

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

**CIV-2011-404-8046  
[2014] NZHC 756**

BETWEEN

ENDEAVOUR GLASS PACKAGING  
LTD  
Plaintiff

ENDEAVOUR PACKAGING PTY LTD  
Second Plaintiff

AND

ANDREW MALCOLM FRASER  
First Defendant

690636 LTD (FORMERLY GATEWAY  
CARGO SYSTEMS LTD)  
Second Defendant

Hearing: 17 and 19 March 2014

Appearances: ARB Barker and A J Steel for the Plaintiff  
DCS Morris for the First and Second Defendant (given leave to  
withdraw)

Judgment: 10 April 2014

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**RESERVED JUDGMENT OF ELLIS J (FORMAL PROOF)**

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*This judgment was delivered by me on 10 April 2014 at 3.00 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Counsel/Solicitors:  
ARB Barker, Barrister, Auckland  
H Kelly, Solicitor, Wellsford  
DCS Morris, Cook Morris Quinn Solicitors, Auckland

[1] The first plaintiff, Endeavour Glass Packaging Ltd (EGP), is a New Zealand company involved in importing and distributing glass packaging and closures. The second plaintiff, Endeavour Packaging Pty Ltd (EPP), is an Australian company involved in a similar business across the Tasman. EPP was placed into administration on 14 August 2013.<sup>1</sup>

[2] The first defendant, Mr Fraser, was a director of both EGP and EPP between November 2002 and November 2011. His fellow EPP directors were Mr Seeto and Mr Wayne Edwards. His fellow EGP directors were Mr Edwards and Mr Vinko Rakich.

[3] Mr Fraser is also the sole director and shareholder of the second defendant, 690636 Ltd. At the time material to these proceedings 690636 Ltd was known as Gateway Cargo Systems Ltd and in this judgment I shall refer to the company as GCS. GCS has a 30 per cent shareholding in EGP.<sup>2</sup>

[4] The plaintiffs say that at the time material to these proceedings Mr Fraser was responsible for the financial management of EGP and EPP and controlled their bank accounts.

[5] In these proceedings EGP/EPP seek recovery of funds which, they say, belong to them and which Mr Fraser has effectively and wrongly caused to be advanced from those companies to GCS and/or to himself personally. The plaintiffs also say that Mr Fraser's actions are in breach of s 131 of the Companies Act 1993 (and his common law director's duty) and seek damages and an account of profits from him.<sup>3</sup> The defendants denied the claims and counterclaimed against EGP for \$2.5 million.

[6] On 13 March 2013 Venning J declined an application by the defendants for an adjournment of the five day trial which was scheduled to commence on 17 March

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<sup>1</sup> In August 2013 EGP took an assignment of all rights EPP had to claim against GCS in relation to the debts that are the subject of these proceedings and authorised EGP to act on its behalf in pursuing those debts.

<sup>2</sup> The name change occurred in May 2013.

<sup>3</sup> There was also a further, alternative, cause of action which (in light of the events I have recorded at [5] of this judgment) was abandoned and which I do not need to consider further.

2013.<sup>4</sup> Venning J summarised the reasons for seeking the adjournment in the following way:

[3] The application is advanced on the basis of material in a reply brief from a Mr McNeilage. The plaintiffs have also increased the quantum claimed.

[4] The defendants submit that the defendants, particularly Mr Fraser require time to respond to the matters raised in the reply brief which, on one view of it, could amount to an allegation of fraud against Mr Fraser.

[7] The Judge then went on to say:

[9] The plaintiffs were late in exchanging their witness statements (due 17 January, exchanged 3 February). The defendants then exchanged their witness statements on 4 March. In response to the defendants' witness statements the plaintiffs reinterviewed Mr McNeilage (he had formerly been employed by the second defendant). Mr McNeilage considered there were errors in a ledger provided by the defendants' discovery. The ledger in issue is the second plaintiff's ledger with the second defendant.

[10] In short, the point is that instead of a zero balance as at 1 July 2008, Mr McNeilage's reconciliation of the ledger discloses a balance of \$2.650m. It has led to the plaintiffs increasing the quantum claimed. That is the issue which has arisen which has led to the informal (by way of memorandum rather than application) application for adjournment of the trial.

[11] It is unsatisfactory that the matter has arisen in the way it has. Both parties have failed to comply with directions of the Court. However, I consider that in large part the present issue has arisen because of the defendants' failure to fully comply with the orders for discovery. The documents in issue and which Ms Cameron submitted Mr Fraser needed time to review are documents which should have been under the control of the second defendant. They are the second defendant's ledger statements. Even accepting there were orders for preservation of property, the defendants could and should have had access to them. Indeed, they should have located them in the course of complying with their discovery obligations. The ledger entries should be supported by the second defendant's bank statements. The ledgers were prepared by Mr McNeilage and/or other employees of the second defendant.

[12] Next, there are only a limited number of transactions predating 1 July 2008. Mr Barker suggested there were 10 to a dozen at most and confirmed that the figures referred to in the ledger now produced matched the entries in the plaintiffs' bank statements. There are likely to be corresponding entries in the defendants' bank accounts.

[13] On my review of the pleadings this case has always been about the reconciliation of the ledger balances. The matter now raised suggests a different starting point for the reconciliation but involves a similar exercise to that which the defendants will already have gone through.

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<sup>4</sup> *Endeavour Glass Packaging Ltd v Fraser* [2014] NZHC 463.

[14] As noted the fixture has been vacated once before. The plaintiffs will be prejudiced if the fixture is vacated. The Court allocates resources to fixtures on the basis parties will comply with directions and orders of the Court. If the current fixture is vacated an alternative date would be several months away.

[15] As noted, the documents that Mr Fraser wishes to access to review are largely documents which the defendants were required to discover to satisfy their discovery obligations. There can be no issue of third party discovery against Mr McNeillage as suggested. The second defendants could have called for the documents in the possession of Mr McNeillage in the course of satisfying their discovery obligations. He was a former employee.

[16] The pleadings have not changed. The increased quantum simply follows from the reconciliation exercise which was always going to be the focus of this case.

[8] The day after Venning J's decision (Friday, 14 March) counsel for the defendants, Mr Morris, filed a notice advising that, because the adjournment had been refused, the defendants were not in a position to defend the claim and were also discontinuing the counterclaim. The matter therefore came before me by way of formal proof.

[9] I proceed on the basis that the plaintiffs do not need to prove the allegations that were admitted by the defendants in the statement of defence.

[10] Notwithstanding the comment at [16] of Venning J's judgment above, it became apparent during the hearing before me that minor amendments to the pleadings would be required in order for this judgment to make sense. The necessary amendments were merely adjustments to certain of the figures contained in the claim, together with a brief pleading of the reason for those adjustments, namely GCS's failure to record pre-July 2008 advances that had been made to GCS (the matter referred to at [12] of the adjournment judgment). Leave was sought, and is hereby granted, to file that amended claim.

### **The issues requiring proof**

[11] The essence of the plaintiffs' claim is that the debt owed by GCS to EPP needs to be off-set against the debt owed by EGP to GCS. Determining quantum is the central task. It is a task that has not only required the reconciliation of the

various ledger balances in the respective companies' accounts but also interrogating some of the entries in those accounts.

[12] Without wishing to understate the difficulty of the forensic accounting exercise that the plaintiffs have undertaken, it is not necessary for me to get into any detailed analysis of the accounts in this judgment. I merely record that the plaintiffs have been required to unravel the accounts kept by Mr Fraser for EGP and EPP.<sup>5</sup> Mr Fraser's company, GCS, had its own ledger in those accounts and it is the transfer of funds between the plaintiffs and GCS, in what the plaintiffs' accounting expert Mr Weber has described as a money-go-round, that has required careful analysis. That task has been made more difficult because, it seems, there were two sets of accounts kept by Mr Fraser for each of the plaintiff companies.

[13] Ultimately, however, the money-go-round and the double accounting are merely obfuscatory; quite possibly deliberately so. I do not need to make specific findings in that respect. The more important point is that I am satisfied that Mr Weber's evidence forms a thorough and coherent accounting basis for this judgment.

*Issue 1: the position as at November 2011*

[14] The stepping off point for all of Mr Weber's analysis of the accounts was the figures contained in the EGP and EPP primary ledgers at the time of Mr Fraser's departure in November 2011. The specific pleading in the statement of claim is that the various balances recorded in the relevant ledgers showed:

- (a) A balance owing from EGP to GCS of NZD\$1,800,000;
- (b) A balance owing from GCS to EPP of AUD\$1,655,000; (NZD\$1.97 million);
- (c) In the EPP ledger, a balance owing from EPP to EGP of NZD\$2,788,149;

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<sup>5</sup> Although the defendants in their statement of defence denied that Mr Fraser had a controlling financial role in relation to the plaintiff companies, the evidence of Mr Rakich and Mr Edwards satisfies me that he did.

- (d) In the EGP ledger, a balance owing from EPP to EGP of NZD\$2,971,360.

[15] On the basis of the figures at (a) and (b), as at November 2011 GCS owed EPP approximately NZD\$1.97 million and EGP owed GCS NZD\$1.8 million. Treating EPP and EGP collectively that gives a net position whereby GCS owed them NZD\$170,000.

[16] In the defendants' statement of defence the figure at [14](b) is accepted but the figure at [14](a) is denied.<sup>6</sup> The pleading is that as at 11 November 2011, GCS's ledger account with EGP showed a balance owing from EGP to GCS of NZD\$3,411,768.07, approximately \$1.612 million more than the amount pleaded by the plaintiffs. There is no pleading of the nature of, or reason for, the difference.

[17] Mr Weber's evidence, however, explains why the plaintiffs' position is correct.

[18] The starting premise from an accounting perspective is that the EGP ledger accounts for EPP and GCS and the EPP ledger accounts for EGP and GCS are necessarily linked. More particularly, the inter-company balances should (subject to fluctuating exchange rates and differences in balance dates) be reconcilable. But what Mr Weber found was that during 2009 and 2010 there were quite significant discrepancies between the EGP and EPP accounts. Thus:

- (a) As at 31 March 2009:

- (i) The EGP ledger showed a balance owing by EPP of NZD\$4,731,477.66; but
- (ii) The EPP ledger showed a balance owing of AUD\$1,607,320.95 (approximately NZD\$1,945,000)

- (b) As at 31 March 2010:

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<sup>6</sup> The defendants denied having any knowledge of the balance figures at [14](c) and (d).

(i) The EGP ledger showed a balance owing by EPP of NZD\$5,057,101.22; but

(ii) The EPP ledger showed a balance owing of AUD\$2,115,123.59 (approximately NZD\$2,729,544).

[19] By 31 March 2011, however, Mr Weber found that the discrepancy had all but disappeared, due to a \$1.6 million adjustment made to the EGP ledger by Mr Fraser in 2011, but backdated to 1 April 2010. This adjustment involved a debit to GCS's ledger account in the sum of \$1.6 million and a corresponding credit to the EPP ledger account. The adjustment was annotated in the accounts as "correction per AMF" (AMF being Mr Fraser's initials).

[20] Although, as I have said, there is nothing before the Court about the basis for the defendants' position in this respect, I record for completeness that Mr Fraser apparently said that the \$1.6 million adjustment was supposed to be part of a three way transaction involving a cheque swap (which it seems did not occur) and which required a reciprocal adjustment made in the EPP ledger. This would have resulted in a credit to GCS which reduced GCS's liability to EPP. Mr Fraser's position was that he did not make the reciprocal adjustment on 1 April 2010 because of the increasing pressure that was being brought to bear upon him at that time.<sup>7</sup>

[21] Mr Weber rejected this as a possible explanation. He says that the April 2010 adjustment was properly made and, indeed, necessary to restore the significant imbalance that had arisen in the inter-company ledgers. He referred to documents that suggest that the imbalance he had identified was recognised by Mr Fraser as early as 2008. He also notes that the adjustment was made before the commencement of these proceedings. He said that making a reciprocal entry in the EPP ledger at that time, if that is in fact what had been intended, would have taken Mr Fraser a matter of minutes. Mr Weber concludes:

In my view, it is apparent that the \$1.6m adjusting journal was intended to correct the imbalance that existed as between EGP and EPP. There can be no other valid reason for this to have occurred.

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<sup>7</sup> Although not entirely clear to me it seems that at some later point Mr Fraser did in fact make the further adjustment and this is the basis for the figure pleaded in the statement of defence.

[22] I am therefore satisfied that the November 2011 ledger balances pleaded by the plaintiff in the statement of claim are correct. The stepping off point is, accordingly, that GCS owed EGP/EPP \$170,000 as at November 2011.

*Issue 2: Management fees and stock adjustment paid to GCS*

[23] The next issue that arises is whether (as the plaintiffs plead) that figure of \$170,000 should be increased to take account of what are said to be unauthorised payments made to GCS between 1 April 2003 and 31 March 2006 for “stock adjustment” and “management fees”. Mr Weber’s review of the historical EGP accounts revealed that, over this period, approximately \$1,294,000 had been debited to EGP and that the GCS ledger in the same accounts showed a credit in the same amount. More particularly the relevant credits/debits were:

(a)	Stock adjustment	31 March 2003	\$334,000
(b)	Management Fee	31 March 2004	\$300,000
(c)	Management Fee	31 March 2005	\$300,000
(d)	Management Fee	31 March 2006	\$360,000

[24] In their statement of defence the defendants accepted that the stock adjustment should be removed “from the EGP liability”.

[25] Although that is probably sufficient to deal with that aspect of the matter, I record that Mr Weber explained that treating a stock adjustment as a distribution of income, and crediting it to a shareholder’s current account, is in breach of accounting convention. He said that the only possible explanation for such an entry is that there was in fact a transfer of stock from GCS to EGP. But there was no evidence of any such transfer and nor was it Mr Fraser’s explanation, which was that the transfer was made for the purpose of reducing EGP’s taxable income. Mr Weber also explained why that explanation makes no sense.

[26] The defendants also accepted in their statement of defence that GCS was not entitled to two thirds of these management fees. But they maintained its entitlement to GCS's "share", namely \$320,000.

[27] The evidence of Mr Rakich and Mr Edwards, which I accept, was that no authority was ever given by them or by EGP to pay management fees at all. That evidence is supported by the fact that Mr Rakich and Mr Edwards (self-evidently) did not themselves receive any such fees and did not query why they had not received them.

[28] The evidence of Mr Weber reveals not only that the funds represented in the journal entries were actually withdrawn by GCS but that the company/Mr Fraser went to significant lengths to hide this from EGP's Board. A variety of devices were employed, including representing to the Board between 2003 and 2007 that some of the funds withdrawn by GCS were on deposit with Westpac Bank. In fact EGP had no account with Westpac; the account was GCS's.

[29] I am therefore satisfied that GCS has received from EGP \$1,294,000 to which it was not entitled.

*Issue 3: correctness of July 2008 nil balance*

[30] Mr McNeilage is an accountant and a former employee of GCS. He commenced employment with the company in November 2006. In that capacity he also assisted Mr Fraser with accounting work for EPP and EGP.

[31] His evidence was that, up until 31 May 2008, both EPP and EGP used an accounting system known as "Accountabill". But a new "Quickbooks" system was trialled by EGP from 1 June 2008 until 31 March 2009. EPP also trialled Quickbooks from 1 July 2008 to 31 December 2008.

[32] It appears that during this time Mr McNeilage was responsible for entering GCS's opening balances into both the EGP general ledger and the EPP general ledger in Quickbooks. Mr McNeilage said that he acted on instructions from Mr Fraser and the opening balances he entered were taken from records purportedly

generated by Mr Fraser from Accountabill, as at 31 May 2008. The opening balance he entered for GCS in the EPP ledger was nil; no transactions before 1 July 2008 between EPP and GCS were recorded in the new ledger.

[33] Mr McNeilage's evidence was, however that GCS's own records showed a quite different picture. He produced in evidence a printout from the GCS ledger for EPP that shows a balance of \$1.7 million owing as at 1 April 2008 and further records which evidence a number of advances made by EPP to GCS prior to 1 July 2008 (ie in the intervening three month period). His evidence was that by 30 June 2008 GCS owed a total of \$2.651 million to EPP. Mr McNeilage explained that although he no longer works for GCS he still has access to that company's historic accounts, because he works for the company that took over its business. Mr Fraser has no connection with that company.

[34] There is further, independent support for the genuineness of the ledger produced by Mr McNeilage in the form of bank records that had been separately sought by the plaintiffs from Westpac Bank for the relevant period. Mr Weber has reconciled the credits shown in Mr McNeilage's version of the ledger against the bank accounts for EPP between 5 October 2007 and 1 July 2008. He was able to do so to extent of \$2.164 million. As I understand it the reason for the discrepancy is that the bank records sought do not cover the entire period in question. But I am satisfied on the basis of Mr McNeilage's evidence, and the ledger printouts he provided, that the full \$2.651 million should have been taken into account when the opening balances were recorded.<sup>8</sup>

[35] I record that the printouts of the GCS ledger produced by Mr McNeilage can be contrasted with the one discovered by Mr Fraser which showed a nil balance on 1 April 2008 and no transactions between EPP and GCS prior to 1 July 2008. I do not propose to comment on that further here.

[36] But the evidence satisfied me that GCS had a pre-existing indebtedness of \$2.651 million to EPP at the time of the transition to the new accounting system in

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<sup>8</sup> The difference comprises a \$337,000 balance that the ledger shows was owing at 15 August 2007 and an additional credit of \$150,000 on 6 June 2008.

mid 2008. The nil opening balance recorded in the new accounts is therefore incorrect; GCS owes a further \$2.651 million to EPP/EGP.

## **Conclusions**

[37] Based on the conclusions I have reached on the evidence above, I consider that GCS has received funds belonging to the EPP/EGP to which it is not entitled totalling \$4,613,000 and the plaintiffs are entitled to judgment against the company in that amount.

[38] In addition, the evidence makes clear that Mr Fraser facilitated (and in fact engineered) the receipt by GCS of that sum and must have known that GCS was not entitled to it. There is no evidence before me that suggests that those funds were paid to GCS for services performed or that EPP/EGP received any other benefit in return. In permitting GCS to benefit in this way at the expense of EGP and EPP Mr Fraser has necessarily breached the duties he owed those two companies as a director. He was involved in conflicted transactions and those transactions were not authorised.

[39] There is nothing to suggest that Messrs Rakich and Edwards were complicit in any of this and, indeed, it would make no sense for them to be. Moreover, Mr Weber's evidence is that Mr Fraser went to considerable lengths to keep the true state of the companies' accounts from his fellow directors.

[40] Accordingly I can see no reason why Mr Fraser should not be liable to pay (equitable) damages to the plaintiff companies for the losses he has caused through breaching his duties as a director. In all likelihood there would also be a restitutionary remedy available.<sup>9</sup> In either event Mr Fraser is required to repay the \$4,613,000 he has caused to be received by his company, GCS, at the expense of the plaintiffs.

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<sup>9</sup> The nature of the available remedies in cases such as this is discussed more fully at [6.6] of Peter Watts' text, *Directors' Powers and Duties* (Wellington, LexisNexis, 2009).

[41] Notwithstanding that I have found both GCS and Mr Fraser liable to the plaintiffs in the sum of \$4,613,000, there can, of course, be no possibility of double recovery.

[42] At Mr Barker's request I reserve leave to the plaintiff to make further application to the Court in the event that it appears that some form of equitable remedy that involves tracing the funds received by GCS into the hands of Mr Fraser becomes necessary. Given my conclusion in relation to Mr Fraser's personal liability that is probably unnecessary, but I do so anyway.

[43] I record that Mr Barker sought an award of indemnity or increased costs although he did not advance any specific basis for doing so. But in my view there is nothing before me to suggest that 2B costs are not appropriate in this case.

[44] Interest is payable on the \$4,613,000 judgment sum at the Judicature Act rate.<sup>10</sup> I accept Mr Barker's sensible suggestion that, in light of the difficulty ascertaining what the net balance of the various ledgers was at any particular time, the fairest and cleanest course is for interest to run from 1 November 2011. As I have said, the defendants are also to pay the plaintiffs' costs on a 2B basis.

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Rebecca Ellis J

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<sup>10</sup> Judicature Act 1908, s 87.