

IN THE SUPREME COURT OF NEW ZEALAND

**SC 47/2012
[2012] NZSC 78**

BETWEEN	DORCHESTER FINANCE LTD Appellant
AND	DELOITTE First Respondent
AND	PERPETUAL TRUST LTD Second Respondent

Court: McGrath, Chambers and Glazebrook JJ

Counsel: R B Stewart QC and G K Holm-Hansen for Appellant
R J Simpson and J Q Wilson for First Respondent
S A Barker and S N Bisley for Second Respondent

Judgment: 11 September 2012

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of \$5,000 to each respondent, plus all reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

[1] Perpetual Trust Ltd, the trustee of a Dorchester Finance Ltd secured debenture stock trust deed, engaged Deloitte to advise it on a Dorchester moratorium proposal. Deloitte rendered a fee for its services. Perpetual questioned the reasonableness of the fee. Eventually that matter was resolved.

[2] Perpetual proposed to pay Deloitte's (reduced) fee and then to seek reimbursement of it from Dorchester under cl 6.1.3 in the trust deed, pursuant to which Dorchester had agreed to pay "all expenses ... reasonably incurred by ...

[Perpetual] in connection with ... the exercise of any power or execution of any trust conferred on [Perpetual] hereunder including the taking of any expert advice deemed necessary by [Perpetual]”. Dorchester said Perpetual should not pay the fee because it was time-barred pursuant to a limitation clause in the Deloitte terms of engagement. If Perpetual chose to pay it, Dorchester said it could not recover the expense from it under cl 6.1.3.

[3] The three parties sought declaratory relief in the High Court. Venning J held that, even though the debt was time-barred, Perpetual could still pay it and recover it from Dorchester as a “reasonably incurred” expense.¹ The Court of Appeal dismissed the appeal.²

[4] Dorchester now seeks leave to appeal to this Court. The application for leave has been advanced on the principal footing that the case raises some fundamental questions as to the nature of contractual limitation clauses. The issue as presented is whether a contractual limitation clause, once triggered, extinguishes a debt, as Dorchester argues, or merely prevents its enforcement. Venning J and the Court of Appeal concluded the answer to such a question turned on the interpretation of the particular clause in context, a view which we consider beyond argument. They went on to hold that, on a proper interpretation, the clause in this case merely prevented enforcement of the debt. While we are minded to agree with that conclusion, we do not find it necessary to conclude a view on it as we do not think this issue is at the heart of the case.

[5] There can be no doubt Perpetual’s contracting for Deloitte’s services was a reasonable exercise of its powers. That act led inevitably to the incurring of an expense. Perpetual’s wish to pay for the services rendered and not to stand on its rights was reasonable in the circumstances, for the reasons Venning J gave.³ Perpetual was not duty-bound, vis-a-vis Dorchester, to refuse to pay the debt just because it had become “stale”. For this reason, we do not think it matters whether the debt, in technical terms, was extinguished or merely became unenforceable.

¹ *Dorchester Finance Ltd v Deloitte* HC Auckland CIV-2010-404-6442, 17 December 2010.

² *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226.

³ At [52]-[59]. The Court of Appeal dealt with this matter only briefly but appears to have agreed with Venning J on this point at [44].

[6] We are satisfied that the principal ground of appeal is not at the heart of this case. The issue that is at its heart, the application of cl 6.1.3, in so far as it has been raised,⁴ is not reasonably arguable.

[7] In addition, we do not see the proposed appeal raising a matter of “general or public importance”: the true issue involves the application of a one-off clause in a particular trust deed in a particular set of circumstances. Nor do we consider “a substantial miscarriage of justice ... may occur unless the appeal is heard”. The case does not come close to meeting that test as it was explained in *Junior Farms Ltd v Hampton Securities Ltd (in liq)*.⁵ Nor does the appeal involve “a matter of general commercial significance”. The dispute is very fact-specific.

[8] For these reasons, we dismiss the application for leave to appeal.

Solicitors:
Simpson Grierson, Auckland for Appellant
Bell Gully, Auckland for First Respondent
Buddle Findlay, Wellington for Second Respondent

⁴ Deloitte’s counsel took the point that the true issue, while briefly mentioned in Dorchester’s submissions, had not been raised in the application for leave.

⁵ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, [2006] 3 NZLR 522.