

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 80/2018
[2018] NZSC 107

BETWEEN JAMES JOHN DUNCAN MACFARLANE
Applicant
AND PERPETUAL TRUST LIMITED
Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicant in person
J Edwards and J C Suyker for Respondent

Judgment: 14 November 2018

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
B Costs of \$2,500 are awarded to the respondent.
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REASONS

Introduction

[1] Mr Macfarlane seeks leave to appeal against a decision of the Court of Appeal,¹ which upheld a decision of Associate Judge Johnston removing a caveat Mr Macfarlane had lodged over a homestead property in North Canterbury (the homestead) and granting vacant possession of the property to Perpetual Trust Ltd (Perpetual).²

¹ *Macfarlane v Perpetual Trust Ltd* [2018] NZCA 311 (French, Simon France and Moore JJ) [*Macfarlane* (CA)].

² *Macfarlane v Perpetual Trust Ltd* [2018] NZHC 1055 (Associate Judge Johnston) [*Macfarlane* (HC)].

Background

[2] Mr Macfarlane's father originally owned the homestead. Under his father's will, the bulk of his estate, including the homestead, was given to the trustees to hold on trust for his widow and his eight children (including Mr Macfarlane).

[3] In the event of Mrs Macfarlane's death or remarriage, the trustees were given an unfettered discretion to wind up the trust and pay the capital to the children in such proportions as they thought fit. In 1965 the terms of the trust were varied by court order. The unfettered discretion was removed and the capital was notionally divided into 40 equal shares and apportioned. In 1992, Perpetual was appointed sole trustee of the estate.

[4] Mrs Macfarlane died in October 2016, having never remarried. Mr Macfarlane had been living with his mother in the homestead and remained living there after her death even though it was badly damaged in the Kaikōura earthquake of November 2016.

[5] Perpetual, after settling an insurance claim in respect of the homestead, decided to sell it in its damaged state. An agreement for sale and purchase was entered into with a settlement date of 14 March 2018.

[6] Mr Macfarlane registered a caveat over the title to the property in February 2016. Then followed three applications to the High Court: Mr Macfarlane's application seeking an order that his caveat not lapse, an application by Perpetual seeking an order for removal of the caveat, together with an application for vacant possession and summary judgment.

[7] All three applications were heard together before Associate Judge Johnston. As the Court of Appeal noted,³ his key findings were:

³ *Macfarlane (CA)*, above n 1, at [11].

- (a) Mr Macfarlane had failed to make out a reasonably arguable case that he had a proprietary interest in the homestead property sufficient to support a caveat.⁴
- (b) Even if he did have a reasonably arguable case, the Associate Judge would, in any event, have been prepared to exercise his residual discretion against Mr Macfarlane.⁵
- (c) Mr Macfarlane had no defence to the application for vacant possession.⁶

[8] The Court of Appeal upheld Associate Judge Johnston's decision on all three points.⁷ In particular, the Court said:⁸

Even if we are wrong in these conclusions and Mr Macfarlane was able to make out an arguable case for a caveatable interest we, like the Associate Judge, would exercise the Court's residual discretion in Perpetual's favour. All the other residuary beneficiaries support the sale and Mr Macfarlane's interests, which are limited to receiving a portion of the sale proceeds, are adequately protected without a caveat. We are satisfied there is no practical benefit to be gained by permitting the caveat to remain and no prejudice to Mr Macfarlane in removing it.

(footnotes omitted)

Submissions

[9] Mr Macfarlane has a number of complaints about the appointment of Perpetual as a trustee, the alleged conduct of Perpetual as trustee and about the sale process followed by Perpetual. He also submits that, in the circumstances of the case, the caveat should have been maintained.

[10] Perpetual denies any wrongdoing but submits that, in any event, this has no bearing on the issues before the Court. It submits further that the sale of the property

⁴ *Macfarlane* (HC), above n 2, at [62].

⁵ At [66].

⁶ At [71].

⁷ *Macfarlane* (CA), above n 1, at [18], [21] and [24].

⁸ At [21].

will not deprive Mr Macfarlane of anything to which he is lawfully entitled. There would also be prejudice to the other beneficiaries if the caveat was maintained.

Our assessment

[11] Both the High Court and the Court of Appeal indicated that they would have exercised the discretion against Mr Macfarlane, even if he had shown that he had a reasonably arguable case of an interest in the homestead sufficient to support a caveat.⁹ This was understandable in light of the position of the other residuary beneficiaries who support the sale.

[12] In the circumstances, the outcome rested on the particular factual circumstances and does not raise any issue of general public importance.¹⁰ Nor does the approach of the Courts below indicate any risk of a miscarriage of justice. The criteria for leave to appeal are not met.

Result

[13] The application for leave to appeal is dismissed.

[14] Costs of \$2,500 are awarded to the respondent.

Solicitors:
Russell McVeagh, Auckland for Respondent

⁹ We thus do not need to make any finding on whether or not there was a sufficient interest.
¹⁰ Senior Courts Act 2016, s 74(2).