relief, in the form of a seven day notice period, is appropriate. This in my view protects against the type of anticipatory oppressive or discriminatory conduct of concern to the plaintiffs, without pre-empting the approach taken by the company. It properly shifts the onus to the plaintiffs to establish, if necessary, that injunctive relief against specified actions should be granted.

[24] Accordingly, I make the following orders:

(a) The existing orders are set aside.

(b) The defendants may not take the following steps other than by giving seven working days' notice to the plaintiffs via their solicitors, Buddle Findlay:

(i) selling, transferring or disposing of any of the assets or liabilities of the company to a third party or to any related entity;

(ii) issuing any new shares or taking any steps to alter the current share ownership of the company as at the date of the filing of the interlocutory application for urgent interim injunction orders (as per the Schedule attached to the interim injunction of Gendall J dated 8 May 2012).

(c) The plaintiffs have leave to come back to this Court by way of memorandum or otherwise for the purpose of seeking relief in respect of notice given by the defendants in accordance with paragraph (b).

(d) Both parties have leave to seek further directions on three working days' notice.

[25] I note for completeness that the plaintiffs sought a further order prohibiting payment of costs to by HDL to its solicitors. Apparently the primary concern is that HDL might be paying the legal costs of the individual directors. While this may be a serious issue (and I have no firm view) I am not prepared to make any such order. The company must be reasonably free to conduct its affairs without judicial intervention at a micro management level. Of course, if the directors are using HDL funds for personal expenses this will need to be properly accounted for. Failure to do so will not cast them in a favourable light if and when the substantive proceedings are considered.

[26] As to timetabling:

(a) The plaintiffs must complete initial discovery within seven days.

(b) The defendants must file a statement of defence within 14 days.

(c) A pre-trial conference is to be fixed as soon as practicable thereafter.

[27] Costs on this application are reserved.

Solicitors:
Buddle Findlay, Christchurch, for Plaintiffs
Minter Ellison Rudd Watts, Wellington, for Defendants