IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 22/2004
[2005] NZSC 19

	BETWEEN	CALAN HEALTHCARE PROPERTIES LIMITED Appellant
	AND	RICHARD JOHN ORD AND COLLEEN MARY FENTON Respondents

Hearing: 22 April 2005

Court: Elias CJ and Tipping J

Counsel: B R Latimour and S C Price for Appellant
M J McCartney for Respondents

Judgment: 27 April 2005

JUDGMENT OF THE COURT

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1. The application for leave to appeal is dismissed.

2. Costs to respondents of $2500.00 plus all appropriate disbursements to be fixed if necessary by the Registrar.

REASONS

(Given by Tipping J)

[1] The underlying issue on this application for leave to appeal is whether pre-emptive rights in the constitution of the appellant, Calan Healthcare Properties Limited were triggered. The respondents presented for registration a share transfer

which was designed to have the effect of transferring the shares in question from existing trustees to new trustees. Fisher J held that this transfer came within the triggering words "a shareholder intending to transfer any shares". The Judge held that the trustee shareholders were intending to "transfer" the shares to the new trustees and hence the pre-emptive rights were triggered. The Court of Appeal came to the contrary view. That conclusion was based on the particular circumstances of the present case, rather than on any general ruling as to the meaning of the triggering provisions.

[2] From para [44] the Court said:

> [44] That Mr Ord's stake in the company was held by a trust at the time the constitution was adopted is of critical contextual significance in interpreting clause 8. If Mr Ord had realised, at the time the constitution was under consideration, that any change in the trustees of the Crucible Trust (other than under clause 8.5) might trigger rights of pre-emption in favour of CIML he would, we imagine, have refused to agree to the constitution except on terms which provided for a carve out from clause 8.4 in respect of changes of trustee. Given the carve outs agreed in relation to clauses 8.3 and clause 8.5, it is inconceivable that Messrs Freestone and Lyttelton would have disagreed. This suggests to us that it was regarded on all sides as so obvious that clause 8.4 did not apply to mere changes of trustee that no such carve out was required. We see this as a controlling consideration in terms of the interpretation of the clause.
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> [45] It is not necessary for us to determine the extent to which clause 8.4 applies outside the obvious case of sales. It is sufficient for us to conclude (as we do) that it does not extend to changes of trustee affecting the Crucible Trust.
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> …
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> [47] Given the extent to which the provisions of clause 8 were tailored to meet the particular circumstances of the parties, we do not see authorities on differently expressed rights of pre-emption as particularly helpful. ….

[3] Mr Latimour, in his well presented submissions, contended that the Court of Appeal had erred in its conclusion that Mr Ord's stake in the company was held by a trust at the time the constitution was adopted. Hence he argued that the Court's view that this had "critical contextual significance" in interpreting the pre-emptive clause was necessarily undermined. But even if, as Mr Latimour pointed out, Mr Ord's shares were transferred to the trust one day after the company's constitution was adopted rather than prior to that event, we consider the Court of Appeal's reasoning is not thereby materially affected. The fact that it was well known Mr Ord's shares

were to be transferred to a trust when Calan's constitution was adopted leads logically to the same consequence as that ascribed by the Court of Appeal to the situation as they understood it.

[4] The way the Court of Appeal expressed itself in para [45] demonstrates very clearly that the Court was limiting its conclusion as to the meaning of the triggering words to "changes of trustee affecting the Crucible Trust". The Court could not have expressed itself more narrowly: see also paras [33] and [34]. The conclusion that the triggering words did not cover this particular transaction provides no precedent for whether the triggering words cover other transactions involving a change in trustees. The Court of Appeal's judgment has no precedent value for other cases because of the narrow way the conclusion was expressed.

[5] As we indicated at the end of the oral hearing, we are unable to see this case as raising any point of general or public importance or any point of general commercial significance. Even if, as Mr Latimour argued, the Court must have adopted a faulty approach to interpretation in order to reach the conclusion it did, there is nothing in the judgment from that point of view which could possibly affect other cases.

[6] For these reasons, which summarise points made during oral argument, we do not regard this case as qualifying for leave under any of the provisions of s 13 of the Supreme Court Act. That is why leave to appeal was declined at the end of the oral hearing. The appellant must pay costs as indicated above.

Solicitors:
Bell Gully, Auckland for Appellant

Cockcroft d'Young Moorhouse, Auckland for Respondents