IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009 409 1993

BETWEEN	NICHOLAS EVAN CAMERON, BRENT ALEXANDER STIRLING, GLEN ROGER JARVIS AND MATTHEW JAMES HICKS Plaintiffs
AND	CROPMARK SEEDS LIMITED First Defendant
AND	CROPMARK NOMINEES LIMITED Second Defendant
AND	VAUGHAN ROBERT ORMSBY AND HASET SALI Third Defendants
AND	VAUGHAN ROBERT ORMSBY, JILL ORMSBY AND KELVIN CROMWELL ORMSBY Fourth Defendants
AND	MARK DAVID ALDRIDGE, JUDITH ANNE ALDRIDGE AND PAIGE ROWENA CUTHBERT Fifth Defendants
AND	NIGEL ANTHONY JOHNSON Sixth Defendant

Hearing: 20 and 21 October 2009

Appearances: S P Rennie and S Caradus for Plaintiff
G N Gallaway and J P Forsey for First Defendant
P F Whiteside and J W Johnson for Third to Sixth Defendants
W J Palmer and E D Peers for S J Natrass (Plaintiff in proceeding CIV 2009 409 154)
J Costigan for Begley and Ors (Plaintiff in CIV 2009 409 1999)

Judgment: 21 October 2009

ORAL JUDGMENT OF CHISHOLM J

[1] This decision concerns applications for consolidation of three proceedings, namely, the proceeding by Mr Nattrass (CIV 2009 409 154). This proceeding by Mr Cameron and others (CIV 2009 409 1993) and the proceeding by Begley and others (CIV 2009 409 1999). All those applications are strenuously opposed by the defendants. Cropmark Seeds Limited is a defendant in each of these proceedings.

Background

[2] Yesterday I commenced to hear a number of interlocutory applications: applications for summary judgment and the appointment of an interim receiver by Mr Cameron and others in this proceeding; and applications for consolidation by the plaintiffs in all three proceedings. These matters were scheduled to be heard over three days.

[3] When Mr Rennie completed his submissions yesterday on behalf of Mr Cameron and others there was an objection to Mr Palmer (on behalf of Mr Nattrass) and Ms Costigan (on behalf of Begley and others) becoming involved in any matters other than consolidation. This opposition was on the basis that the only applications before the Court involving the other two proceedings involved consolidation.

[4] Given that situation I decided that the appropriate course was to hear argument about, and resolve, the issue of consolidation before proceeding any further. Then I could make an informed decision about the entitlement or otherwise of Mr Palmer and Ms Costigan to be heard in relation to summary judgment and the appointment of an interim receiver.

[5] It should be recorded that Mr Palmer (and to a lesser extent Ms Costigan) were concerned about the approach that I was proposing to adopt. This reflected orders that I made during a telephone conference last week as to the use that could be made of documents (see Minute of 14 October 2009). Mr Palmer considers he is

restricted in his ability to properly argue the issue of consolidation. Despite those concerns I decided to determine that issue.

Applications for consolidation

[6] Detailed submissions for and against the applications have been advanced on all sides. Obviously there are extremely strong views about the future conduct of this litigation, which is probably not surprising or uncommon in litigation of this type.

[7] In summary the plaintiffs in each proceeding contend that there should be consolidation because:

(a) Each case involves a shareholder or former shareholder in Cropmark Seeds Limited.

(b) All proceedings allege oppression and/or discriminatory conduct.

(c) In each case relief is sought under s174 of the Companies Act 1993.

(d) There are common threads of evidence running through each of the proceedings. Mr Rennie submitted that all events up to the date of hearing will be relevant.

(e) There will be a commonality of witnesses. Mr Palmer suggested that the same witnesses would be called in each case.

(f) Three separate hearings would be wasteful of Court resources, and would involve unnecessary expense to the parties.

(g) There is a risk of conflicting findings if the three proceedings are not heard by one Judge.

Underlying the plaintiffs' submissions is the theme that Rule 10.12 confers a wide discretion and that the interests of justice in this particular case warrant an order.

[8] The defendants' opposition can be also summarised:

(a) Examination of the pleadings reveals that there are three quite distinct and separate claims.

(b) They involve different defendants, a different timeframe and different relief.

(c) To the extent that the plaintiffs rely on common or overlapping evidence, that assertion has been overstated.

(d) Except for Mr Ormsby, the third to sixth defendants in this proceeding are not parties to the two other claims. Moreover, Mr Ormsby is represented by different counsel on the Nattrass claim. Particular concern was also expressed about the position of Mr Johnson, the sixth defendant, who Mr Whiteside described as an *"innocent party"* that has become embroiled in this proceeding.

(e) There is a *"real fear"* of prejudice by virtue of inadmissible evidence in some claims being used consciously or subconsciously in other claims.

(f) Commercially sensitive information could also fall into the hands of Mr Nattrass if his proceeding was consolidated with this proceeding. This reflects an alleged conflict of interest on the part of Mr Nattrass.

(h) Rather than resulting in a shorter trial, consolidation is likely to have the opposite effect.

Discussion

[9] Rule 10.12 of the High Court Rules provides:

> *"10.12* ***When order may be made***
> *The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after*

another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—

(a) that some common question of law or fact arises in both or all of them; o

(b) that the rights to relief claimed therein are in respect of or arise out of—

(i) the same event; or

(ii) the same transaction; or

(iii) the same event and the same transaction; or

(iv) the same series of events; or

(v) the same series of transactions; or

(vi) the same series of events and the same series of transactions; or

(c) that for some other reason it is desirable to make an order under this rule.

Even though the High Court Rules are relatively new, the principles are well established. The wide discretion is to be exercised broadly in the interests of justice: *Medlab Hamilton Limited v Waikato District Health Board* [2007] 18 PRNZ 517 at [8].

[10] I am perfectly satisfied that each of the three limbs in Rule 10.12 apply. The plaintiffs are all shareholders or former shareholders in Cropmark Seeds Limited. The company is a defendant in all the proceedings, with Mr Ormsby being a defendant in two of them. And in each case the plaintiffs are seeking relief under s174.

[11] More specifically with reference to paragraphs (a) and (b) of the Rule, I am satisfied that there will be common issues of fact and law and that any rights to relief arise out of the same series of events and transactions. The underlying issue will be whether there has been oppression and/or discriminatory conduct. As observed in *Latimer Holdings Limited v SEA Holdings NZ Limited* [2005] 2 NZLR 329:

"... fairness is not to be assessed in a vacuum, or from the point of view of one member of a company ... all the interests involved must be balanced against each other, including the policies underlying the Act and those underlying s 174. For unfairness in this broad sense to be grounded, there must be a "visible departure"

> *from the standards of fair dealing, "viewed in the light of the history and structure of the particular company, and the reasonable expectations of [its] members".*"

While the history relevant to the three claims does not span exactly the same period, the history from 1999 to 2006 will be common to all.

[12] As to paragraph (c), it is plainly desirable for the proceedings to be consolidated. Contrary to the submission on behalf of the defendants, I am completely satisfied that a consolidated hearing will be substantially shorter than three separate hearings which would be wasteful of resources, give rise to unnecessary expense, and would involve witnesses having to give evidence on more than one occasion. At the very least all the plaintiffs would have to give evidence at each hearing. No doubt Mr Ormsby and Mr Aldridge will also have to do so. Apart from that, there is a possibility that three separate trials could give rise to conflicting findings, obviously a situation to be avoided.

[13] In my view the factors advanced in opposition to the application do not outweigh those supporting consolidation. While it is true that the relief sought in the various proceedings is not identical, this is specifically accommodated by Rule 10.13. Moreover, although there are obviously differences in the detail and focus of the pleadings, there is a common underlying issue arising from s174. While the third to sixth defendants in this proceeding (with the exception of Mr Ormsby) are not parties to the other proceedings, they are represented by the same counsel. Admissibility issues can be addressed, and ruled upon, as and when they arise. This is not an uncommon situation for Judges. Likewise, confidentiality issues can be resolved (if necessary, before trial) to ensure there is no prejudice.

[14] Finally, it is highly desirable (and this seems to be one of the few areas where there is a measure of agreement between the parties) that this litigation is carefully managed to ensure that it does not get out of control. To my mind that can be much more effectively achieved if the proceedings are consolidated.

Outcome

[15] There is an order for consolidation of the three claims. This means consolidation, as opposed to an order for consecutive hearings.

(Discussion between counsel and Bench)

Costs

[16] Each of the plaintiffs are entitled to 1B costs against the first defendant.

(Discussion between counsel and Bench)

Scope of submissions

[17] I have now heard submissions about whether counsel for the plaintiffs in the other two proceedings should be heard in support of the applications for summary judgment and the appointment of an interim receiver.

[18] Ms Costigan indicated that she would only wish to be heard on the conditions of the receivership, should such an order be made. She was given leave to withdraw on the basis that if there is an order for the appointment of a receiver all counsel, including Ms Costigan, will be heard on the issue of conditions.

[19] Mr Palmer is in a different situation. He seeks to be heard on both the summary judgment and receivership issues.

[20] I cannot see any basis in which he should be heard on the summary judgment application. It involves an event that arose after Mr Nattrass departed the company and Mr Nattrass does not seek any relief that arises directly from that event. I do not accept Mr Palmer's argument that the ultimate state of the company is relevant to Mr Nattrass's claim and justifies him being heard. If that was so, it would logically follow that he would be entitled to be heard in support of all components of the claims in the other two proceedings because the outcome of those claims could affect the ultimate state of the company. That cannot be right.

[21] Consequently I am not prepared to hear from Mr Palmer on the issue of summary judgment. That ruling is, however, in the context of this interlocutory matter. It will be for the trial Judge to determine the scope of his submissions at trial.

[22] As far as the receivership is concerned, Mr Palmer drew attention to his memorandum of 18 September 2009 which sets out Mr Nattrass's position in relation to the receivership and, in particular, that he intended to support it. Mr Palmer noted that none of the other parties have objected to his involvement and there was no indication during the hearing before French J or the telephone conference before me that he could not be heard. His submission is that it is inappropriate for other parties to be objecting at this late stage, given that Mr Nattrass has a genuine interest in the outcome of the application to appoint an interim receiver.

[23] For the first defendant Mr Gallaway abides the decision. Through Mr Whiteside the third to sixth defendants strongly oppose any involvement by Mr Nattrass in the receivership application. He notes that there has been no formal application by Mr Nattrass for involvement and that it could not be helpful to the Court for there to be supplementary submissions from another party. Mr Whiteside emphasised that it is the current situation that counts and at this time Mr Nattrass is *"outside the tent"* in the sense that he is not a shareholder.

[24] This is a relatively evenly balanced matter. Ultimately it comes down to a perception of how justice can be best achieved. Clearly it is within my jurisdiction to allow Mr Palmer to be heard if I think that that is in the interests of justice.

[25] I have no doubt that Mr Nattrass has a genuine interest in the appointment of a receiver, and the consolidation of proceedings strengthens his entitlement to be heard. I am going to allow Mr Palmer to present submissions, subject to the caveat that those submissions are not to duplicate points already made by Mr Rennie. (Discussion). The right of reply will be confined to Mr Rennie.

Solicitors:	Rhodes & Co, Christchurch Duncan Cotterill, Christchurch Wynn Williams, Christchurch Buddle Findlay, Christchurch Goodman Steven Tavendale Reid, Christchurch