IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-443-000002
[2015] NZHC 1327

BETWEEN	CHRISTOPHER LAWRENCE WHITAKER AND TERESA MARGARET WHITAKER Plaintiffs
AND	JOHN FREEMAN Defendant

Hearing: 19 August 2014

Appearances: A R Laurenson for the Plaintiffs
M Keall for the Defendant

Judgment: 22 June 2015

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 22 June 2015 at 10.30 a.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

Govett Quilliam, New Plymouth
Michael Keall, Auckland

Introduction

[1] The plaintiffs, Christopher and Teresa Whitaker, claim summary judgment for the full amount of their claim of $436,279.60 plus interest and costs. The defendant, Mr Freeman, opposes summary judgment.

[2] The claim arises out of an undated agreement for the sale and purchase of Mr and Mrs Whitaker's 100% shareholding in Whitaker Civil Engineering Limited (Whitaker) to a company called Black and Brown Limited (B&B), whose sole shareholder and director is Mr Freeman. Broadly at issue is Mr Freeman's liability as guarantor for the performance of B&B's obligations under the agreement, which turns on:

(a) Whether or not the parties to the agreement, Mr and Mrs Whitaker and B&B, reached a true accord, the terms of which must govern their rights and obligations with respect to price and other matters said to be in dispute;[1] and if they did

(b) Whether the Whitakers personally suffered loss as a result of B&B's alleged breach for failing to settle its purchase of the shares.

[3] If the Whitakers demonstrate that there is no genuine dispute on those points, Mr Freeman will be liable for B&B's breach as its guarantor. The onus is on the Whitakers to prove their claim and to show that Mr Freeman lacks a tenable defence – in which case summary judgment may be granted.

The Court's approach to a plaintiff's application for summary judgment

[4] The plaintiffs make their application in reliance upon High Court Rule 12.2, which relevantly requires that a plaintiff is to satisfy the Court that the defendant has no defence:

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[1] The primary argument over the issue of whether the parties reached an accord relates to a claimed increase in the purchase price of $926,700. It is however not the only such argument.

> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action. …

[5] The legal principles applying to applications for summary judgment were succinctly expressed by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26]:

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[6] The no defence position and the obligations that the rule imposes on the parties have been expressed in a number of ways. In *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 the Court of Appeal said:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[7] For reasons I will turn to presently, I am not satisfied on the material currently before the Court that Mr and Mrs Whitaker have demonstrated they have a claim to which Mr Freeman has no defence.

The plaintiffs' claim

[8] The basis of Mr and Mrs Whitaker's claim is a written guarantee contained in an undated agreement for sale and purchase which they say B&B breached when it failed to settle the purchase of their shares in Whitaker.

[9] The statement of claim relies on a single cause of action and is pleaded in minimal terms to the following effect:

(a) The plaintiffs decided to sell their shares and Whitaker entered into an agreement with Baker Tilly (NZ) Transaction Services Ltd to act as their agent for the purpose of sale. Under the agreement Whitaker was required to pay a commission of 6% (or, $336,104.75) if an agreement for sale became unconditional.

(b) On or about 8 February 2013, they entered into an agreement for sale and purchase with B&B in which B&B agreed to buy the shares for $3.23 million (subject to adjustments);

(c) Mr Freeman signed the sale and purchase agreement as sole director of B&B and as B&B's guarantor.

(d) The agreement was made unconditional by B&B on or about 14 February 2013, and settlement was to take place on 27 February 2013.[2]

(e) Settlement did not in fact occur on the 27 February date, because the plaintiffs were not in a position to settle. They advised B&B that they would be ready to settle on 13 March 2013.

(f) Settlement did not occur on 13 March 2013, however B&B advised it would settle on 27 March 2013, having earlier indicated 22 March for settlement. On neither of the purported settlement dates did settlement actually occur.

(g) On or about 22 April 2013 Vendor Settlement Notices were served on B&B and Mr Freeman.[3] The notices were not complied with.

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2 Settlement date is defined in the agreement. It means "10 working days after the date of this agreement".

3 The notices required settlement of the purchase by payment of the claimed settlement amount and interest within 12 working days of the date of service of the notice.

(h) B&B's failure to settle the agreement for sale and purchase amounted to a breach of the agreement for sale and purchase.

(i) As B&B did not remedy the breach as required by the Vendor Settlement Notices, on or about 10 May 2013, Whitaker served B&B and Mr Freeman (as guarantor) with cancellation notices, and the agreement for sale and purchase was terminated. B&B never took ownership of the shares in Whitaker.

(j) As a result of B&B's breach of the agreement for sale and purchase the plaintiffs have personally suffered losses (by reason of their 100% shareholding in Whitaker) amounting to $436,279.40.

[10] The losses claimed are said to be made up of:

(a) Commission payable by Whitaker to Baker Tilly of $336,104.75;

(b) Work undertaken by employees of Whitaker in respect of the agreement for sale and purchase;

(c) Legal costs incurred by Whitaker of $45,530.91.

[11] Before turning to Mr Freeman's grounds of opposition, I pause to note that the plaintiffs' pleading is silent on the matter of the amount of the adjusted purchase price claimed in the Vendor Settlement Notices from B&B for the shares ($4,156,859), which appears to lie at the heart of Mr Freeman's opposition. The plaintiffs' pleading touches upon that adjustment in general terms only and by oblique reference to the Vendor Settlement Notices. At no point does it state that there was any actual adjustment in price, or set out the basis for it under the terms of the agreement. The plaintiffs also do not elaborate upon the issue in their evidence in support of their application, other than by passing reference to the agreement and the settlement notice. It is their affidavit evidence in reply that principally deals with the issue and as such it is necessary to bear in mind that the defendant has not had

the opportunity to respond to it. Caution is needed before it is treated as determinative.

The grounds advanced in opposition at the hearing

[12] Mr Freeman acknowledges that he signed the agreement for sale and purchase on 8 February 2013, though he says that negotiations continued for some time after that date over various issues. He does not deny however that there was on the part of both sides an intention to create legal relations. At the hearing four specific grounds were advanced on his behalf in opposition to the claim for summary judgment. The first to third grounds go to the issue of liability. They are that:

(a) The agreement for sale and purchase is void and unenforceable. The reasons are twofold:

(i) There has been a purported increase of $926,770 in the purchase price under cl 11.1 of the agreement, which is questionable, and there is no machinery provision in the agreement that provides an objective means of correcting the irregularity and providing certainty. The result is contractual uncertainty over the purchase price.

(ii) The date of the agreement is uncertain, and hence the date for settlement nominated in the agreement, being 10 working days after the date of the agreement, cannot be identified. There is no machinery provision in the agreement for identifying the settlement date.

(b) Alternatively, there is no evidence that the plaintiffs were ready, willing and able to settle on the purported settlement dates.

[13] The fourth ground goes to loss. It is that there is no evidence that the plaintiffs actually suffered loss, because the claimed losses (if proved) would be losses suffered by Whitaker and not Mr and Mrs Whitaker personally.

Legal principles relating to contractual uncertainty

[14] It is well established that certainty as to essential terms is a prerequisite for formation of a contract. If the contract itself is not certain, it must be capable of achieving certainty, usually by means of some machinery explicitly outlined in the contract.[4] It is true that it will be rare for a contract to be void for uncertainty if the parties had the intention to contract, because lack of specificity will often show a lack of intention to contract; but certainty and intention are not the same thing.[5] It is also true that once a court has decided that the parties intended to be bound, it will do what is necessary to uphold the contract, and in some cases, the courts will step in to impose certainty on an agreement which is uncertain.[6] In a case where, as here, uncertainty was an issue upon summary judgment, Tipping J applied that approach:[7]

> It is one thing to imply a term so as to create a contract. That is logically unsound and not permissible: see per Lord Roskill in *Aotearoa International v Scancarriers A/S* [1985] 1 NZLR 513 at p 556. It is logically sound and quite permissible, agreement on essentials having been reached, to imply necessary terms so as to give business efficacy to the bargain.

[15] Justice Tipping went on to find that various terms which were relatively clear in context, but not explicitly defined in the contract, could be clarified by implication of terms imposing the normal business practices relevant in the situation.

Contract – provisions as to price

[16] The agreement for sale and purchase is a fairly extensive document. It comprises some 33 operative clauses (and numerous sub-clauses) together with several schedules, one of which sets out a lengthy list of warranties and representations. The nominated vendors and purchasers are Mr and Mrs Whitaker and B&B. Mr Freeman is named as guarantor of B&B's obligations under the agreement. Clause 32 sets out, in standard terms, his obligations as guarantor.

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4 See for example *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 489 (CA) at 495; *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) at [50]-[58].

5 *Fletcher Challenge Energy*, at [50].

6 At [58]; *Money v Ven-Lu-Ree Ltd* [1989] 3 NZLR 129 (PC) at 133-134.

7 *Marxen v Smith* [1990] 3 NZLR 585 (HC) at 598.

[17] Clause 5 of the agreement materially provides that the term "purchase price" means $3.23 million.[8] It also sets out how that purchase price is to be paid - it provides for payment on a staged basis, partly in cash and partly by B&B's procuring the company to assign all outstanding retentions due to it as at 30 November 2012, to the Whitakers. Additionally it provides for adjustments in the amounts of cash and retentions but without affecting the overall purchase price of $3.23 million. It requires "the outstanding retentions" and the outstanding retentions figure to be shown in the settlement accounts.

[18] Adjustments to the overall purchase price are dealt with under cl 11. Under its provisions, upward or downward adjustments are to be made to the purchase price depending upon whether the "net assets figure set out in the settlement accounts" is more or less than the purchase price of $3.23 million.

[19] Materially, cl 11.1 sets out that the purchase price is increased if the net assets figure set out in those accounts is more than $3.23 million. It states:

> If the net assets figure set out in the settlement accounts is more than $3,230,000.00, then the amount more than $3,230,000.00 ("balance") shall be paid by the purchaser to the vendor over three (3) months from the settlement date, with interest calculated daily and accruing at the rate of 11.15% per annum on the unpaid portion of the balance until it is paid in full.

[20] Clause 11.2 operates in the reverse and sets out that the purchase price is decreased if the net assets are less than $3.23 million. It states:

> If the net asset figure set out in the settlement accounts is less than $3.23 million, then the amount less than such figure shall be paid by the Vendor to the Purchaser within seven (7) days of the settlement accounts being finalised and if not paid shall accrue interest from the date payment was due until payment is made by the Vendor to the Purchaser at the interest rate…

[21] Before turning to the accounts that serve as the settlement accounts for the purpose of the agreement, I pause to refer to cl 10. It sets out certain principles governing the assessment of the net assets for inclusion in those accounts, and hence is material to the ultimate purchase price. Pertinently, cl 10.1 requires an assessment

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[8] Clause 2 also defines the purchase price as $3.23 million.

of the total operating assets of the company and its liabilities as the basis for determining the net assets:

> **Net assets**
>
> 10. The advances are excluded from the total liabilities in the calculation of the net assets of the company.
>
> 10.1 The Purchaser has entered into this transaction on the basis that in the settlement accounts the net assets of the company, **being the total operating assets less the total liabilities**, will be not less than $3.23 million. This does not include the 2012 Land Rover vehicle and such vehicle and any financing arrangements shall be transferred out of the company's ownership before the completion of the settlement accounts.
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> 10.2 The value of the plant and equipment in the business is agreed at $4,096,000.00 (including the asset revaluation reserve). This figure shall be taken into account in assessing the net assets of the company for the purposes of the settlement accounts.
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> [Emphasis added.]

[22] Turning then to the settlement accounts, it is common ground that these are a set of accounts prepared by Whitaker's accountants, Vanburwray Chartered Accountants Limited, for the period to 30 November 2012, that were given to B&B in late January 2013 before both sides signed the agreement for sale and purchase.[9]

[23] Notably, no figure for "net assets" is set out in the settlement accounts, despite the claimed increase and the requirements of cl 11.1. Additionally those accounts do not identify what categories of the assets have been treated, or should be treated, as "operating assets" for the purpose of determining the net assets figure. That, it seems, is left to be inferred, and despite the requirements of cl 5, the settlement accounts do not set out the outstanding retentions as a separate item.

Analysis

Does clause 11.1 authorise the claimed increase of $926,770? Or is there uncertainty as to price?

[24] The plaintiffs claim they were entitled to an upward adjustment of $926,770 to the purchase price of $3.23 million that is set out in cl 5 of the agreement. That

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[9] This accords with the meaning of "settlement accounts" as defined in cl 2 of the agreement.

claimed increase was set out in Vendor Settlement Notices. It was also set out in a statement of Whitaker's financial position provided by Whitaker's accountant in early April 2013.

[25] At issue is whether the plaintiffs have demonstrated that they are entitled to the claimed increase in purchase price, or whether as the defendant contends, there is a real question as to:

(a) Whether the increase is unequivocally authorised under cl 11.1; and if not

(b) Whether there is an objective means of correcting or resolving the issue, and thereby determining the extent of the entitlement to any adjustment to the purchase price of $3.23 million.

[26] Counsel for the defendant freely accepts that despite the lack of a net assets figure in the settlement accounts it is possible to deduce, by reference to cl 10.2 of the agreement and the content of the November accounts, that there would be an upward adjustment to the purchase price of $3.23 million based upon an expressly agreed revaluation of plant and equipment. There was, as cl 10.2 of the agreement shows, a distinct accord on a revaluation of plant and equipment for use in assessing the net assets, and (consistent with that accord) the amount of the revaluation is clearly set out in the settlement accounts. Counsel acknowledges that the revaluation could take the purchase price to a sum in excess of $4 million.

[27] Counsel submits however that the November settlement accounts contained a separate upward adjustment of over $1 million which was not the subject of any such accord, and which was used to artificially inflate the net assets as at 30 November 2012, in order to justify the claimed increase of $926,770 under cl 11.1. He submits, in essence, that:

(a) Retentions were concealed in the sundry debtors figure in the settlement accounts as if they were new sundry debtors. The intention to include retentions in the settlement accounts in this way was

without disclosure or agreement throughout the time of the parties' negotiations from October 2012 to January 2013 when the settlement accounts were provided;

(b) It was not until early April 2013, when the plaintiffs were calling for settlement, that they provided an amended statement of position that disclosed this treatment of the retentions, together with a claimed increase in the net assets of $926,770; and

(c) Without the inclusion of retentions, the net assets as at 30 November would not have exceeded $3.23 million. The correct net assets figure would not therefore have justified the claimed increase of $926,770 under cl 11.1 even if adjusted for the revalued amount of the plant and equipment.

[28] Counsel also submits that it is by no means clear from the terms of the agreement that retentions should have been treated in this way and in fact that this treatment appears to be contrary to sound accounting practice. The result is, he contends, that the claimed price increase of $926,770 under cl 11.1 (the "pivotal" clause dealing with the entitlement to an increase in the purchase price) was arguably irregular.

[29] Counsel also argues if there had been a genuine increase in the net assets, Mr Freeman would have accepted readily that he could not argue, but that the evidence suggests the contrary and therefore that cl 11.1 was not triggered. He further submits that it would be a strange result if, as purchaser, Mr Freeman had agreed to an increase in the purchase price under cl 11.1 for retentions when under cl 5 ownership of retentions belongs with the vendor.

[30] The submission is reflective of Mr Freeman's evidence. He deposes that during the parties' negotiations over price in October 2012 the company's accountant provided details of the monthly accounts for September and October, which gave no indication that retentions were included in the monthly assessment of the company's position, or that retentions would be used to justify an

increase in price. He says when he received the November settlement accounts shortly before signing the agreement in January 2013 he noted a significant increase in the monthly figure for current debtors – it had increased by over $1 million over the two month period to 30 November 2012. At the time he was unconcerned, because he had no reason to assume other than that the increase reflected a significant genuine growth in current debtors. There was no note or other indication in the settlement accounts to show the contrary. It was not until several months later, in early April 2013, when he was given an updated statement of the company's financial position, that the company's accountant revealed that the sundry debtors figure in the settlement accounts had been inflated by the inclusion of retentions.

[31] The statement sets out the position for each of the three months September to November 2012, and contains a notation for the November position which Mr Freeman contends contrasts tellingly with the absence of any such qualifying notation in respect of the September and October positions contends. The updated statement also revealed for the first time that the sundry debtors figure for November included retentions.

[32] Mr Freeman says that had he been aware that the plaintiffs' accountant intended to treat retentions in the settlement accounts in this way, he would never have agreed to it, especially because under cl 5 they were to be assigned back to the vendors.

[33] Counsel for the plaintiffs did not attempt to examine the terms of cl 11, or to set it in the context of the overall terms of the agreement, or its relationship with cl 10.2. Critically cl 10 identifies that the 'operating assets' are to be taken into account in assessing the 'net assets' for the purpose of cl 11, but it is silent on what seems to be the key underlying question - whether the operating assets are to include retentions.

[34] There was also no analysis of these provisions and cl 5. The latter deals expressly with retentions due as at 30 November 2012 (which are to be applied by way of assignment in part payment of the purchase price). It expressly states that any adjustments that may be required to the amount attributable to the assigned

retentions do not affect the purchase price of $3.23 million. However, materially it does not deal with the relationship between operating assets and retentions. There is a marked absence of provisions that might make the position concerning this relationship plain. Presumably the position is explicable, but there has been no analysis of the agreement that provides the necessary explanation.

[35] Rather than undertake an analysis of the terms of the agreement, counsel for the plaintiffs took the approach that Mr Freeman's allegations of fact are plainly wrong. By this approach he sought to deal with the issue of retentions. He pointed to evidence given in reply to Mr Freeman's evidence by the company's accountant as proving that the accounts for the three months of September to November 2013 all included retentions and that the marked increase in the net assets of the company in the November accounts was because of an increase in the company's profitability over the past 6 to 8 months, and not because of a new and inconsistent approach to retentions in those accounts. He also pointed to Mr Whitaker's evidence in reply as demonstrating that there is no substance in Mr Freeman's claim that he did not know what the position was with respect to retentions. Mr Whitaker says a list of retentions was given to Mr Freeman on 13 February 2013 and Mr Freeman agreed to them.

[36] It may well be the case that the monthly accounts incorporated retentions and that there was a dramatic improvement in the company's profitability that accounts for the increase of approximately $1 million in the November sundry debtors. It may also be the case that in February 2013 Mr Freeman knew about retentions due to the company (including any due as at 30 November). Nonetheless counsel's submissions on these disputed factual matters are conclusory. There is a paucity of contemporaneous documentary evidence that puts these disputed matters beyond argument. The submissions also rather beg the question whether cl 11 reflects a common intention to incorporate retentions in the assessment of operating assets, and therefore in the net assets. That question is not one that is amenable to definitive answers simply on the evidence currently before the Court. It needs to be explained in terms of the agreement for sale and purchase or by reference to the availability of some standard accounting mechanism.

[37] I do not think it prudent to rely upon factual assertion given by way of reply evidence. It may well be that there is a clear answer based on normal accounting practice, but no clear accounting evidence is presently before the Court.

[38] I cannot therefore be satisfied on the material presently before the Court that there is no argument of substance as to whether an accord was reached on the adjusted purchase price. Accordingly, I conclude that the matter is not amenable to summary judgment.

Uncertain settlement date?

[39] I turn then to the second ground of opposition. Given the finding on the first ground, it is not strictly necessary to deal with this ground of opposition. I note, without drawing any firm conclusion, that there do appear to have been mechanisms in the form of settlement notices for fixing a settlement date.

[40] Likewise, the argument that the plaintiffs were in fact not ready, willing and able to settle the agreement on the date specified in the settlement notice dated 22 April 2013 appears weak, and was not actively pursued in argument at the hearing, but since it has already been established that the agreement was arguably uncertain, it is not necessary to deal with it further.

No loss

[41] Finally, and in the alternative, Mr Freeman argues that the plaintiffs have not suffered loss because they are distinct legal persons from the company and its employees and the losses claimed were suffered by the company.

[42] The plaintiffs disagree, citing *Christensen v Scott*.[10] That case concerned a claim associated with harm to a company, but based on a duty owed directly to the shareholders. The shareholders had hired an accounting firm and a legal firm to carry out work associated with a business purchase, but the firms had done so negligently. As a result, the company collapsed. Its shares were worth nothing. They commenced

[10] *Christensen v Scott* [1996] 1 NZLR 273.

a claim where the company claimed in breach of contract and negligence, and they personally claimed in negligence.

[43] Thomas J noted the traditional position from *Foss v Harbottle*[11], being that they could not claim as their own losses which were actually suffered by the company. That type of claim, which was correctly struck out, is distinguishable from a case which happens to involve a company, but where the duty is owed to and the losses suffered by the plaintiffs personally. The present pleading is suggestive of losses of the former kind, and as such cannot be claimed by the Whitakers. They must plead and demonstrate, on the evidence, personal loss.

[44] In terms of valuation, *Christensen v Scott* says this:[12]

> [46] We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors.

[45] The diminution in value issue appears to me to be an issue of what types of loss are attributable to the shareholders as opposed to the company. If a company suffers loss, and the shareholders try to claim that loss as their own, they are putting themselves in the company's shoes. Unless done in accordance with the Companies Act 1993, that violates the rule in *Foss v Harbottle* and the claim is not a permissible one. If the shareholders are claiming a diminution in value of their shares, that tends to show that they are concerned with losses they personally have suffered (since the point of separate legal personality is that companies and shareholders are distinct).

[46] It should be noted that *Christensen v Scott* itself is not uncontroversial, as it partly contradicts the rule in *Prudential Assurance Co Ltd v Newman Industries*

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11 *Foss v Harbottle* (1843) 67 ER 189

12 *Christensen v Scott*, above n 12, at 280.

Ltd.[13] It also has been rejected by various courts in Australia as an unacceptable inroad into the rule in that case.[14]

[47] Here, the plaintiffs are not claiming for a loss they personally have suffered. They are claiming for losses their company suffered. It was the company which paid the commission to Baker Tilly (pursuant to its personal contractual obligation to Baker Tilly) and the company which paid the employees. If the plaintiffs were to show a personal loss, to my mind that would have to be quantified as the difference between the price they could have expected to receive under the agreement for sale and purchase for their shares and the price they might actually receive in a future sale. That is, the loss would be the diminution in value of the shares in the company. There is no evidence of this type of personal loss currently before the Court, and as such I consider that, in addition to arguable uncertainty, there is an arguable case that the plaintiffs have not suffered loss.

Result

[48] I am not satisfied that summary judgment for the plaintiffs is appropriate. They have not shown that the defendant has no reasonably arguable defence to their claims. The application for summary judgment is accordingly declined.

[49] In accordance with *NZI v Philpott,* costs are reserved.[15]

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Associate Judge Sargisson

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13 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (CA).

14 See *Milfull v Terranora Lakes Country Club Ltd* [2002] FCA 178; *Thomas v D'Arcy* [2004] QSC 260

15 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).