IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA605/2021
[2023] NZCA 435

BETWEEN	ANTHONY JOHN GAPES Appellant
AND	DEMPSEY WOOD CIVIL LIMITED Respondent

Hearing: 18 October 2022

Court: Miller, Brown and Gilbert JJ

Counsel: J W A Johnson and S T Dymond for Appellant
E St John for Respondent

Judgment: 12 September 2023 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed save that the orders made under the Companies Act 1993 and reflected in orders (a), (b) and (c) in the sealed judgment of the High Court are set aside.

B The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert J)

[1] Mr Gapes was the sole director of Panama Road Development Ltd (Panama), a company formed for the purpose of carrying out a substantial residential property development in Auckland known as the Springpark development. Panama contracted Dempsey Wood, one of New Zealand's largest civil works contracting companies, to

carry out the civil works. Panama was placed in receivership on 3 December 2015 by its secured creditor, Koi Structured Credit Pty Ltd (Koi), a Singapore-based lender that provided Panama with a $30 million development facility personally guaranteed by Mr Gapes. The receivers sold the development in March 2016 for around $25 million. This left a shortfall of approximately $2.57 million outstanding to Koi. Liquidators were appointed by special resolution of Panama's shareholder (Mr Gapes' interests) on 6 April 2016. Unsecured creditors, including Dempsey Wood, with combined debts totalling some $1.4 million, received nothing.

[2] Dempsey Wood brought proceedings against Mr Gapes in the High Court alleging a breach of s 9 of the Fair Trading Act 1986 (the FTA) and breaches of ss 131, 135, 136 and 137 of the Companies Act 1993.[1] Dempsey Wood sought relief pursuant to s 301 of the Companies Act in respect of the alleged breaches of that Act.

High Court judgment

[3] In a careful and comprehensive judgment delivered on 10 September 2021, Fitzgerald J found that Mr Gapes breached his duties as a director under ss 135 and 136 of the Companies Act from 13 November 2015.[2] The Judge rejected the claim that Mr Gapes breached his duty under s 131.[3] The Judge made an award of $100,000 pursuant to s 301 of the Companies Act in respect of the ss 135 and 136 breaches.[4]

[4] The Judge also found that an email Mr Gapes sent to Mr Dempsey on 12 November 2015 (the email) was misleading and deceptive and was reasonably relied on by Dempsey Wood in continuing to carry out works from that date until receivers were appointed 15 working days later.[5] The Judge ordered Mr Gapes to pay Dempsey Wood the sum of $286,295 pursuant to s 43 of the Fair Trading Act.[6] This sum was calculated as the cost to Dempsey Wood of carrying out this work after deducting its profit margin.

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1 The claim under s 137 of the Companies Act 1993 was not pursued.
2 *Dempsey Wood Civil Ltd v Gapes* [2021] NZHC 2362 [High Court judgment] at [181], [203] and [263(a)–(b)].
3 At [215].
4 At [233].
5 At [252] and [256].
6 At [261].

[5] The Judge sought further submissions on whether the amount she awarded under s 301 of the Companies Act should be paid to Dempsey Wood or to Panama and on the interaction of that award and the order made pursuant to s 43 of the FTA.[7]

[6] In a subsequent judgment delivered on 1 November 2021, the Judge directed that the s 301 award should be paid to Panama.[8] The Judge considered there was no double recovery, but she made an order that the FTA award was to be reduced by any amount received by Dempsey Wood as a result of Mr Gapes' payment to Panama of the award made under s 301 of the Companies Act.[9]

[7] The sealed judgment recorded the following orders:

> (a) [Mr Gapes] breached section 135 of the Companies Act 1993, with a breach date of 13 November 2015.
>
> (b) [Mr Gapes] breached section 136 of the Companies Act 1993, with a breach date of 13 November 2015.
>
> (c) Pursuant to section 301 of the Companies Act 1993, [Mr Gapes] is to pay $100,000 to [Panama], together with interest of $16,803.16 from 6 April 2016 to 10 September 2021, calculated using the Civil Debt Interest Calculator established by the Interest on Money Claims Act 2016.
>
> (d) [Mr Gapes] breached section 9 of the [FTA].
>
> (e) Pursuant to section 43 of the [FTA], [Mr Gapes] is to pay $286,295 to [Dempsey Wood], plus interest of $52,858.20 from 13 November 2015 to 10 September 2021.
>
> (f) The award paid to [Dempsey Wood] under the [FTA] is to be reduced by any amount received by [Dempsey Wood] as the result of [Mr Gapes'] payment to [Panama] under the Companies Act 1993.
>
> (g) [Mr Gapes] is to pay [Dempsey Wood] costs of $90,342.00, calculated as set out in Schedule 1.
>
> (h) [Mr Gapes] is to pay [Dempsey Wood] disbursements of $64,479.28, calculated as set out in Schedule 2.

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7 At [263(j)].
8 *Dempsey Wood Civil Ltd v Gapes* [2021] NZHC 2933 at [15].
9 At [18], [21] and [23].

Grounds of appeal

[8] Mr Gapes appeals against the judgment granting relief under s 43 of the FTA, contending the Judge erred in finding:

(a) the email was misleading and deceptive;

(b) Mr Dempsey relied on the email; and

(c) the email caused Dempsey Wood's loss.

[9] Mr Gapes appeals the judgment granting relief under s 301 of the Companies Act, contending the Judge erred in finding:

(a) Mr Gapes created a substantial risk of serious loss to creditors by allowing Panama to continue trading from 13 November 2015 and therefore breached s 135;

(b) the obligation to Dempsey Wood was incurred for the purposes of s 136 from 13 November 2015, rather than when the contract was entered into on 5 September 2014, as contended by Mr Gapes;

(c) Mr Gapes did not have a reasonable basis for believing that Panama could meet its obligations to Dempsey Wood; and

(d) in applying the "new debt" approach when assessing Mr Gapes' liability for the purposes of the award under s 301.

[10] Because of the coincidence in the Judge's findings as to the timing of the various breaches of obligation, both under the Companies Act and FTA, any losses recoverable by Dempsey Wood under the Companies Act (for the period 13 November to 3 December 2015) are subsumed in the damages awarded under the FTA caused by reliance on the 12 November 2015 email in continuing to carry out work under the contract for the same period. This overlap was recognised in the order made by the Judge and reflected in order (f) of the sealed judgment. For this reason,

Mr St John, for Dempsey Wood, advised at the hearing that the appeal in respect of the Companies Act claims leading to orders (a) to (c) of the sealed judgment is not resisted. This sensible and practical concession means that we do not need to engage with the appeal against the judgment in respect of the Companies Act claims. This part of the appeal can be allowed without opposition given Dempsey Wood is the only creditor found to have suffered loss as a result of Mr Gapes' breaches of duty under the Companies Act. Our attention can therefore be focused on the appeal against the judgment given under the FTA, the only part of the judgment Dempsey Wood actively seeks to defend.

The facts

[11] The Judge set out the largely uncontested factual background in considerable detail.[10] The following summary will suffice for present purposes.

[12] Stage 1 of what was intended to be a three-stage development was to comprise 107 townhouses, 44 terraced houses, four apartments and 150m^2 of retail. Panama, which was beneficially owned by interests associated with Mr Gapes, was incorporated on 24 May 2012 for the purpose of taking title to the land and carrying out stage 1. The development was marketed in 2013 leading to 149 sale and purchase agreements being entered into. These pre-sales off the plans were for a combined total of approximately $60 million. Most of these sales had a practical completion date of 15 September 2015 and a sunset date of 20 December 2015 for the issue of title. Either party could cancel the sale and purchase agreement after the sunset date if practical completion had not been achieved, a code of compliance certificate had not been issued in respect of the dwelling, or a separate title had not been issued for the property.

[13] The development was initially funded by Crown Financial Limited (Crown). Crown appointed receivers on 30 April 2014. The development was refinanced a short time later, in June 2014, with funding from Koi personally guaranteed by Mr Gapes. Koi's $30 million facility was provided in two tranches of $15 million. The first tranche was to repay the debt to Crown. The second tranche was paid into two trust

[10] High Court judgment, above n 2, at [27]–[110].

accounts held by Panama's solicitors, Russell McVeagh, to be drawn down periodically to fund the development works. One trust account (the construction account) was to pay construction costs to the builder, KN Construction. The other trust account was to meet other development costs, including those of Dempsey Wood (the project account). Payments from these trust accounts could only be made with Koi's approval and no more frequently than once a month. Koi would only be obliged to direct a payment from the project account if it had received certification from its consultant, Kingstons, on various matters including:

(a) the cost of the works to be carried out during stage 1 of the development and the costs to complete those works; and

(b) that all previous contractors' and subcontractors' claims had been paid.

[14] Panama entered into the civil works contract with Dempsey Wood in September 2014. The original contract sum was $5.384 million (excluding GST) but this was later increased by approximately $2 million for approved variations.

[15] The development was beset by serious delays and costs overruns. It was clear by July 2015 that the development was going to cost significantly more than was initially budgeted. Without a cash injection, the Koi facility would be exceeded during the August 2015 drawdown from the project account. This problem was addressed by the sale of land that had been intended for stages 2 and 3 of the development (referred to as the "Superlot") for approximately $14.78 million. This money was paid into the project account.

[16] On 27 August 2015, Kingstons noted that the project contingency was forecast to be overrun by approximately $4.3 million and, given the delays incurred to date, there was no prospect of the work being completed prior to the practical completion date of 15 September 2015 and the majority of the sunset dates were unachievable.

[17] By this stage, the housing market had risen significantly meaning it would be desirable to terminate the pre-sales if possible and re-sell at the higher prices then

available. Mr Gapes succinctly explained the critical importance of being able to cancel the pre-sale agreements:

> If you can't cancel [them] then the land probably isn't worth anything and if you can, then it's worth plenty.

[18] The Koi facility was due to expire on 15 October 2015 and a replacement funder was needed because Koi was not prepared to extend. On 4 September 2015, Koi advised that the amount required to repay the facility was approximately $37.57 million, less the proceeds from the sale of the Superlot and whatever cash balance remained in the construction account and the project account at the time of refinance. As the Judge observed, it was clear that whatever was left in these accounts would be returned to Koi. A cashflow forecast prepared as at 4 September 2015 indicated that the additional amount required to refinance the Koi debt (taking account of the monies held in the construction and project accounts) was approximately $22.5 million.

[19] Considerable efforts were made from around June 2015 to find a replacement funder. At some stage prior to 12 October 2015, Mr Dempsey became aware that the development was to be refinanced because Mr Gapes invited him to attend a meeting with a prospective funder (which turned out to be Webber Capital, described by Mr Gapes as a "tier 4" lender).

[20] Prior to that meeting taking place, on 15 October 2015 being the day Koi's facility expired, Panama entered into an agreement to sell the development to Webber Capital for $22.5 million, conditional on successful due diligence. As noted, this was the amount required to repay Koi after taking account of the balances remaining in the construction and project accounts. The agreement required Panama to continue the development pending settlement. The price was to increase by an amount equal to the costs incurred by Panama in relation to the development between 16 October 2015 and settlement of the sale, effectively the contractors' costs including Dempsey Wood. Panama had no resources of its own and accordingly it was likely that the only way it could fund this obligation would be if Koi agreed to provide the money. An associated agreement provided for Panama to manage the development

after settlement for a fee. That agreement also contained put and call options enabling an entity associated with Mr Gapes to repurchase the development at a later date.

[21] On 16 October 2015, Koi served Panama with a notice pursuant to s 119 of the Property Law Act 2007 notifying it that if repayment of the total amount outstanding was not made on or before 17 November 2015, enforcement rights under the facility would become exercisable. Mr Gapes did not inform Mr Dempsey of this development.

[22] In or around mid-October 2015, Mr Dempsey attended a meeting with Mr Gapes and the principals of Webber Capital. By all accounts, this was an unpleasant meeting with threats of default and receivership being made. On 21 October 2015, Dempsey Wood issued a notice of intention to suspend works for non-payment of its September 2015 progress claim of approximately $740,000 due for payment that day.

[23] On 23 October 2015, Dempsey Wood submitted its invoice for the period ending 31 October 2015 in the sum of approximately $998,000.

[24] On 27 October 2015, Koi authorised payment of Dempsey Wood's September 2015 progress claim.

[25] On 29 October 2015, Dempsey Wood's solicitor, Mr Alan Jones, sent a letter to Mr Gapes setting out its concerns about Panama's financial position and ability to complete the development. He sought evidence of Panama's ability to meet its payment obligations to Dempsey Wood including the extension of time claim. This letter provides the immediate context for Mr Gapes' email which was found to have been misleading. We therefore set out the text of this letter in full:

> 1. We act for [Dempsey Wood] which is party to a construction contract with [Panama].
>
> 2. Further to your recent meeting with our client (and the Chow interests [Webber Capital]), and recent telephone discussions, we confirm that
>
> (a) You have advised that [Panama] intends to sell the development;

(b) [Panama's] purpose in selling the development is two-fold;

(i) it does not have the resources to complete the development and;

(ii) it cannot afford to honour the existing sale and purchase agreements which are now considered to have been sold too low compared to the current market [value] of the properties;

At the meeting, our client was told that the Chow interests wanted to move quickly and take over the contract with contractors. But since that meeting more than a week ago, there has no update from [Panama];

(c) Our client was told that one of [Panama's] options was to go into receivership and thus repudiate its obligations to our client. Our client has serious concerns about [Panama's] financial position and its ability to meet the ongoing obligations under the contract.

3. Our client requires, and will continue to require, [Panama] to meet its full payment obligations under the construction contract. This will include an [extension of time] claim expected to be in the vicinity of $1 million.

4. Given further works are required to complete the contract, my client requests that you provide the following directly to me by **5pm Friday, 30 October 2015**:

(a) Confirmation that [Panama] intends to meet all its payment obligations under the construction contract; and

(b) Evidence of the funding available to [Panama] to meet its payment obligations including the [extension of time] claim foreshadowed above. This would include the monies said to be in the trust account of Russell McVeagh.

5. In the event [Panama] does not and cannot meet its payment obligations, my client will look for recourse against Mr Gapes personally as director of [Panama] and the person who has represented the company.

[26] Mr Gapes did not reply to this letter.

[27] On 5 November 2015, Webber Capital terminated the agreement for non-satisfaction of the due diligence condition. Webber Capital made a further offer to purchase the development on 8 November 2015. The price offered of $20.75 million was unacceptable to Panama and to Koi.

[28] Following a discussion between them that day, Mr Dempsey sent an email to Mr Gapes on 11 November 2015:

> Hi Tony it was good to talk today re subject of the Chow Bros./Webber Capital re financing deal falling over for the Panama Road contract.
>
> This makes it even more imperative that all of our concerns outlined in our letter sent by [Mr Jones] dated 29 October are addressed.
>
> The lack of communication recently has also not helped matters and is decreasing our level of confidence in the ability for [Panama] to continue to fund this project.
>
> In our discussion today you again re-affirmed that there was a $3.9 million deposit in a Russell McVe[a]gh Trust account with the specific purpose of assuring payment for the civil works for this project.
>
> You agreed today to organise a written statement from Russell McVe[a]gh to this effect. Can you please forward this to us by close of business today.

[29] Mr Gapes responded to Mr Dempsey early the following morning saying, "I have asked [Russell McVeagh] for this – will chase today". Mr Gapes did not forward Mr Dempsey's request to Russell McVeagh. At the same time as he sent his email to Mr Dempsey, he sent a separate email to Russell McVeagh asking them to provide the following information:

> Can you please send me an email letting me know that there is still $3+m in the project account to pay the civils works and consultants costs and that there is a separate project account for the [KN Construction] payments. [Mr] Dempsey would like some comfort we have the money still available to pay him.

[30] Russell McVeagh replied to Mr Gapes later that morning:

> Project Account balance is $4,172,351.07.
>
> KN Construction Account balance is $1,312,989.77.

[31] Mr Gapes forwarded this email chain to Mr Dempsey that afternoon (12 November 2015) with the following comment:

> Hi Email below from [Russell McVeagh]. The $4.172 is for civils and consultants etc.

[32] This was the email the Judge found to be misleading and deceptive.

[33] Mr Dempsey emailed Russell McVeagh directly the following day with further queries about the funds in the project account:

> [T]hanks for the confirmation of the Project Account balance. It is great to see [there] seems to be an allowance for funding of works at Panama Road. What [Dempsey Wood] require from yourselves is verification of what the Project Account funds are for. It would be very helpful to know the answers to the following questions.
>
> *Is the fund specifically for the payment of the Civil contract works?
>
> *Is the fund able to pay out upon the producing of a monthly payment certificate or are [there] other requirements needed to gain access to the fund?
>
> *Is the purpose of the fund to allow for any shortfall in the financing of the project from Olympus Capital [Koi's parent]?
>
> Thanks and look forward to hearing from you.

[34] Russell McVeagh did not respond to this email for nearly two weeks. They eventually responded to Mr Dempsey on 24 November 2015, copying in Mr Gapes, as follows:

> We respond to your queries as follows:
>
> - The funds held in the project account are to fund the project works (excluding the costs incurred by KN Construction, for which there is a separate account). The project works are those works relating to Stage 1 to be designed and constructed in accordance with the relevant design documents.
>
> - We are unable to pay out of the account unless [Panama's] lender has approved the payment. [Panama's] lender will only approve the payment if it has received certification from a quantity surveyor acceptable to [Panama's] lender.
>
> - We understand that the purpose of the funds in the project account is to finance all costs associated with the project works (excluding the costs incurred by KN Construction).
>
> Please advise if you have any further queries.

[35] In the meantime, on 19 November 2015, Dempsey Wood gave Panama further notice of its intention to suspend works for failure to pay its October 2015 invoice, due for payment that day. Mr Gapes responded:

> This is getting silly because we get one of these every month because you keep lodging your invoice earlier than everyone else. We do one drawdown per month and we need to get all the invoices in together to enable them to be

> processed by Kingstons and Russell McVeagh. We need to get you aligned with KN [Construction] and the others.

[36] Kingstons certified payment for October costs, including Dempsey Wood's invoice, on 23 November 2015. Koi approved payment out of the project account for these costs on 25 November 2015 but stated in its email, copied to Mr Gapes, that this should not be construed as a waiver of Koi's rights or Panama's defaults under the facility.

[37] On 1 December 2015, Koi gave Panama formal notice that it intended to appoint receivers the following day. The amount owing to Koi was $26.752 million. The receivers were duly appointed and subsequently sold the development for around $25 million. The eventual shortfall to Koi with accrued interest was $2.575 million. Unsecured creditors totalling approximately $1.41 million received nothing. Dempsey Wood did not receive any payment for the works it carried out in November 2015, totalling $503,374 (including GST). Nor did it receive payment for its extension of time claim in the sum of $200,279.

Did the Judge err in finding that the email was misleading and deceptive?

High Court judgment

[38] The Judge considered it was clear that Mr Gapes knew Mr Dempsey was seeking assurance that Dempsey Wood would be paid for ongoing works.[11] His request was not one of academic interest as to what amounts remained in the project account.[12]

[39] The Judge was not persuaded by the argument advanced on behalf of Mr Gapes that the email was not capable of being misleading given it was made to a sophisticated businessman who knew: the general concept of a secured lender having priority over unsecured lenders; how property funding worked at a basic level, including that Koi's quantity surveyor was required to sign off on any payments and Koi's approval was required; refinance was needed to continue the development; and receivership was a

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11 At [246].
12 At [248].

possibility.[13] Even accepting for the purposes of the argument that Mr Dempsey had knowledge of all these matters, the Judge considered this is what led him to seek Mr Gapes' assurance that Panama had the ability to pay for ongoing work.[14]

[40] Viewed in context, the Judge was satisfied that the email was capable of misleading or deceiving a hypothetical reasonable person in Mr Dempsey's position. Mr Gapes' assurance was not qualified in any way. Mr Dempsey could reasonably have understood the email to mean that, on the basis of Mr Gapes' current knowledge and arrangements with Koi, the funds would be available to pay Dempsey Wood.[15]

[41] However, the reality was quite different to that conveyed in the email. The Koi facility had expired, and Koi had issued a Property Law Act notice. Mr Gapes knew that the amounts remaining in the construction and project accounts were already earmarked to be repaid to Koi in part repayment of the facility. At the time of the email, there were no other arrangements on the table which would have enabled contractors to be paid. Mr Gapes had also been put on notice the previous day, 11 November 2015, that Koi was trying to sell its facility including the amounts remaining in the construction and project accounts.[16] The Judge considered the email was therefore misleading and deceptive, in breach of s 9 of the FTA.[17]

Submissions

[42] Mr Johnson, for Mr Gapes, submits that the email was not objectively misleading or deceptive given it was sent to someone with the knowledge and expertise of the hypothetical reasonable person in Mr Dempsey's position.[18] He developed this submission by referring to the meaning he contends was conveyed by the email and then reviewing the circumstances in which it was sent.

[43] Mr Johnson argues that the email could not reasonably be interpreted to mean that the funds in the project account would be available to pay Dempsey Wood, as

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13 At [247].
14 At [248].
15 At [249].
16 At [250].
17 At [252].
18 Citing *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].

found by the Judge. He contends that was not an available inference in the circumstances. Read in isolation, he says the email was objectively correct in representing two things — first, it confirmed the balance in the project account, and secondly, it indicated the purpose for which those funds were being held. Mr Johnson points out that the pleaded case was not that either of these statements was false, rather that the email was misleading because at the time it was sent, Panama was in default under the Koi facility and Mr Gapes knew that the money in the project account would soon be used to repay Koi's secured debt. For this reason, he endorses the Judge's observation that the essence of Dempsey Wood's pleaded claim was one of misrepresentation by omission.[19]

[44] Mr Johnson says the Judge found that the email was effectively an unequivocal guarantee of payment, but he contends that is a stretch. He says the email cannot reasonably be interpreted to mean that *all* of the money in the project account would *definitely* be available to pay Dempsey Wood in *any circumstances* and *irrespective* of any actions taken by Koi which had control over how the funds in the project account were applied.

[45] Turning to the circumstances in which the email was sent, Mr Johnson makes the following points:

(a) Dempsey Wood was a sophisticated corporate entity with annual turnover of approximately $200 million.

(b) Mr Dempsey was aware that Panama had secured lending with Koi and his follow-up email to Russell McVeagh reveals an understanding of development financing and secured lending.

(c) Mr Dempsey understood that Koi exercised a degree of control and supervision over the funds being paid out to contractors. Mr Dempsey must have known that the funds could not automatically be distributed from the project account at Panama's discretion.

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19 High Court judgment, above n 2, at [16(a)].

(d) Mr Dempsey was aware that Panama was looking to refinance the development and that receivership was a possibility.

(e) Dempsey Wood was "perennially anxious" about Panama's ability to pay its invoices, issuing notices of intention to suspend works for four consecutive months from August to November 2015.

(f) It is possible that Mr Dempsey did know about Panama's default on the Koi facility.

[46] In these circumstances, Mr Johnson argues it would be naive for Dempsey Wood to interpret the email as an unqualified guarantee of payment. While he accepts that Dempsey Wood was anxious about Panama's financial position and sought assurances that it would receive payment, Mr Johnson says it does not automatically follow that the email gave such assurance.

[47] Mr St John submits that the Judge was correct to find that the email was objectively misleading because of what Mr Gapes left unsaid. He supports the Judge's analysis.

Assessment

[48] We consider the Judge was correct to find that the email was misleading and deceptive in the circumstances.

[49] Mr Gapes knew that Mr Dempsey was very concerned about Panama's ability to meet its payment obligations to Dempsey Wood. Dempsey Wood gave notice of intention to suspend works for non-payment every month from August 2015. Mr Jones' letter on 29 October 2015 expressed serious concerns about payment for ongoing works and sought not only confirmation that Panama intended to meet all its payment obligations under the contract but also evidence of the funding available to Panama to meet those obligations, including the extension of time claim. Mr Jones gave notice that Dempsey Wood would seek recourse against Mr Gapes personally if Panama did not meet its payment obligations. This reinforced that what Mr Dempsey

was seeking was an assurance from Mr Gapes that if Dempsey Wood continued to work on the development, it would be paid for doing so.

[50] Mr Dempsey's email of 11 November 2015 made it clear to Mr Gapes that following the meeting with Webber Capital, it was "even more imperative" that the concerns set out in Mr Jones' letter were addressed. Mr Dempsey said that the lack of communication was decreasing their confidence in Panama's ability to continue to fund the project. He referred to a telephone discussion that day in which Mr Gapes advised that there was a sum of $3.9 million in a Russell McVeagh trust account for "the specific purpose of assuring payment for the civil works". Mr Dempsey recorded this in his email to Mr Gapes and noted Mr Gapes had agreed to obtain a written statement from Russell McVeagh "to this effect". Mr Dempsey asked for this statement to be sent to him by the close of business that day. Mr Gapes told Mr Dempsey by email that he had asked Russell McVeagh for this, adding that he "will chase today".

[51] Of course, Russell McVeagh could not have made any such statement "assuring payment" and Mr Gapes would have known that. This likely explains why he did not forward Mr Dempsey's email to Russell McVeagh and ask them to supply the assurance Mr Dempsey had been promised and was expecting. Instead, he obtained an email from Russell McVeagh which did no more than record the balance held in the project account (and the construction account). Mr Gapes added his own comment to bridge the gap in terms of what he knew Mr Dempsey was expecting by stating the "$4.172 is for civils and consultants etc". In context, the email conveyed the plainly false impression that these monies would be available for payment of ongoing costs to Dempsey Wood if it continued to work on the development.

[52] In summary, Mr Gapes told Mr Dempsey he would obtain a written statement from Russell McVeagh to the effect that the monies were held for the specific purpose of assuring payment for the works. The email he provided, with the addition of his own shorthand comment, was intended to convey this assurance. It was misleading and deceptive to advise that $4.172 million was being held in the project account for payment of civil works when, as Mr Gapes knew, the money was likely to go to Koi given its facility had expired and its Property Law Act notice was due to expire in the

next few days. Mr Gapes chose not to share any of this with Mr Dempsey because it was in his interest for the works to continue.

Did the Judge err in finding that Mr Dempsey relied on the email?

High Court judgment

[53] The Judge was satisfied that Dempsey Wood relied on the email in continuing to work on the development. She did not consider Mr Dempsey's follow-up enquiry of Russell McVeagh in his 13 November 2015 email undermined this conclusion. The Judge noted that Dempsey Wood continued to work on the development for some time before Russell McVeagh replied to this email.[20]

Submissions

[54] Mr Johnson submits that the Judge erred in finding that Dempsey Wood relied on the email. He contends that Dempsey Wood's conduct following the email suggests the complete opposite. He says Mr Dempsey's follow-up email to Russell McVeagh shows that he did not rely on the email. Either Mr Dempsey read the email as being inherently unreliable or, given his understanding of the development, he interpreted the email to mean that the funds in the project account were not exclusively for the payment of civil works and consultant costs. His query as to whether the funds in the project account were specifically for payment of the civil contract works shows that he apprehended that the funds were being held for something other than just payment of civil contract works. Mr Johnson says Mr Dempsey's further query about "other requirements needed to gain access to the fund", shows he appreciated there might be restrictions on the use of the funds and that Koi might have some control over them. Mr Johnson places particular emphasis on Mr Dempsey's enquiry as to whether the project account was intended to "allow for any shortfall in the financing of the project from Olympus Capital" (Koi's parent company). He says this shows that Mr Dempsey was openly speculating about the possibility of Koi claiming some of the funds in the project account.

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[20] At [254].

[55] Taken together, Mr Johnson submits that Mr Dempsey's follow-up email to Russell McVeagh invites one of two conclusions. Either Mr Gapes' email did not objectively amount to an unqualified assurance that Dempsey Wood would be paid if it continued working, or Mr Dempsey did not rely on it because he actively doubted what Mr Gapes had said and sought further clarification. He says if Dempsey Wood relied on the email as an unqualified assurance of payment if it continued working, it would have continued to do so, content in the knowledge it was guaranteed to receive payment. However, Mr Dempsey's follow-up queries show that he was not satisfied he had received an unqualified assurance of payment. Mr Johnson points out that Dempsey Wood went so far as to serve a further notice of intention to suspend works one week after receiving the email. He argues that these steps are not consistent with Dempsey Wood's claim that it had been reliably assured of receiving payment.

[56] Mr St John submits it is clear Dempsey Wood relied on the email in continuing to work on the development. He notes that Mr Dempsey did not receive a reply to his follow-up email for nearly two weeks and Dempsey Wood continued working in the meantime. In any event, Mr St John supports the Judge's finding that the further enquiry did not negate Dempsey Wood's reliance on the email. Borrowing from the expression used in *Red Eagle*, Mr St John says that the email had a "crucial continuing influence" on Dempsey Wood's decision to continue working.[21]

Assessment

[57] We are not persuaded there is any justification for us to depart from the Judge's assessment that Dempsey Wood relied on the email in continuing to work on the development. Such reliance was not negated by Mr Dempsey's follow-up email to Russell McVeagh asking for further information. There is ample evidence to support the Judge's conclusion, which has a distinct air of reality about it. If Mr Gapes had been open with Mr Dempsey that he could not provide the assurance as to payment he was seeking, it appears very likely that Dempsey Wood would have ceased work. The fact that Dempsey Wood continued to work on the development indicates Mr Dempsey did rely on the email. That he sought further information does not mean he disbelieved Mr Gapes, disregarded the email, or placed no material reliance on it.

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21 *Red Eagle*, above n 18, at [32].

Rather, it shows that he remained anxious and so he continued to seek assurance, directly from Russell McVeagh, that his understanding based on what Mr Gapes had told him, was correct.

[58] It seems to us that Mr Gapes, in furtherance of his own interests, was stringing Mr Dempsey along so that he kept working. The flaw in Mr Johnson's submission is that it does not follow from the fact that an assurance is not fully nailed down that it cannot be misleading and cannot have been reasonably relied on by a recipient who seeks to shore up the position by requesting that further nails be added.

Did the Judge err in her assessment of the losses caused?

High Court judgment

[59] The Judge accepted Mr Dempsey's evidence that in the absence of Mr Gapes' assurance in the email, Dempsey Wood would have "downed tools", stopped work, and "worried about the legals later".[22]

[60] In assessing quantum, the Judge rejected Dempsey Wood's claim for recompense for its extension of time claim because that was spread over the entire contract period.[23] She apportioned the November 2015 progress claim to allow for the 15-working-day period from the date of the email (12 November 2015) up to and including the day receivers were appointed (3 December 2015). She calculated this to be $20,974 per day, for a total of $314,610.[24] From this, the Judge deducted a nine per cent margin for profit, bringing the total to $286,295.[25]

Submissions

[61] Mr Johnson submits there are flaws in the Judge's causation analysis, describing it as "cursory". He cites *Red Eagle* for the proposition that s 43 requires a "practical or common-sense concept of causation",[26] and he refers to the statement in

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22 High Court judgment, above n 2, at [255] and [257].
23 At [205] and [259].
24 At [259].
25 At [261].
26 *Red Eagle*, above n 18, at [29].

Goldsbro v Walker that a "clear nexus" is needed between the impugned conduct and the claimed loss.[27]

[62] Mr Johnson submits that the Judge should not have accepted Mr Dempsey's evidence that Dempsey Wood would have "downed tools" had he not received the assurance in the email. He says Dempsey Wood was contractually obliged to continue work and the Judge should not have accepted so readily that it would have simply "repudiated" the contract. Mr Johnson referred us to the following exchange in cross-examination to support his contention that "the unavoidable point is that Dempsey Wood was contractually obliged to continue work":

> [Mr Johnson]
>
> So you say, as I understand it, you know the project could go into receivership by this time because Mr Gapes has told you, you know there was an attempt to find a new funder that had failed, you [then] asked specifically about funds in the account, Mr Gapes gives an answer. You did not actually rely on that answer, did you?
>
> [Mr Dempsey]
>
> We did, because we were carrying on working. We hadn't stopped. We were in the field doing our contract works or carrying out our contract work so for you to say that I didn't trust what [Mr Gapes] had said I think is wrong.

[63] Mr Johnson contends that the suggestion Dempsey Wood would have stopped work is at odds with Mr Dempsey's evidence that Dempsey Wood continued working despite reservations about Panama's financial position because it was "contracted to carry on" and he had "committed the company to building the project". As a matter of logic, he says it is difficult to argue causation in circumstances where a claimant has already committed to doing something before the impugned representation. Mr Johnson describes Mr Dempsey's rejoinder as "obvious" but "unpersuasive":

> [Mr St John]
>
> So notwithstanding what may have been in the contract, again, what would you have done if you hadn't had that assurance?
>
> [Mr Dempsey]
>
> We would've stopped work and probably looked at, yeah, the legal ways on how we bring the contract to a close. That'll be the process for that.

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[27] *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 401.

[64] Mr Johnson says that beyond "bare assertion" from Mr Dempsey, there was nothing before the High Court to enable a finding that Dempsey Wood would have simply quit the site.

[65] Next, Mr Johnson submits that the Judge failed to address the issue of timing. He asks, rhetorically, how quickly would Dempsey Wood have downed tools — would it have been a day, a week, a month? He says there was no evidence to support the Judge's conclusion that Dempsey Wood would have stopped work immediately apart from Mr Dempsey's evidence to this effect which he discounts as mere assertion:

> [Mr St John]
>
> My question is what would you have done if you hadn't received these assurances?
>
> [Mr Dempsey]
>
> Stop work immediately and that's what I told [Mr Gapes] we'd do and that's hence the calls, $4.172 million in the account, don't [worry], you'll get paid.

[66] Mr Johnson says that evidence is difficult to square with Dempsey Wood's own delay in raising concerns after the meeting with Webber Capital. Mr Jones' letter was not written until 29 October 2015 and, despite there being no response, Mr Dempsey did not speak to Mr Gapes until 11 November 2015. In summary, Mr Johnson contends that Dempsey Wood's arguments as to causation were conceptually confused and unsubstantiated. The Judge should have recognised this.

[67] Turning to quantum, Mr Johnson says Dempsey Wood's evidence about this was distinctly lacking. Dempsey Wood did not adduce any reliable evidence which could assist in determining the costs it incurred by continuing to work beyond 12 November 2015. This led the Judge to observe that a "broad-brush approach is all that is possible on the evidence".[28] The Judge reverted to what Mr Johnson describes as a "rudimentary" per-day calculation and deducting a "hypothetical" margin because Mr Dempsey could not say what the actual margin on the contract was. In these circumstances, he submits that the Judge should have declined to make any award or

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[28] High Court judgment, above n 2, at [261].

at least significantly discounted the claim. He argues that Mr Gapes should have been given the benefit of the doubt.

[68] Mr St John drew attention to Mr Dempsey's evidence that if he had known how bad Panama's financial position was, he never would have agreed to continue working on the development through November 2015. He only continued working because of Mr Gapes' assurance in the email. When Mr Dempsey was notified of the receivership on 3 December 2015, Dempsey Wood immediately ceased work on the site. He submits that the Judge was entitled to find on the evidence that Dempsey Wood would have ceased working immediately had it not been misled by Mr Gapes' email.

[69] As to quantum, Mr St John notes that almost six years had passed by the time the matter went to trial and detailed records to establish the appropriate profit margin were not available. The Judge's assessment was the mid-point of Mr Dempsey's evidence that the margin was generally between seven and 11 per cent. He argues that the Judge's approach was perfectly appropriate and necessary to do justice between the parties.

Assessment

[70] We are not persuaded the Judge was wrong to accept Mr Dempsey's evidence that he would have directed his company to cease work immediately had he not been misled by the email into thinking that the continuing work would be paid for. As the sole director of the company, Mr Dempsey was the only person in a position to give this evidence. While the Judge was not obliged to accept his evidence, she was entitled to do so and could not simply disregard it as nothing more than a bare assertion. This applies not only to the decision to cease work, but the timing of the implementation of such a decision. Mr Dempsey consistently stated that this would have occurred immediately. That is what happened when the receivers were appointed. There was no evidential basis for a conclusion that having taken the decision to stop work, it would have taken days, weeks or even a month to implement it. If there was no assurance of payment, it is reasonable to assume Dempsey Wood would not have carried on working.

[71] It is not uncommon for there to be a lack of precision in the quantification of loss. Dempsey Wood bore the onus of proof, but it cannot be said there was no evidence on which to base the assessment. It would have been wrong for the Judge to dismiss the claim for lack of proof. Nor do we consider it would have been appropriate to apply an arbitrary discount to give Mr Gapes, as the wrongdoer, the benefit of the doubt. Rather, the Judge was required to do the best she could on the basis of the available evidence to arrive at an assessment of loss that did justice to both parties. We see no error in her approach or in the conclusion she reached.

Conclusion

[72] For the reasons given, the appeal against the judgment in respect of the FTA claim must be dismissed. The damages awarded under s 301 of the Companies Act were calculated by reference to the same losses suffered by Dempsey Wood over the same period and these are subsumed in the judgment given in respect of the FTA claim. The liquidator took no part in these proceedings. For these reasons and because of the stance adopted by Dempsey Wood on this appeal, the orders made in the High Court under the Companies Act can be set aside without opposition.

[73] In these circumstances, Mr Johnson invited us to direct that costs in the High Court be remitted to that Court for reconsideration in the light of this Court's judgment. However, on reflection, we do not consider this is appropriate. Dempsey Wood succeeded on both causes of action in the High Court. We are not persuaded there is any reason why costs in that court should be reduced merely because the appeal against orders made under the Companies Act was not resisted for pragmatic reasons.

Result

[74] The appeal is dismissed save that the orders made under the Companies Act 1993 and reflected in orders (a), (b) and (c) of the sealed judgment of the High Court are set aside.

[75] The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

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