IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-000124
[2013] NZHC 10

	BETWEEN	EQUINOR TRUST LIMITED AND ORS First to Thirty-First Plaintiffs
	AND	ASB BANK LIMITED Defendant

Hearing: 17 January 2013

Counsel: R B Hucker and D Lang-Sui for the Plaintiffs
Z Kennedy and N Chamberlain for the Defendant

Judgment: 18 January 2013

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 18 January 2013 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:…….

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Introduction

[1] The first plaintiff, Equinor Trust Limited (Equinor) offers a trustee management service. The remaining plaintiffs are trustee companies. Mr Lachlan Williams is a director of all the companies. He is also a director of Kiwi Deposit Building Society (Kiwi), which is a registered building society. The plaintiff companies have held bank accounts with the defendant, ASB Bank Limited, since 2007 and Kiwi since 2009. Late last year, the ASB gave notice of its intention to terminate its banking relationship with these parties and to close all of the plaintiffs' accounts.

[2] The plaintiffs have not been able to find a new banker. They have brought proceedings seeking a permanent injunction that would require the ASB to maintain their accounts until alternative banking facilities have been obtained. In the meantime, they have applied for interim relief requiring the bank to maintain the accounts for a further 21 days or, at least, to refrain from remitting the funds held in those accounts.

[3] I heard argument yesterday and dismissed the plaintiffs application. These are my reasons.

Is there a serious question to be tried?

[4] The events leading up to the ASB's decision to terminate its relationship with the plaintiffs is canvassed in affidavits by Mr Williams and by an ASB Commercial Manager, Mr Allen. Although there a rough consistency, each has a very different perspective.

[5] Mr Williams maintains that the ASB's decision is driven by its concern that Kiwi presents a commercial threat to the ASB's own services being offered to high network individuals. This concern seems to have centred mainly around Kiwi's efforts to open a "nostro" account service system, which would allow access to the SWIFT interbank messaging system. According to Mr Williams, the ASB stalled

Kiwi's application for a nostro account by continuing to ask questions and seek more information.

[6] Mr Allen deposed that dissatisfaction with the plaintiffs' and Kiwi's accounts increased over the course over 2012 as a result of the nature of the transactions being effected and the lack of clear responses to queries about those transactions. He gave as one example a transfer of US$1M in October 2012 from a Tunisian company to an Islamic bank in the United Arab Emirates via a Kiwi account. The ASB did not get satisfactory answers about the nature of this transaction. Then, in November 2012, the ASB was contacted by the Royal Bank of Scotland regarding a suspicious Kiwi transaction.

[7] Shortly afterwards the ASB resolved that, due to its lack of confidence in Mr Williams and concerns over its own position in terms of risk and anti-money laundering compliance issues, it would terminate the banking relationship. Mr Allen rejects as nonsense any suggestion of the ASB being driven by concerns over competition from Kiwi.

[8] Clearly, there are factual issues which are not capable of being resolved at this point in the proceedings. However, they are not of direct relevance to the determinative issue. The plaintiffs acknowledge that the ASB has the right to terminate the banking relationship. That right is provided for in the terms and conditions of the accounts held by the plaintiffs. The real question between the parties is whether sufficient notice was given.

[9] Of the 97 accounts in question, 65 are foreign currency accounts. The terms and conditions applying to the general accounts included:

> We will not normally close your Account or withdraw a Product or Service until we have given you at least 14 days notice setting out the relevant details. However, there may be circumstances where we close your Account or withdraw a Product or Service without prior notice. Examples are:....
>
> …
>
> (vi) We consider your Account is not being conducted in a satisfactory manner.

[10] The terms and conditions applying to the foreign currency accounts include:

> 2.5 The bank may in its absolute discretion close any account at any time upon reasonable notice to the Customer. The bank may immediately suspend the operation of any account or close it without prior notice if:
>
> …
>
> (c) The bank in its absolute discretion considers that it has reasonable grounds to do so.

[11] Because the ASB elected to give notice, the issue in relation to all the accounts is likely to be whether the notice actually given was reasonable. Initially four weeks notice was given on 8 November 2012. This was extended at the plaintiffs' request, with the notice period ultimately given being 64 days.

[12] Mr Hucker, for the plaintiffs, submitted that, given the nature of the plaintiffs' businesses and the time of year at which notice was given (coinciding with the Christmas break), this amount of time was not reasonable. He pointed out that of the additional four weeks extension agreed to, about half fell within the Christmas break, making it very difficult for the plaintiffs to advance its efforts to obtain alternative banking accommodation and to access legal advice. In this regard, Mr Williams deposed that the plaintiffs had been unable to obtain legal advice until 10 January 2013.

[13] One might well say that 64 days in these circumstances was reasonable, and that a mark of that reasonableness was the fact that it was sought and agreed to by the plaintiffs. Mr Williams is clearly a person with considerable experience in commerce and holds a current practising certificate from the Law Society, so it is reasonable to expect that he would have been conscious of the potential problems created by the Christmas break. On the other hand, the plaintiffs sought and agreed to the four week extension from a position of weakness, with no alternative options. It is evident that their banking needs are reasonably complex and I accept that there finalising alternative arrangements over a period that included the Christmas break would have been challenging. For these reasons I consider that the reasonableness of the notice given is a serious issue to be tried.

Balance of convenience

[14] I am not, however, satisfied that the balance of convenience favours the plaintiffs. In their favour is the fact that serious consequences may flow from the closure of the accounts. As I have noted, the plaintiffs have not been able to find an alternative banker. Although the BNZ initially indicated that it would be prepared to accept the plaintiffs as customers, last week it advised that it would not do so. Mr Williams has deposed that if the plaintiffs cannot access bank accounts they will be unable to manage funds so as to discharge their trustee obligations. Some of the trusts are trading trusts, which clearly would impact on their operations. Other trusts receiving dividends or returns from investments will be unable to distribute them. Some of the trusts may fail. Mr Williams also points to the serious risk of loss to Equinor through reputational damage not compensatable by way of damages. These are matters of serious concern.

[15] As against these factors is the ASB's obvious concern about its own position. Mr Allen has deposed to the seriousness with which the ASB views its own exposure and its compliance obligations, particularly in terms of anti-money-laundering requirements. Mr Kennedy, for the ASB, submitted that the bank ought not be forced into an ongoing banking relationship in these circumstances. There are also serious reputational issues for the bank which would be difficult to quantify. In that regard, I also accept that the undertaking as to damages offered by the plaintiffs is of little comfort since it is given with virtually no information as to the assets that are truly available to respond to a damages claim.

[16] However, the reason that I consider that the balance of convenience does not favour the plaintiffs is that I am not satisfied that interim relief would in fact assist them. Mr Williams has referred only to his unsuccessful efforts to obtain banking accommodation with the BNZ. However, he provides no details of other possible arrangements. There is no suggestion that negotiations are on foot with any other banker. Given the relative complexity of the plaintiffs' banking needs, it is inconceivable that alternative arrangements could be put in place within the 21 days sought. There is, therefore, no basis on which I can find interim relief of the kind sought would have any utility. That being the case, there is, in truth, no benefit to

the plaintiffs in my granting interim relief and, to the contrary, significant disadvantage to the defendant to be forced to continue this relationship.

[17] As of yesterday the ASB had completed closure of the accounts and prepared cheques for the credit balances of them. I directed that these cheques were to be dispatched in accordance with advice from Mr Hucker to be given by 9am today, 18 January 2013.

[18] I was not addressed on the issue of costs. Costs are reserved.

Courtney J