

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-1572  
[2019] NZHC 3228**

BETWEEN

JINGQIU TANG  
First Plaintiff

SUNBOW GROUP LIMITED  
Second Plaintiff

SUNBOW INVESTMENT LIMITED  
Third Plaintiff

FANG SUN  
Fourth Plaintiff

AND

SUNBOW LIMITED  
First Defendant

YING ZHONG  
Second Defendant

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Hearing: 4 December 2019

Counsel: J Land for Plaintiffs  
R Reed and A Manuson for Second Defendant

Judgment: 9 December 2019

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**JUDGMENT OF WHATA J**

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*This judgment was delivered by me on 9 December 2019 at 4.00 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors: Duthie Whyte Lawyers, Auckland  
Prestige Lawyers Limited, Auckland

AND

KENNEDY POINT GROUP LIMITED  
Third Defendant

CARRICK WINES LIMITED  
Fourth Defendant

DIGITAL POST LIMITED  
Fifth Defendant

DIGIFILM LIMITED  
Sixth Defendant

[1] The plaintiffs claim that Ms Zhong, a shareholder and director of Sunbow Limited (Sunbow), breached her duties as trustee shareholder and as director of that company in various ways to the plaintiffs' detriment. The plaintiffs have already obtained interim orders (effectively by consent) and freezing orders on a without notice basis. These orders were extended and modified (again, effectively by consent) at the hearing of this matter.<sup>1</sup> The effect of these orders is, in short, that Ms Zhong is prevented from disposing of any significant assets of Sunbow or otherwise engaging in any significant transaction affecting Sunbow.

[2] Ms Zhong seeks the solicitors acting for the plaintiffs to be debarred from so acting because she says they:

- (a) were effectively acting for her in relation to the subject matter of the plaintiffs' claims; and
- (b) will need to give evidence.

### **Background**

[3] The first plaintiff, Ms Tang, currently holds a 10 per cent shareholding of Sunbow. Ms Zhong currently holds a 76 per cent shareholding of Sunbow. The plaintiffs claim that Ms Zhong holds 60 per cent of those shares on trust for Sunbow Group Limited (SGL), the second plaintiff, pursuant to agreed restructuring arrangements concluded in November 2016. This involved an agreement to transfer the shares for \$9m. The plaintiffs claim that the purchase price was fully satisfied in exchange for Mr Sun, the fourth plaintiff, waiving a debt owed to him by Ms Zhong. Alternatively, it is claimed that Ms Zhong, under a separate agreement, owed \$10m to SGL.

[4] The plaintiffs also claim that prior to 21 February 2019, Ms Zhong was the sole shareholder of SGL, holding the shares on behalf of the Sunbow Trust. However, they say that on 21 February, under instructions from Mr Sun ("a primary beneficiary of the Sunbow Trust"), Ms Zhong transferred 60 per cent of the shares in SGL to

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<sup>1</sup> *Tang v Sunbow Limited* CIV-2019-404-1572 (HC) 4 December 2019.

Mr Zhang and 20 per cent of the shares to Sunbow Investment Limited. New directors of SGL were then appointed. The plaintiffs claim the directors of those companies then changed the directorship of Sunbow, on 28 June 2019, but Ms Zhong refuses to acknowledge this.

[5] Proceedings were commenced by the plaintiffs in August this year seeking, among other things, various orders under the Companies Act 1993 enabling them to obtain the shareholding and control of Sunbow. They also sought interim injunctive relief and, at a hearing before Powell J, the orders mentioned above were obtained by consent. One of those orders permitted access to Sunbow's accounting records. The plaintiffs then identified what they consider to be major misappropriations (circa \$4.5m) of Sunbow monies. Amended pleadings were then filed seeking relief in respect of the alleged misappropriations, together with a without notice application for freezing orders. The application was granted.<sup>2</sup>

[6] Ms Zhong denies that the shareholding is held on trust. She says the \$9m purchase price was never paid. She also denies any wrongdoing but has not had the opportunity to gather evidence or plead to these claims. She has, however, agreed to preserving the status quo in the form of the agreed orders to avoid unnecessary litigation. But she is adamant that Duthie Whyte cannot act for the plaintiffs, having acted for her and Sunbow on the transactions, which are said to form the background to the initial claim.

### **Argument and evidence**

[7] The application to debar Duthie Whyte is made on the following grounds:

- (a) Duthie Whyte Lawyers prepared or assisted in the preparation of documents which are in issue in these proceedings. These documents include:

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<sup>2</sup> Mr Land has filed a memorandum identifying a significant gap in the information provided to the Court. The plaintiffs alleged that Ms Zhong misappropriated \$4m from Sunbow. The plaintiffs did not, however identify the circa of \$2m deposited with Sunbow by Ms Zhong. As indicated to Mr Land, this emphasises the importance of adopting on notice procedures, especially when the parties are actively engaged in litigation. It is unnecessary at this stage to say anything more about it, given the cooperative attitude of Ms Zhong.

- (i) All share sale agreements prepared in 2019;
  - (ii) The share registrar prepared in 2019, which is alleged to be the share registrar of Sunbow;
  - (iii) The minutes and resolutions appointing Allen Wu and Preston Zhang as directors of Sunbow;
  - (iv) The minutes, resolutions and notices removing the second defendant as a director of SGL; and
  - (v) The minutes and resolutions transferring 80 per cent shares in the name of the second defendant in SGL to Preston Zhang and Sunbow Investment Limited.
- (b) Duthie Whyte Lawyers may be required to give evidence of a contentious nature in this proceeding;
- (c) Duthie Whyte Lawyers was acting in conflict during the material times in which the dispute was precipitating between the parties:
- (i) Duthie Whyte Lawyers purported to act for Sunbow in or around 12 July 2019 and subsequently acted for Jingqiu Tang and Sunbow Investment Limited in correspondences with DBR Limited against the interest of Sunbow;
  - (ii) Duthie Whyte Lawyers acted for SGL and Sunbow in creating documents to reflect the alleged change in shareholding of Sunbow. Such action was inconsistent with Sunbow's interests, as any changes in shareholding would trigger breaches of loan agreements entered into by Sunbow; and
  - (iii) Duthie Whyte subsequently alleged on behalf of SGL and/or the plaintiffs that Sunbow, through its director, Ms Zhong, had failed to register the change of shareholding in 2016.

- (d) Duthie Whyte Lawyers acted for Sunbow up until the end of July 2019, without instruction from Sunbow's sole director at the time (that is, Ms Zhong).
- (e) In respect of Ms Zhong, she was a director of SGL during material times between February and June 2019, and who Duthie Whyte Lawyers should have taken instructions from before and while acting for SGL.
- (f) Duthie Whyte Lawyers acted for Sunbow and the plaintiffs prior to June/July 2019 in relation [to] the assets preservation of Sunbow and its share registrar and, in relation to the same, the plaintiffs are now seeking orders requiring Sunbow to register the share transfer and limiting the ability of Sunbow to carry out its usual transactions and business operations.
- (g) Before the commencement of the proceedings, Duthie Whyte Lawyers have been put on notice of the prejudices which may be caused to the plaintiffs should they continue to act but are later debarred from acting.
- (h) On further grounds appearing in the affidavit of Ying Zhong dated 4 October 2019.

[8] This application is supported by the evidence of Ms Zhong. Her evidence, on this aspect, is short. She says:

I understand that Duthie Whyte Lawyers started acting for the plaintiffs and/or Mr Fang Sun as early as February 2019 when they were in communications with Loo & Koo Lawyers, and Duthie Whyte Lawyers prepared the various share sale agreements. One of these arrangements have also been exhibited at "E" of the affidavit of Mr Fang Sun. These documents do not record the correct position. I was mistaken about the nature of these documents at the time when I signed these documents on 21 February 2019 at the office of Sam Chan. Mr Fang Sun and his associates just set up the whole without notifying me of what was going on and they just brought out heaps of documents for me to sign.

I understood that I was a director of STFL, or Sunbow Group Ltd up until 30 July 2019. Duthie Whyte Lawyers have been representing that they acted for Sunbow Group Ltd before 30 July 2019, but they never informed me about

any matters in relation to Sunbow Group Ltd or STFL. Attached and marked “J” are letters and emails from Duthie Whyte Lawyers stating that they act for Sunbow Group Ltd, dated before 30 July 2019,

Duthie Whyte Lawyers have also represented to other third parties that they acted for Sunbow Ltd between June and July 2019. Again, this was done without my knowledge or consent as a director. Attached and marked “K” are letters from Duthie Whyte Lawyers stating that they acted for Sunbow Ltd.

[9] The application is opposed on the basis that the substantive matters in dispute were all matters that Duthie Whyte had no involvement in and that the documents referred to by Ms Zhong are not relevant to any contested issue. The evidence filed in opposition, by Mr Wu who is now the managing director of SGL, notes that Duthie Whyte was not engaged by any of the parties until February 2019 and then only by Mr Sun, Sunbow Investment Limited and, later, SGL shortly before Ms Zhong was removed. This is recorded in letters of instruction.

### **Analysis**

[10] I can be brief. There is insufficient evidence before me that Duthie Whyte was acting for Ms Zhong or her interests or Sunbow in relation to the subject matter of the proceedings. Ms Zhong, who filed evidence in support of the application to debar, does not state that she instructed them to act for her or her companies. At most, I gather it may have appeared to Ms Zhong that they purported to act for SGL and Sunbow while she was in control of it and/or were acting for her and/or her interests during the restructuring process. But Ms Zhong, Sunbow and SGL are separate legal personalities and Mr Wu has produced evidence that strongly suggests Duthie Whyte acted for Mr Sun and his interests in the key period.

[11] I agree, however, that based on the widely-cast amended statement of claim, there is a real possibility that Duthie Whyte Lawyers may have to give evidence. They appeared to have played a key role in documenting, among other things, the restructuring which purportedly removed Ms Zhong. They also purported to act for SGL and Sunbow while Ms Zhong was still a director of those companies, yet apparently without her instructions to do so. It seems likely that, in that context, its role and dealings with Ms Zhong and/or her interests will come into focus at trial. If this happens, Duthie Whyte will be in a very difficult position if they remain solicitors

on the record. The admonition made by the Supreme Court in *Vero*<sup>3</sup> may well resonate in this context if the lawyers from Duthie Whyte are required to give evidence.

[12] Having said that, I acknowledge Mr Land's submission that he does not think that evidence from Duthie Whyte will be necessary and if it is, it will not be on a contestable matter. Superficially, that appears to be correct insofar as, on the evidence before me, Duthie Whyte simply provided transactional advice to Mr Sun's interests, albeit with consequences for Ms Zhong. We are also at a very early stage in the proceedings, so the extent to which Duthie Whyte might be required to give evidence in the substantive proceeding is not readily capable of accurate assessment at this stage.

[13] I consider therefore that the application to debar is premature. The Court and the parties will be better placed after discovery and close of pleadings to understand whether representatives of Duthie Whyte will need to give evidence and the nature of that evidence.

[14] I therefore decline to make any order debaring Duthie Whyte at this time. I propose, however, to grant leave to the parties to bring this matter for reconsideration later. It is an acknowledgement that the issue is not clear-cut and should be revisited if it becomes clearer that Duthie Whyte's involvement bears on resolution of the dispute between the parties.

[15] Given where I have got to, costs are reserved.

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<sup>3</sup> *Vector Gas v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [149].