IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-1089

BETWEEN	WELLINGTON AUDIO VISUAL LTD First Plaintiff
AND	PETER JOHN WATT Second Plaintiff
AND	PETER JOHN WATT AND NORTHERN TRUSTEE SERVICES (NO. 84) LTD Third Plaintiff
AND	EURO BOSTON GROUP LTD First Defendant
AND	PETER BRUCE MARRIOTT Second Defendant

Hearing: 19, 20, 21, 22 and 23 October 2009

Counsel: D W Grove for Plaintiffs
No appearance by or on behalf of First Defendant
P B Marriott, Second Defendant, in person

Judgment: 9 December 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 9 December 2009 at 3.15pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Ellis Law, PO Box 4516, Auckland
Counsel:
D Grove, PO Box 130, Shortland Street, Auckland
Copy to:
Defendant in person

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Introduction

[1] Wellington Audio Visual Ltd (WAVL) was incorporated as a private limited liability company in 1990. Of its share capital, 99 of the 100 shares were held by trustees (Mr Marriott and Mr Splite) of the St Helens Trust (the Trust), with the remaining one share being held by Mr Marriott. At the time of incorporation, every company was required, by law, to have at least two shareholders. Mr Marriott accepts that the one share in his name was held on behalf of the trustees of the Trust.

[2] From the time of its incorporation, until Mr Splite's resignation in November 2000, Mr Marriott and Mr Splite were directors of WAVL. Though Mr Watt was not disclosed as either a director or a shareholder of WAVL, it is clear that the company was treated as his alter ego. No significant decision was made without Mr Watt's agreement.

[3] The Trust was settled on 14 March 1999 for the benefit of Mr Watt and his family. Mr Watt held the power of appointment of trustees and was also a discretionary beneficiary. Mr Splite was one of Mr Watt's business associates, while Mr Marriott acted as a solicitor for Mr Watt. Mr Marriott acted on both the settlement of the Trust and incorporation of WAVL.

[4] During the course of the hearing, the issues for my determination reduced. Originally, WAVL, Mr Watt and the present trustees of the Trust (Mr Watt and Northern Trustee Services (No 84) Ltd) sued Euro Boston Group Ltd (Euro Boston) in respect of losses totalling $1,197,187.06, arising out of (what I shall call) the Lombard transaction. That claim is no longer pursued. It is accepted that Euro

Boston has no funds to meet any judgment. Another cause of action was stayed and others were left for future determination, if necessary: see, generally, para [6] below.

[5] At the end of the hearing, there were three major issues for resolution:

a) The first concerns the extent (if any) of Mr Marriott's personal shareholding in WAVL (the shareholding issue).

b) The second is whether Mr Marriott breached his duties as a director of WAVL, by entering into the Lombard transaction and causing loss to WAVL (the Lombard issue).

c) The third involves the liability (if any) of Mr Marriott to repay a sum of $40,000 that was advanced to him by WAVL on 18 August 2004 (the debt issue).

[6] During the course of the hearing, Mr Marriott agreed that his claim for an inquiry into the affairs of the company could be stayed, pending judgment on remaining issues arising on the proceeding. Mr Marriott accepted that, if he were to fail on other issues, that application would be rendered moot. Mr Grove sought to amend the Statement of Claim to seek an inquiry into damages in the event that Mr Marriott was found to have a shareholding in WAVL. By consent, I made orders staying Mr Marriott's claim for an inquiry and granting leave for the plaintiffs to amend the Statement of Claim, in the manner indicated.

Credibility assessments

[7] The two main protagonists, Mr Watt and Mr Marriott, both gave evidence. Issues of credibility and reliability assume some importance. For example, while Mr Marriott contends that the agreement that he receive a shareholding in the company in lieu of remuneration was entered into orally in 1999, Mr Watt denies that such a discussion ever occurred. In relation to the Lombard transaction, Mr Watt and Mr Marriott are at odds as to which of them instigated the transaction and was responsible for its implementation.

[8] Regrettably, I have concluded that I cannot accept, without corroboration, oral evidence given by either Mr Watt or Mr Marriott. There are significant problems with their evidence. I am left with no confidence that I can rely on either in the absence of confirmation by external witnesses whom I regard as credible and reliable or contemporaneous documentary evidence.

[9] There are two aspects of Mr Watt's evidence that have led me to the conclusion that I cannot rely on it. The first relates him forging Mr Marriott's signature on a lease document, on or about 1 June 2003. The second relates to his evidence that he had no knowledge of the Lombard transaction until February 2006.

[10] Mr Watt accepted that he had signed a deed of lease dated 1 June 2003 between WAVL (as landlord) and Turner Porter Group Ltd (as tenant), in the name of Mr Marriott. The signature shown on the document clearly demonstrates an intention to mimic Mr Marriott's signature. Immediately below the signature are the words "Peter Bruce Marriott – Director". Mr Watt's actions in signing that document in Mr Marriott's name can be contrasted with his execution of another lease, in which he signed on behalf of WAVL, in his own name, as "Authorised Signatory". That document was signed on or about 28 May 2006. That action demonstrated that Mr Watt knew he could sign as an "Authorised Signatory". He had no basis to act dishonestly in forging Mr Marriott's signature.

[11] Two letters were sent by Mr Watt to Mr Smith (as director of FAR Financial Group Services Ltd, the company that brokered the Lombard transaction) about his involvement in the Lombard transaction. The second was dated 8 November 2006. That letter was generated in the wake of the sale of WAVL's commercial property at 326-340 Karangahape Road, to repay a debt to Lombard Finance and Securities Ltd. Efforts were made to obtain assistance from Mr Smith to enable WAVL to "exit" from the transaction because the price of the Lombard Group shares had fallen significantly.

[12] Mr Marriott drafted a letter for Mr Watt. That was sent to Mr Ellis, WAVL's solicitor. Mr Ellis redrafted the letter. That re-draft was signed by Mr Watt and sent to Mr Smith on or about 8 November 2006. The salient parts of the letter read:

Whatever you may think the motives of Wellington Audio Visual Limited may have been entering into this arrangement with Lombard, it was done only to help ***you*** [Mr Watt's emphasis] *with a crisis that arose with you before Christmas last. Wellington Audio Visual was not to be exposed to any risk. I was aware that the price of the Lombard shares was intended to rise but that just minimised the risk for you. Instead I have watched the price fall.*

I had always understood that a fee arrangement would cover interest. Instead it appears that interest has been borrowed. I thought that it was to be short term – maybe 3 months, not more [than] 6 months. It is almost a year.

My discussions with Michael Reeves seem to confirm my view. That is why I am so surprised that he can say that he has forgotten who helped him and why. I have still not had any response to my call to meet with him.

I think that you should know that what I expect of you is to find an exit from this for Wellington Audio Visual Ltd. The fact that we may sell the building has no effect on that. I really want to know that you are putting all your effort into this. I expect no less [than] getting the mortgages discharged from the Wellington Audio Visual Ltd properties without further delay, without further excuses and without further obfuscation. I am simply not interested in any other scenario.

You have already offered to fund any debt that has been foisted on Wellington Audio Visual Limited for what can only be regarded as improper motives. That is an absolute minimum requirement and must occur at the same time as the mortgages are discharged.

The next thing that I expect is to come out of this no worse off. I am sure that you can achieve this for all of us, but again I need to know that it is getting your immediate attention. You always seem so busy that I am not sure that those who have supported you are always getting the proper share of your time. Please reassure me and take the actions necessary to get the mortgages discharged.

You need to be aware that I have taken preliminary legal advice. The initial reaction to the information provided is that I should simply refer the whole matter to the regulatory authorities and let them investigate what has happened to these shares, to Lombard and to this entire transaction. Why should I not do this?

(my emphasis)

The references in the first paragraph of the letter suggest that Mr Watt was aware, when the Lombard transaction was initiated (before Christmas 2005), that WAVL was acquiring shares to assist Lombard. His expressed concern was that, contrary to expectations, WAVL had not obtained the profit expected.

[13] So far as Mr Marriott is concerned, I found his evidence contradictory on important issues and, to a large extent, inconsistent with contemporary documents.

[14] Mr Marriott portrayed himself as an experienced company officer and businessman. He referred on a number of occasions to the way he kept records "meticulously". Yet, while responsible for doing so, he failed to bring into existence or maintain statutory records required by relevant Companies Acts. That includes a register of shares, something of some significance in the context of the dispute over ownership of shares.

[15] It was also clear that Mr Marriott was not averse to involving himself in dubious transactions, if the economic results would benefit him. Examples are a deliberate decision not to provide any GST returns to the Commissioner of Inland Revenue during the 2006 calendar year, at least up to the point at which he was removed as a director of WAVL, in December 2006. Another example was his suggestion that a sum of $40,000 had been paid to him out of the sale of a Papakura property as some form of distribution to him, in his capacity as a shareholder. It was shown as an advance in the books of the company. Mr Marriott sought to explain this by saying that there were tax consequences to him personally (if the loan had been written off or the moneys received by way of distribution) that he wanted to avoid.

[16] The words and actions of both Mr Watt and Mr Marriott to which I have referred demonstrate that each was prepared to engage in colourable business practices for commercial gain. Their willingness to rewrite the history of their actions demonstrates to me that their evidence lacks credibility and is unreliable.

Shareholder issues

[17] Mr Marriott first met Mr Watt in 1989, while in practice as a solicitor. Having acted, among other things, on the incorporation of WAVL and on settlement of the Trust, Mr Marriott decided, in 1992, to forego legal practice in favour of involvement in the commercial sector, as a trustee, investment banker and business consultant.

[18] During this initial period, Mr Marriott was not involved in the day-to-day operation of WAVL. Nor did he undertake any accounting functions for the

company, during that time. Rather, his role was that of a trusted adviser to Mr Watt. He also assisted in documenting various arrangements into which WAVL entered.

[19] A number of other companies have direct links to Mr Watt. At the conclusion of his evidence, Mr Watt accepted that his corporate interests were, in effect, treated as one global enterprise. Mr Marriott appears to have undertaken tasks for companies other than WAVL.

[20] Mr Marriott accepts that he took no active role in the management of Mr Watt's trading entities. Rather, he deposes that he assisted in designing "structures" for them and provided advice to "managers". For example, Mr Marriott says that he "drew up business plans and operational manuals" and was involved in establishing franchises for a trading label owned by Mr Watt, known as "Tommy Gun". During this time, Mr Marriott lived in Wellington but travelled regularly to Auckland for business purposes. The amount of time that Mr Marriott spent on work in relation to the business affairs of WAVL (or the wider Watt group of companies) is in dispute.

[21] Mr Marriott's position is that, in the period between 1990 and 1999, Mr Watt's business interests were recovering from financial difficulties experienced at the time of the collapse of property markets, in around 1990. For that reason, Mr Marriott says he was unable to draw any fees for his roles as trustee or director. Mr Marriott asserts that Mr Watt assured him that situation was "temporary" and that his "reward would come later". Mr Marriott took that as an assurance that he would later be remunerated for the work undertaken for WAVL and the Trust. He considered that by 1999 he was beginning to take on a greater role in the management of WAVL, so the remuneration issue became more significant at that time.

[22] Mr Marriott alleges that, some time in 1999, Mr Watt and he reached an agreement that 20% of the shares in WAVL would be transferred to him personally. Mr Marriott alleges that the agreement was struck during a meeting with Mr Watt at a coffee house in Auckland, at some (unspecified) time during that year.

[23] Mr Marriott's case is that Mr Watt agreed:

a) in consideration of his past services to WAVL, to transfer 10% of WAVL's shares to him; and

b) to transfer a further 10% of the share capital, in consideration of anticipated future services.

Mr Watt denies any meeting of that type occurred and that any agreement was reached.

[24] The only documentary evidence of such an agreement is a form lodged with the Registrar of Companies, showing a change in WAVL's shareholding in 2004. That shows Mr Marriott as owning 10% of the shares. It was registered on 12 August 2004, at a time when Mr Marriott was the sole director of WAVL and the sole trustee of the Trust. While Mr Splite had resigned as a director of WAVL in November 2000, (as far as I can ascertain from the evidence) he remained a trustee of the Trust until he died in July 2004, the month before the change in shareholding was registered.

[25] Mr Marriott's failure to maintain a share register is important. Had a share register been maintained, in accordance with s 87 of the Companies Act 1993, the entry of the name of a person in the share register would have been *prima facie* evidence that legal title to the share vested in the person named: s 89(1). The absence of a share register, to support the shareholding disclosed in the August 2004 return, means that no evidential presumption arises in favour of Mr Marriott's position.

[26] Mr Marriott accepted that he did not keep "a running record" of the time he spent dealing with the affairs of WAVL or the Trust. But, he says that he constantly reminded Mr Watt of the extent "of the accruing debt" to him. Mr Marriott produced extracts from diaries he kept, which he suggested demonstrated that "hardly a week went by [after 1999] without [him] doing work for WAVL". From calculations he undertook Mr Marriott estimates that the value of his time to WAVL from 1999 until 2006 was approximately $600,000.

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[27] I am not satisfied that the entries made contemporaneously in Mr Marriott's diary are sufficient to support his claim of the work undertaken. Further, there are other difficulties inherent in an assessment of Mr Marriott's true involvement in the management of WAVL, both before and after 1999. A particular problem arises from the intertwined nature of the Watt company structures and the inability to separate out work undertaken for one company from work undertaken for another. Management of WAVL's affairs was directed, primarily, to a fixed number of property investments.

[28] WAVL had a property portfolio. As part of the loose group of companies, associated with Mr Watt's private interests, WAVL received the benefit of a number of inter-company advances. Those advances enhanced WAVL's ability to draw on revenue receipts, for its own purposes.

[29] Until 2006, the three major properties owned by WAVL were all commercial premises, situated in Auckland City. They were at 27 Cross Street, 146 Karangahape Road and 326-340 Karangahape Road. The property at 326-340 Karangahape Road was sold in September 2006. Although disputed by Mr Marriott, Mr Watt says that he only sold that property to meet losses arising out of the Lombard transaction.

[30] For the purposes of this analysis, I take as my starting point (in favour of Mr Marriott) the proportions of shares shown in the public register. Even the public register does not go as far as Mr Marriott suggests. It shows that he holds 10 shares in the company rather than the one share previously held. Mr Marriott acknowledged that he held the earlier one share on behalf of the Trust. The public register does not disclose whether shares are held in trust or in a personal capacity. Therefore, even if correct, the public register does not assist in resolving the question whether any shares shown in Mr Marriott's name were held personally or on behalf of the Trust.

[31] That means I must consider whether there was an agreement of the type alleged by Mr Marriott. The agreement is alleged to have been reached orally in a coffee house some time during 1999. While there is some force in Mr Marriott's suggestion that he would not have undertaken work for the company if he were not

to have been remunerated in some form, the contrary position is that there is not a scintilla of independent evidence to support Mr Marriott's contention.

[32] Mr Marriott did receive, during the currency of his association with WAVL, payment of travel expenses to and from Wellington and reimbursement of other agreed expenses. On one view, that type of reimbursement would have recompensed Mr Marriott adequately for the time he spent on WAVL's business. I am satisfied that Mr Marriott spent a good deal of time in Auckland on personal business matters, even when the cost of travelling to and from Wellington had been met by WAVL.

[33] More importantly, I find it unbelievable that a meticulous record-keeper (as Mr Marriott seeks to portray himself) would fail to make (even) a handwritten note of such an important event and, then, not register details of any transfer until after his co-trustee, Mr Splite, died in July 2004. Mr Marriott's evidence, on this topic, also conflicts with his letter to Mr Ellis of 13 December 2006, set out at para [46] below. In the first paragraph of the quoted portion of that letter Mr Marriott, at the time he was removed as a director of WAVL in December 2006, is stating that any shares he held in WAVL were shares "received for services rendered prior to 2002". The 2002 date does not sit easily with the way in which the shareholding claim has been put, based on an agreement alleged to have been reached in 1999. Added to those factors is the limited amount of work carried out for the company by Mr Marriott in the period leading up to 1999, casting doubt on whether transfer of 10% of the capital of the company to him at that time was any likely outcome of a discussion between Mr Watt and Mr Marriott.

[34] The second part of Mr Marriott's claim is that he was to receive an additional 10% of the share capital for work after 1999. This claim must fail on the grounds, that, even if such a discussion had taken place (which Mr Marriott has not proved to my satisfaction) there could be no certainty of terms, so any oral agreement to that effect would be unenforceable on grounds of uncertainty.

[35] I find Mr Marriott holds no shares in WAVL in his own name.

The Lombard issue

[36] The Lombard transaction started life in late 2005. At that time, an arrangement was brokered through FAR for WAVL to acquire shares in advance of a public float of Lombard Group Ltd. Mr Watt contends that Mr Marriott was the instigator of this arrangement and that he had no knowledge of it until February 2006. Mr Marriott contends that the transaction was initiated through Mr Watt.

[37] In December 2005, Mr Reeves, the Chief Executive Officer of the Lombard companies, was preparing for a public offering of shares in Lombard Group Ltd, early in the following year. Leaving to one side the person responsible for WAVL's involvement in the Lombard transaction, the broad features of the arrangements were:

a) FAR was responsible for putting together a reverse take-over, which involved a publicly listed company being acquired, so that Lombard could use it to make a public offering.

b) WAVL agreed to acquire 40,000,000 shares in Lombard Group Ltd, for a purchase price of $1,000,000.

c) Euro Boston was nominated as the purchasing entity on the share acquisition. Lombard Finance and Securities Ltd advanced $1,000,000 to that company, so that it could buy the shares.

d) A first mortgage, in favour of Lombard Finance and Securities Ltd, was given by WAVL over the property at 326-340 Karangahape Road, Auckland, to secure the debt of $1,000,000 owed by Euro Boston to Lombard Finance and Securities Ltd.

e) Lombard Group Ltd failed, not long after the public offering. The shares became worthless. Euro Boston was left with a debt of $1,000,000 to Lombard Finance and Securities Ltd. It was unable to pay the debt from its own resources.

f) WAVL (as guarantor) did not have liquid funds from which to pay the debt to Lombard Finance and Securities Ltd. The mortgaged property was sold in September 2006. The debt was discharged on settlement of the sale of that property.

[38] The involvement of FAR in the Lombard transaction is murky. There is no doubt that the transaction was entered into with a view to "assisting" Mr Reeves to comply with New Zealand Stock Exchange's Listing Rules. Under those Rules, the maximum amount of equity that entities associated with the offeror could hold was 75%. If WAVL/Euro Boston had not agreed to acquire 40,000,000 shares before the public offering, that shareholding would have been exceeded. That was known to FAR's directors at the time the arrangements with WAVL/Euro Boston were made.

[39] I am satisfied that, of his own volition, Mr Marriott introduced Euro Boston as the company to own the Lombard Group Ltd shares. Euro Boston was a company in which Mr Marriott and Mr Watt each held a 50% interest. The fact that, in late 2005, Mr Marriott structured the arrangement in that way also tends to support my conclusion that he did not have any shareholding in WAVL. By using Euro Boston, a personal benefit would have been derived by Mr Marriott, if the share price in the Lombard Group shares had risen following the float. On the other hand, Euro Boston's lack of assets meant that repayment of the debt to Lombard Finance and Securities Ltd could only be met out of the sale of WAVL's property at 326-340 Karangahape Road, if the shares did not produce a profit.

[40] Mr Smith, the director of FAR responsible for brokering the arrangements with WAVL/Euro Boston, was also involved actively in the float of Lombard Group Ltd. The "assistance" provided to Mr Reeves to avoid the need to comply fully with the New Zealand Stock Exchange Listing Rules is borne out by three purported transactions documented in December 2005.

[41] On 22 December 2005, WAVL issued three tax invoices addressed to FAR:

a) The first was for (so-called) "Consulting Fees". These totalled $40,500. WAVL did not provide any consultancy services to FAR.

This "invoice" represented a charge to recover three payments of interest, each of $13,500, for the first three months of the Lombard Finance and Securities Ltd loan.

b) The second was for (so-called) "Sub-underwriting Fees". WAVL had assumed no sub-underwriting obligations. Yet, a fee of $25,000 was charged for such "services".

c) The third was for expenses associated with the Lombard Financial and Securities Ltd advance to Euro Boston. They totalled $11,380.75. They included two sets of legal fees and a valuation fee for the Karangahape Road property that had been used as security for the loan.

On 20 February 2006, FAR issued an invoice to "Lombard Investments Ltd" in the sum of $11,380.75, to obtain reimbursement of the "expenses".

[42] The transactions recorded in those invoices were pure fiction. As Mr Smith accepted in evidence, the amounts claimed in the three invoices represented nothing but the price that FAR was prepared to pay for WAVL's assistance in reducing the percentage of shareholding of interested parties in Lombard Group Ltd below that required by the Stock Exchange Listing Rules.

[43] The relationship between Mr Watt and Mr Marriott soured in the aftermath of the losses caused by the Lombard transaction. Their tensions culminated in a meeting held at the offices of Ellis Law, solicitors, Auckland, on 11 December 2006. At that time, Mr Ellis (of that firm) was acting for Mr Watt and WAVL. As a result of what occurred at that meeting, Mr Marriott was removed as a director of WAVL and as a trustee of the Trust.

[44] On 13 December 2006, Mr Marriott wrote to Mr Ellis referring to an attempt that Mr Smith had made to "broker a solution to the situation as it now stands in a discussion with [Mr] Watt". Mr Marriott set out his position. He wrote:

1. *I remain a shareholder in WAVL. These were shares that I received for services rendered prior to 2002.* A claim for further shares in lieu of fees and charges subsequent to that remains to be determined. The principal charges relate to administration of the company, which has been work intensive – at least 20 hours per month. [Mr Watt] and I have endeavoured to pass the administration or part of it, over to others for many years, but it has always proved either too costly or ineffective.

2. One difficulty that has faced the company is dealing with companies related to [Mr Watt]. Despite demand Reporter Limited, Turner Porter Group Limited and Orbatex Limited have failed to pay rent. In addition advances have been made to those companies and also to New York Gear Limited, Emax Limited and Boston Global Corporation Limited without repayment or interest, as [Mr Watt] required. In the case of New York Gear Limited and Emax Limited a very large sum of money has been written off at [Mr Watt's] direction.

3. Money has also been applied directly to [Mr Watt] and he has diverted money from the company without the knowledge or approval of the (then) director.

4. In all my dealings as regards the company (as will be apparent from documents) I have been scrupulous in acting in the interests of WAVL and its shareholders.

5. As will be clear from the above, despite my shareholding, while director of WAVL I managed the company at [Mr Watt's] direction.

6. The company has adopted a policy of holding property, investments or loans to related companies. There is no inconsistency in the advance to Euro Boston Group Limited for the purchase of the Lombard shares. There is no constructive trust.

7. *The only money that I have received from WAVL is by way of reimbursement of expenses, as will become clear from your investigation of the accounts. This is entirely consistent with the position that [Mr Watt] took: "Your reward will come later" (-still echoes loudly). In anticipation of further shares I have further applied myself.*

8. I am still owed by WAVL for money diverted by Westpac (if not settled), outstanding disbursements from last year ($3,164.15) and for money due to me by Reporter diverted at [Mr Watt's] request ($2000.00). Add to that my claim for fees to be settled by shares – a further 10% was to be delivered when the Lombard transaction came to fruition.

9. *As mentioned at our meeting on Monday what actually happened regarding Lombard was beyond our control. A series of spectacular crashes in the finance company market damaged the share price of Lombard and a benefit on sale could not be realised within the expected term. The position now is that the sale of those shares needs to be managed with care to get the best benefit possible.*

10. *The suggestion that my interest in WAVL is nil is insulting.* If we are to resolve matters constructively there must be regard had for my considerable input into this company.

11. *My 10% share in WAVL is worth at least $459,650.00 and my claim is for a greater sum.* In my view were it not for money applied by WAVL at [Mr Watt's] insistence, into loss making enterprises in the dying garment trade, the company would have a significantly higher value.

12. Given [Mr Watt's] attitude to the company's funds and his apparent attitude to me, I am concerned for WAVL and my interest in it. I therefore consider that failing our being able to reach a negotiated settlement of these matters the appropriate course is to apply to the High Court to have WAVL liquidated on just and equitable grounds. Unless we can promote a solution I will move to file the documents that I have prepared before Christmas.

13. It is still my desire to settle all issues. That means that my without prejudice offer made by my letter of 4 December stands, with the possibility (as mentioned on Monday) that I may be able to arrange some cash payment also. Such a solution would be designed to rid [Mr Watt] of the Lombard position and of me. (my emphasis)

[45] WAVL bears the onus of proving that Mr Marriott breached duties owed to the company by involving it in the Lombard transaction. I am not satisfied that it has discharged that onus.

[46] First, it is clear from Mr Watt's letter to Mr Smith of 8 November 2006 (see para [12] above) that Mr Watt knew the true nature of the arrangement with Lombard before Christmas 2005. While Mr Watt knew the nature of the Lombard transaction at that time, he did not, I find, know that Mr Marriott had interposed Euro Boston as the company to hold the shares. For differing reasons, I am satisfied that both Mr Watt and Mr Marriott saw the opportunity to acquire shares in Lombard

Group as a means of turning a significant profit after that company had been floated. They took a commercial risk and their judgment was proved wrong.

[47] Second, Mr Smith gave evidence to confirm that Mr Watt had been involved in discussions early in the negotiations. Mr Smith was prepared to make frank concessions about the nature of the arrangements involving WAVL and Lombard Group which satisfy me that he is a reliable witness. On that topic, he confirms Mr Marriott's evidence and casts doubt on that of Mr Watt.

[48] I find that the claim against Mr Marriott in respect of the Lombard transaction fails.

The debt issue

[49] On 16 August 2004, WAVL sold its interest in a property at Great South Road, Papakura to the St Stephen's and Queen Victoria's Schools' Trust Board. The amount of the sale was about $570,000.

[50] On 18 August 2004, Mr Marriott received $40,000 out of the proceeds of sale. A letter to Mr Marriott, from the solicitor acting on the sale, Mr Horsley of Atmore Law, dated 19 August 2004, encloses a draft statement (sent to Mr Marriott's facsimile contact number in Wellington) and recorded that the sum of $40,000 was transferred into "a personal ledger account for [Mr Marriott] and then used to repay [a personal debt]". Mr Marriott directed the solicitors to pay that debt, on his behalf. The statement records a payment of $40,000, at Mr Marriott's direction, on 18 August 2004.

[51] Mr Watt denied knowledge of this payment to Mr Marriott. His evidence was that he only learnt of the payment while preparing for trial. Mr Marriott suggested that evidence was a lie, saying "the suggestion that Mr Watt would simply miss $40,000 out of this transaction is sheer nonsense". Mr Marriott said that Mr Watt was "very careful with proceeds of sale".

[52] As indicated in para [15] above, Mr Marriott suggested that the money was recorded as a loan to avoid a tax liability in his hands. He accepted, in answer to a question from me, that if WAVL had gone into liquidation, the amount recorded would have been recoverable as a debt, even if, previously, it had been written off.

[53] The contemporary documents of Mr Horsley, recording Mr Marriott's instructions, indicate that Mr Marriott received a copy of the draft statement, in which the payment was described as a "loan advance". That is sufficient corroboration of the existence of a loan.

[54] There is nothing in the contemporaneous documents to suggest that Mr Watt had any knowledge of this particular payment to Mr Marriott. Nor is there any evidence to suggest that, at the time of the sale of the Papakura property, Mr Watt had seen the settlement statement.

[55] In those circumstances, I find that a debt of $40,000 is owed by Mr Marriott to WAVL.

Result

[56] I do not propose to enter judgment at this stage, because other causes of action remain stayed or outstanding. Rather, I summarise my findings below:

a) WAVL is entitled to a declaration that Mr Marriott holds no shares in WAVL in his own name.

b) WAVL has not satisfied me that it has any claim against Mr Marriott in respect of the Lombard transaction.

c) Mr Marriott owes WAVL the sum of $40,000.

[57] During closing submissions, Mr Marriott raised the spectre of a claim for *quantum meruit,* if he were unsuccessful in his shareholding claim. I have real doubts whether such a claim could succeed, having regard to the original terms of

the Articles of Association of WAVL and (after re-registration under the Companies Act 1993) s 161 of the Companies Act 1993. In the absence of any resolution of directors, prior to Mr Marriott's removal in December 2006, my tentative view is that it would be necessary for the current directors to pass any resolution under s 161(1)(a) at this stage. But, I will hear further argument on that should Mr Marriott wish to pursue the point.

[58] To determine whether any other aspects of the proceeding require to be addressed and to make formal orders, I adjourn the proceeding for a case management conference, in Court for Chambers, before me at 9am on 9 February 2010.

[59] At that time, I will also hear from the parties on questions of costs. My inclination, having regard to the findings I have made, is to leave costs to lie where they fall. However, I will hear from counsel and Mr Marriott further on that issue, should they wish me to do so.

P R Heath J

Delivered at 3.15pm on 9 December 2009