IN THE COURT OF APPEAL OF NEW ZEALAND

CA201/2014
[2015] NZCA 149

BETWEEN	KENNETH ANGUS HOLMES Appellant
AND	KIRIWAI CONSULTANTS LIMITED First Respondent
	KENNETH ANGUS HOLMES AND DAVID BRIAN RUSSELL AS TRUSTEES OF THE K A HOLMES 2003 FAMILY TRUST Second Respondent

Hearing:	5 February 2015 (further submissions received 26 February 2015)
Court:	Stevens, French and Miller JJ
Counsel:	B D Gray QC and S D Williams for Appellant P J Dale for Respondents
Judgment:	6 May 2015 at 10.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed and the judgment of the High Court against the appellant for $3.287 million is confirmed.

B The application for extension of time in which to bring the cross-appeal is granted.

C The cross-appeal is allowed. The judgment of the High Court against the second respondents is quashed and replaced with a judgment in the sum of $1,932,908.

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

REASONS OF THE COURT

(Given by French J)

Introduction

[1] A company director buys the shares of a minority shareholder. The director does so without telling the minority shareholder that the company is in the process of negotiating a highly lucrative deal that, were it to go ahead, would significantly affect the value of the shares. Shortly after the shares are transferred, the lucrative deal does indeed go ahead. The minority shareholder (who had also been an employee of the company) finds out about it and sues the director.

[2] That was the scenario before Courtney J in the present case.[1]

[3] The Judge held that the fair value of the shares for the purposes of s 149 of the Companies Act 2003 was not affected by the possibility of the lucrative deal but that, in the special circumstances of the case, the director owed a fiduciary duty to the minority shareholder to disclose what he knew about the negotiations. The Judge found the director had breached that duty and awarded the minority shareholder the difference between what was paid for the shares and the amount they would have been worth after the lucrative deal went ahead.

[4] The director now appeals that decision and the minority shareholder cross-appeals the Judge's ruling regarding the assessment of fair value under s 149.

Background

[5] The appellant, Mr Holmes, is an experienced businessman in the forestry industry. In 2006, he acquired the Lambert group of companies. The acquisition

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1 *Kiriwai Consultants Ltd v Holmes* [2014] NZHC 512.

was done through the vehicle of a company he formed especially for that purpose called Holmes Ventures Limited (HVL).

[6] Kiriwai Consultants Limited (Kiriwai) had been providing contract management services to the Lambert Group. Kiriwai was owned by Mr Emmens who was a friend of Mr Holmes.[2]

[7] After the takeover, Mr Emmens (through the auspices of Kiriwai) continued to provide management services to HVL. It had been agreed that Mr Emmens would have a financial stake in HVL and this was formalised in 2007 when his company Kiriwai acquired 10 per cent of the shares in HVL for the sum of $200,000. Mr Holmes remained the sole director of HVL and he and his family trust, the K A Holmes 2003 Family Trust (the Holmes' Family Trust), held the other 90 per cent of the shares.[3] Kiriwai and the trustees of the Holmes' Family Trust (Mr Holmes and his accountant Mr Russell) entered into a written shareholders' agreement.

[8] In 2009, Mr Emmens became group general manager of HVL and was directly employed by HVL. Kiriwai's shareholding was linked to his continued employment in that, under the shareholders' agreement, HVL could require Kiriwai to sell its shareholding if Mr Emmens ceased to be an employee of HVL. As an incentive for Mr Emmens to remain with HVL, the shareholders' agreement also provided that if Kiriwai sold its shares within five years it would receive no more than $200,000. If, however, it sold after five years it would receive the fair value of the shares.

[9] The HVL group was successful. Unfortunately, however, in 2012 the relationship between Messrs Holmes and Emmens broke down to the point where Mr Emmens went on stress-related sick leave, there was talk of disestablishing his role, he sought legal advice and Mr Holmes entertained suspicions that Mr Emmens was working for a competitor.

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2 Mr Emmens was a director and shareholder of Kiriwai. The other shareholders were his wife and a family trust.

3 The Holmes family trust held 89 per cent of the shares and Mr Holmes personally held one per cent.

[10] The parties held a meeting on 5 September 2012 following which Mr Holmes formally advised Mr Emmens that his role as general manager was disestablished effective 5.00 pm that day.

[11] On 7 September 2012 Mr Emmens' solicitor, Mr Chapman, wrote to Mr Holmes' solicitor, Mr Barclay, requesting certain financial information about HVL. Mr Emmen's accountant needed the information to value the Kiriwai shareholding. Although Mr Barclay had indicated at the meeting on 5 September 2012 that any information requested would be provided, none was ever forthcoming.

[12] There was no contact from either Mr Holmes or his solicitor for two months.

[13] Then, as the Judge put it, without preamble, on 5 November 2012, Mr Barclay telephoned Mr Chapman with an offer of $1 million for the shares.[4] According to Mr Chapman's unchallenged evidence, Mr Barclay talked about the difficulty of dealing with Mr Holmes, the suggestion being that the latter might act irrationally. Mr Barclay also advised that, in any event, the financial information Mr Chapman had requested was not yet available.

[14] Without the financial information, Mr Emmens' advisers were not prepared to recommend he accept the offer.

[15] There matters rested until 14 November 2012 when Mr Barclay emailed Mr Chapman renewing the offer of $1 million, this time on a "take it or leave it" basis. The email advised that unless the offer was accepted by 4.00 pm the following day, it would be withdrawn. Mention was also made in the email of concerns held by Mr Holmes that Mr Emmens was working for a competitor and that Mr Holmes reserved his position in the event the offer was not accepted.

[16] We pause here to interpolate that at this time Mr Emmens was no longer an employee of HVL and was not subject to any restraint of trade. He was, however, still bound by obligations of confidence.

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4 At [18].

[17] Kiriwai accepted the offer on 15 November 2012 and a deed of settlement was executed on 16 November 2012. Mr Emmens was a reluctant signatory. He did not believe the figure of $1 million represented fair value. As he put it in an email, his "gut feel" was that the shares were worth between $2.5 million and $3 million. But in light of the phone conversation between the two solicitors, he was also worried that Mr Holmes might behave irrationally, in particular that he might move assets or even liquidate the companies.

[18] On 31 January 2013, HVL sold one of its subsidiaries, Quality Marshalling (Mount Maunganui) Limited (Quality Marshalling), to Port of Tauranga Limited (the Port) for $34 million. It was not disputed that the negotiations leading up to this deal had commenced in early November 2012 immediately before Mr Holmes made his offer to Kiriwai and that if the sale were to be taken into account in fixing the value of the shares, the shares would have been worth significantly more than $1 million.

[19] When Mr Emmens found out about the transaction, he issued the present proceedings in the High Court against Mr Holmes and the trustees of the Holmes Family Trust, alleging inter alia a breach of s 149 of the Companies Act and a breach of fiduciary duty.[5] Mr Emmens claimed that had he been told about the negotiations with the Port in November 2012, he would never have accepted the offer for the shares but rather would have waited to see if the Quality Marshalling deal went ahead. The Judge made a finding to this effect which has not been challenged.[6]

[20] We turn now to a more detailed consideration of the claims, the Judge's findings and the issues on appeal. Although the claim under s 149 was the subject of the cross-appeal, it is convenient to deal with that first.

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5 The statement of claim pleaded four causes of action: (i) a claim under s 174 of the Companies Act which was abandoned on the first day of the trial; (ii) a claim against HVL and the trustees of the Holmes Family Trust for breach of the shareholders' agreement. The Judge found that any such claim was precluded by the terms of the settlement agreement executed in November 2012. That finding has not been appealed; (iii) a claim under s 149 against the trustees of the Holmes Family Trust; and (iv) a claim for breach of fiduciary duty against Mr Holmes in his capacity as director.

6 At [70].

Section 149 of the Companies Act

[21] As explained by this Court in *Thexton v Thexton*, s 149 was designed to address the problem of insider trading arising where directors buy or sell shares with information that might affect the value of the shares.[7]

[22] Section 149 relevantly provides:

> **149 Restrictions on share dealing by directors**
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> (1) If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other financial products issued by the company or a related company, the director may acquire or dispose of those shares or financial products only if,—
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> (a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or financial products;
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> (b) …
>
> (2) For the purposes of subsection (1), the fair value of shares or financial products is to be determined on the basis of all information known to the director or publicly available at the time.
>
> (3) Subsection (1) does not apply in relation to a share or financial product that is acquired or disposed of by a director only as a nominee for the company or a related company.
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> (4) Where a director acquires shares or financial products in contravention of subsection (1)(a), the director is liable to the person from whom the shares or financial products were acquired for the amount by which the fair value of the shares or financial products exceeds the amount paid by the director.
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> …

[23] As noted in *Thexton*, the section does not require the director to disclose the confidential information.[8] Rather, it requires the director to abstain from dealing with the shares unless at fair value.

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7 *Thexton v Thexton* [2002] 1 NZLR 780 (CA) at [12].

8 At [19].

[24] On appeal, there was no dispute over the meaning of "fair value". Fair value is what is fair as between vendor and purchaser in all the circumstances, taking into account all material information known to the director at the relevant time.[9]

[25] There was also no dispute that in assessing fair value the Court must take into account any risk factors which might materially influence the value of the shares.

[26] It was also common ground that s 149 applied to this case even though it was not Mr Holmes who acquired legal ownership of the shares but Mr Holmes and Mr Russell acting in their capacity as the trustees of the Holmes Family Trust.

The High Court decision

[27] In the High Court, both sides called expert evidence about the value of HVL. The primary difference between the experts was whether the sale of Quality Marshalling should be taken into account or not.

[28] Mr Lucas, the expert for Mr Holmes considered it should not be taken into account. He valued the fair value of the Kiriwai shareholding as at 15 November 2012 as $2.17 million.

[29] Mr Hagen, the expert for Kiriwai, however, included the Quality Marshalling transaction in his valuation, concluding that the fair value of the Kiriwai shareholding as at 15 November 2012 was $4.287 million.

[30] The Judge said she accepted the view of Mr Lucas that, as matters stood on 15 November 2012, the prospects of HVL selling Quality Marshalling were not sufficiently certain to justify being reflected in the valuation, much less at the price ultimately achieved.[10] She accordingly held that the fair value of Kiriwai's shareholding was $2.17 million. That meant (taking into account a further payment of $642,318 made to Kiriwai before trial) that under this cause of action, Kiriwai was entitled to an additional $564,274. Judgment was therefore entered in favour of

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[9] An argument that fair value should have been discounted to reflect the minority status of Kiriwai was abandoned before trial in the High Court.

[10] At [33].

Kiriwai against the trustees of the Holmes Family Trust for $564,274. We were told that this sum has since been paid.

Analysis on appeal

[31] Kiriwai challenges the Judge's finding on the s 149 claim by way of cross-appeal. The cross-appeal was filed 13 days late and Mr Holmes opposed leave being given to bring it out of time. There was no explanation for the delay other than counsel needing more time. However, the delay was short and did not cause Mr Holmes any prejudice. We are therefore prepared to grant leave.

[32] We also record that by consent the parties to the cross-appeal were amended at the hearing to include the trustees of the Holmes Family Trust. Originally, the only parties to the appeal were Mr Holmes in his personal capacity as director and Kiriwai.

[33] In deciding the s 149 claim, Courtney J appears to have assumed that she was required to choose between the competing views of the experts and to do so on an all or nothing basis. However, whether the Quality Marshalling transaction was likely to proceed was a question of fact and it was, in our view, incumbent on the Judge to undertake her own factual analysis of the relevant evidence.

[34] In any event, on appeal we are ourselves required independently to review the evidence which we now set out in greater detail.

<u>The evidence about the Quality Marshalling negotiations</u>

[35] The evidence established that the negotiations for the Quality Marshalling transaction commenced sometime over the weekend of 3–4 November 2012 when the chief executive officer of the Port, Mr Cairns, telephoned Mr Holmes. Mr Cairns explained to Mr Holmes that the Port's current stevedoring and marshalling operation was likely to be coming to an end, that the Port wanted to maintain a presence in the forestry marshalling sector, and that he was wondering if Quality Marshalling was for sale. Mr Holmes indicated he would be open to considering a proposal.

[36] It will be recalled that it was on Monday 5 November 2012 that out of the blue Mr Holmes' solicitor made the offer of $1 million to Kiriwai for its shares in HVL.

[37] On 6 November 2012, the Port emailed a confidentiality agreement to Mr Holmes. In the email, Mr Cairns said "I also can assure you we are not 'tyre-kickers' and will move reasonably quickly with a decision".

[38] The email was followed by a meeting of the Port's representatives, Mr Holmes, and Mr Holmes' solicitor, Mr Barclay, on 7 November 2012. At the meeting, it was verbally agreed that the parties would negotiate a sale and purchase agreement under which the Port would acquire 100 per cent of the shares in Quality Marshalling. An indicative methodology for valuing Quality Marshalling was discussed. So too was a target settlement date of 31 January 2013.

[39] Later on 7 November 2012, Mr Cairns instructed the Port's solicitors to draft a formal sale and purchase agreement. He also sent an email in the evening to Mr Holmes which was copied to the Port's solicitor. The subject line was "Putting the handshake back into business". The email confirmed that Mr Cairns and the Port's chief financial adviser would "get stuck into the due diligence" and that he would arrange for the Port's solicitor to contact Mr Holmes' solicitor to start working up a sale and purchase agreement. Mr Cairns also stated "You have restored my faith in how business should be conducted" and that he and the Port's chief financial adviser "could almost taste the scallops". This last comment was a reference to a joke which had been made about Mr Holmes taking them out for scallops when the deal was done.

[40] Either that evening or early in the morning of 8 November 2012, Mr Holmes phoned his accountant and said "I think I've sold [Quality Marshalling] for $34 million. I think I've won Lotto". The reference to a figure of $34 million was based on the indicative methodology for valuing Quality Marshalling which had been discussed at the earlier meeting with the Port representatives.

[41] On 8 or 9 November 2012, the Port's chief financial officer conferred with HVL's accountant regarding the information needed for due diligence. Financial records were provided and further information was sought by the Port on 13 November 2012, which Mr Holmes promised to get to them by the following day. The respective financial advisers also conferred about the net working capital figure to be inserted in the sale and purchase agreement based on a settlement date of 31 January 2013.

[42] The next thing that happened was that on 13 November 2012, Mr Holmes' accountant sent Mr Holmes and the latter's wife an email setting out how the accountant saw the sale being structured. The email actually stated "Ken [Mr Holmes] has sold the company for $34,000,000". Legally that was incorrect. However, it is an indication of how confident Mr Holmes and his advisers were about the prospects of the sale proceeding. In cross-examination, Mr Cairns accepted that, by 13 November 2012, there was "a real prospect the transaction would go ahead".

[43] On 14 November 2012, the Port's chief financial officer emailed Mr Holmes saying:

> I realize it is hard getting all these records without raising suspicion but we also need a list of all employees, their positions and pay.
>
> Would be good to catch up with you once I've digested all the information and discussion re settlement date and our solicitor needs us to confirm some other details

[44] That same day, Mr Holmes' solicitor emailed Mr Emmens' solicitor to restate the offer for the Kiriwai shares on a "take it or leave it" basis.

[45] On 30 November 2012, the Port's board of directors resolved that Mr Cairns negotiate and purchase Quality Marshalling up to a price of $35 million, subject to due diligence and final approval from the Chairperson.

[46] The following steps were then taken. On 5 December 2012, the Port forwarded a draft sale and purchase agreement to HVL's solicitors who made comments; a second draft was circulated on 12 December 2012; due diligence was

undertaken on 10–14 December 2012 and on 12 December 2012, the final draft was signed. The signed agreement was conditional on the Port obtaining legal advice regarding Commerce Act 1986 implications (if any) arising from the transaction but that condition was waived on 31 January 2013. Settlement took place the same day.

Our assessment of the evidence

[47] It is correct that as at 15 November 2012 there was no legally binding sale contract in existence. However, in our view, it does not follow that the prospects of the sale going ahead were "negligible", as claimed by Mr Holmes' expert witness. In our assessment, the evidence shows the contrary. In our view, by 15 November 2012, it was in fact highly probable the sale would proceed and, more specifically, that it would proceed at the figure of $34 million.

[48] As already mentioned, Mr Holmes and his accountant were themselves confident the deal was virtually "in the bag". The assessment is, of course, an objective one but Mr Holmes' announcement that he thought he had won Lotto reflected the reality of the situation. As he knew, the Port was flush with funds arising from the termination of its existing marshalling operation, which had been a joint venture. The Port no longer had a marshalling operation and it needed one. It did have the option of setting up a brand new operation itself but that would be problematic and costly. Quality Marshalling was by far its best option. The steps taken by the parties and the speed with which the steps were taken between 4 November 2012 and 15 November 2012 underscore that. So too does the fact that the Port was prepared to settle at $34 million even though it knew two of Quality Marshalling's main contracts with third parties were due to expire in mid-2013. In a very real sense, the Port was a captive and commercially desperate buyer.

[49] Having reviewed the evidence, we are firmly of the view that, as at 15 November 2012, the likelihood of the sale proceeding at $34 million was sufficiently high that it was a material factor that should have been taken into account in assessing fair value. That said, we also recognise that the transaction was not certain and there were contingencies. It was still possible the deal might not go ahead or not go ahead at that figure. Accordingly, we consider that there should be

some discount to reflect those possibilities. In the view of Stevens and Miller JJ, an appropriate discount reflecting those contingencies would be no greater than five per cent. French J would apply a higher discount of 15 per cent on the basis of the sale conditions such as Board approval that were still to be satisfied as at 15 November 2012.

[50] Taking the view of the majority, the fair value of Kiriwai's shares for the purposes of the s 149 claim is therefore $4.1395 million. This has been calculated by applying a discount of five per cent to Mr Hagen's assessment of the value of the Quality Marshalling sale to HVL which was $29.5 million.

[51] The Holmes Family Trust has made three payments. The first was a payment of $1,000,000 (the original sale value), $642,318 (a sum paid before the High Court trial) and $564,274 (being the amount ordered by the High Court).

[52] In accordance with the view of the majority and taking the three payments into account, the Court finds that the sum of $1,932,908 is owing under the s 149 claim.

Outcome of cross appeal

[53] The cross-appeal is allowed and in accordance with the view of the majority, the judgment of the High Court awarding Kiriwai payment of $564,274 under s 149 is quashed and substituted with a judgment for $1,932,908.

Breach of fiduciary duty

Argument on appeal

[54] It was common ground that there are two categories of fiduciary relationships. As explained by the Supreme Court in *Chirnside v Fay*, the first is those which are status-based such as the relationship between solicitor and client, principal and agent, trustee and beneficiary, doctor and patient.[11] Relationships in this category are inherently fiduciary. The second category comprises relationships

[11] *Chirnside v Fay* [2006] NZSC 68; [2007] 1 NZLR 433.

which are not inherently fiduciary but where a fiduciary duty nevertheless arises because of special factual circumstances. Relationships in this second category are sometimes described as fact-based or particular fiduciary relationships. The sort of circumstances which will generate a fiduciary duty are not capable of precise definition but the hallmarks of a fiduciary relationship are said to be that it is a relationship in which there are elements of reliance, confidence or trust between the parties often arising out of an imbalance of power or vulnerability in relation to the exercise of rights, powers or the use of information affecting their respective interests. One party has a legitimate expectation or is entitled to rely on the other not to act in a way that is contrary to the other's interest.

[55] In the present case, Courtney J held that a fact-based fiduciary duty existed because of Kiriwai's vulnerability arising out of an imbalance of power and knowledge as between Kiriwai and Mr Holmes. She further held that in failing to disclose the fact of the negotiations with the Port, Mr Holmes had breached that fiduciary duty and was liable to pay Kiriwai the difference between the price it received for its shares and the price it should have received had the information been disclosed. This latter figure was calculated on the basis of Mr Hagen's expert evidence and, after taking into account payments already made, resulted in judgment being entered for the sum of $3.287 million.

[56] Counsel for Mr Holmes submitted that the Judge was wrong to so find because:

(a) The facts relied on by the Judge did not support the existence of a fiduciary relationship. The parties were operating at arms length in a commercial context.

(b) The statement of claim pleaded only a status-based fiduciary relationship.

Analysis

[57] It is well-established that the relationship between director and shareholder is not an inherently fiduciary one.

[58] However, in *Coleman v Myers,* this Court held that, although directors generally do not owe fiduciary duties to shareholders, on the special facts of the case the directors of a closely held family company did owe a fiduciary duty of disclosure to individual shareholders when acquiring shares from them and/or advising them on shares.[12]

[59] *Coleman v Myers* was decided before the enactment of s 149, which, as mentioned, does not impose a duty of disclosure. However, it was common ground that the case is still good law in New Zealand. That is to say, it was accepted that the existence of the different statutory remedy under s 149 for insider trading does not of itself preclude recognising a fact-based fiduciary duty.

[60] Where counsel differed was as to the type of facts required to establish a duty in the context of share dealing by a director. Counsel for Kiriwai argued that the *Coleman v Myers* duty applied whenever the director was in possession of confidential information which could affect the value of the shares. Counsel for Mr Holmes argued that the duty was confined to small family companies.

[61] We do not accept that either of those statements accurately reflects the scope of *Coleman v Myers*.

[62] In our view, it is clear from *Coleman v Myers* that something more than just possession of price sensitive information is required. On the other hand, while a family relationship was a critical feature of the facts of *Coleman*, it was not suggested as a matter of general principle that the duty could only ever arise in that context. The approach of the Court is well encapsulated in the following passage from the judgment of Woodhouse J:[13]

> It is, however, an area of the law where the courts can and should find some practical means of giving effect to sensible and fair principles of commercial morality in the cases that come before them; and while it may not be possible to lay down any general test as to when the fiduciary duty will arise for a company director or to prescribe the exact conduct which will always discharge it when it does, there are nevertheless some factors that will usually have an influence upon a decision one way or the other. They

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12 *Coleman v Myers* [1977] 2 NZLR 298 (CA).
13 At 325.

> include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it. In the present case each one of those matters had more than ordinary significance and when they are taken together they leave me in no doubt that each of the two directors did owe a fiduciary duty to the individual shareholders. The reasons are implicit in the account I have given of the C & E company and those associated with it together with the depth of knowledge and experience on the one side when contrasted with the relative lack of it on the other and the careful development of the takeover proposals.

[63] The issue is a finely balanced one, but, applying those principles to the facts of the present case, we agree with Courtney J that the circumstances did give rise to a fiduciary duty on the part of Mr Holmes to disclose the information about the prospective sale of Quality Marshalling to the Port.

[64] We say that for the following reasons.

[65] HVL was a small company (having effectively only two shareholders) over which Mr Holmes had complete control. There may not have been family relationships but importantly there was an employment overlay with Mr Emmens, the beneficial owner of Kiriwai, holding the role of general group manager. Not only did the employment dimension mean there were duties of good faith as between HVL and Mr Emmens, but Mr Holmes also had the power to compel Kiriwai to sell its shares by terminating Mr Emmens' employment. This gave Mr Holmes the power to end Kiriwai's access to company information as well as curtailing Mr Emmens' remuneration and therefore impacting on his negotiating power over the sale of the shares. The sale of the shares was a significant transaction for Mr Emmens and Kiriwai. Mr Holmes knew that. He also knew that Mr Emmens was seeking information to give to his legal and financial advisers so he could be properly advised on the value of the shares.

[66] These factors, combined with the steps taken by Mr Holmes to pressure a quick sale of the shares in the knowledge that he was in possession of material information did, in our view, give rise to a fiduciary duty. Mr Holmes breached this duty by failing to disclose the fact of the negotiations with the Port.

[67] In coming to this conclusion we have not overlooked an argument raised by Mr Gray QC that, far from relying on Mr Holmes, Mr Emmens was in fact on the evidence distrustful of him. However as noted in *Coleman v Myers*, a fiduciary does not lose that character merely because the person to whom his duty is owed begins to have doubts or suspicions.

[68] We have also not overlooked the important pleading point raised by Mr Gray.

[69] Kiriwai's amended statement of claim pleaded the action for breach of fiduciary duty in the following terms:

> 26. The first defendant at all material times owed a fiduciary duty to the plaintiff by reason of:
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> (a) The first defendant's status as director and majority shareholder of HVL.
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> (b) HVL was a joint venture company established at the instigation of the plaintiff and for the benefit for all of the shareholders.
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> 27. In breach of the first defendant's fiduciary obligations he:
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> (a) Failed to disclose the negotiations with Port of Tauranga in respect of the QML shares.
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> (b) Withheld material information relating to the HVL group in order to pressure the plaintiff into a sale at an under-value.
>
> (c) Acquired the shares at a gross under-value.

[70] Despite Kiriwai's valiant attempts on appeal to argue otherwise, this was undoubtedly a pleading that the relationship was a status-based fiduciary relationship.

[71] We accept that the pleading was defective and wrong in law. The relationship between directors and shareholders is not an inherently fiduciary one.

[72] We also accept that the pleading of a fact-based fiduciary relationship must plead the facts which are relied upon as giving rise to that relationship. It is not enough to make a bare assertion that a fiduciary relationship exists.[14]

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[14] *CED Distributors (1998) Ltd v Computer Logic Ltd* (in rec) (1991) 4 PRNZ 35 (CA) at 44.

[73] In light of the deficiencies in the statement of claim, Mr Gray submitted that Kiriwai was bound by its pleadings and that the Judge exceeded her jurisdiction by adjudicating on a matter not properly before her.

[74] We do not accept that submission. The primary facts which we have held created a fiduciary relationship were all pleaded elsewhere in the statement of claim. Further and most importantly, we are not satisfied Mr Holmes was prejudiced as a result of any pleading deficiency.

[75] Mr Gray submitted that the way he conducted the case at trial would or might have been different had he realised the claim was a fact-based fiduciary one. When pressed to be more specific, he said he would have challenged evidence about Mr Holmes being difficult and would have wanted to adduce more evidence of Mr Holmes' concerns regarding Mr Emmens' dealings with competitors. Mr Gray also claimed that the way the claim was pleaded had impacted on an interlocutory decision made by Courtney J regarding the scope of discovery of documents.

[76] We have read the Judge's decision on discovery.[15] The relevant background to it was that Mr Holmes had already obtained discovery of communications between Mr Emmens and a competitor of HVL prior to 15 November 2012, but was seeking additional discovery of communications after that period on the grounds that the later communications might shed light on what was happening prior to 15 November 2012. According to the judgment, Mr Holmes swore an affidavit deposing that the documents were relevant because the settlement agreement was an overall settlement of all issues between the parties including Mr Emmens' suspected breach of duties as an employee and that the price paid for the shares reflected that issue. This does not, however, appear to have been an argument pursued at trial.

[77] As we read the interlocutory decision, the reason the Judge disallowed the discovery of documents after 15 November 2012 was not because of the scope of the pleadings but because on the evidence before her it was very much a fishing expedition without any foundation.[16] She found there was no basis for concluding

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15 *Kiriwai Consultants Ltd v Holmes* [2013] NZHC 3290.
16 At [32].

that documents created after November 2012 and which related to fresh contracts between Mr Emmens and his clients were likely to show what Mr Emmens was doing prior to 15 November 2012. Significantly for present purposes, Courtney J also stated that her decision might have been different if Mr Holmes had been able to produce an example from the documents already discovered. But otherwise it was speculative to suggest that later documents might show something that earlier documents did not.[17]

[78] We are satisfied that the Judge's decision on discovery would have been the same whatever type of fiduciary duty was pleaded. We are also satisfied that the issues which Mr Gray says he would have pursued but did not because of the pleading were not matters that would have affected the final outcome.

[79] In the absence of any meaningful prejudice, we consider that, in the interests of justice, substance should prevail over form. We therefore reject the pleading point and uphold the High Court judgment against Mr Holmes in his capacity as director.

Outcome

[80] The appeal is dismissed and the judgment entered against Mr Holmes for $3.287 million in the High Court is confirmed.

[81] The application for extension of time in which to bring the cross-appeal is granted.

[82] The cross-appeal is allowed. The judgment for $564,274 made by the High Court against Messrs Holmes and Russell in their capacity as trustees is quashed and replaced with a judgment in the sum of $1,932,908.

[83] The appellant must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements. We make no award on the cross-appeal because the arguments were for all practical purposes subsumed in the appeal.

Solicitors:
Claymore Partners Ltd, Auckland for Appellant
Dawson Harford & Partners, Auckland for Respondents

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17 At [32].