IN THE SUPREME COURT OF NEW ZEALAND

SC 112/2017
[2018] NZSC 1

BETWEEN	IAIN MCLENNAN AND BORIS VAN DELDEN AS LIQUIDATORS OF NEIL TIMBER LIMITED (IN LIQUIDATION) Applicants
AND	BORIS LIVAJA First Respondent
	IWONA GRAZYNA KOTOWSKA-LIVAJA Second Respondent
	ORION TRUSTEE 1 LIMITED Third Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	P J Dale and A J Steel for Applicants S R G Judd for Respondents
Judgment:	1 February 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay costs of $2,500 to the respondents.

REASONS

Introduction

[1] This application for leave arises out of an application by the applicants, as liquidators of a company called Neil Timber Ltd, to sustain a caveat over a property in Henderson, Auckland. The respondents are the registered proprietors of the

property which is the subject of the caveat in their capacity as trustees of the Orion Trust.[1]

[2] Both the High Court[2] and the Court of Appeal[3] dismissed the application to sustain the caveat. The applicants seek leave to appeal to this Court.

Background

[3] The background is somewhat drawn out but is fully explained in the judgment of the Court of Appeal.[4] We need only note that the applicants' caveatable interest is said to arise from knowing receipt by the trustees of the D'Angellis Trust, another trust settled by the second respondent, of Neil Timber Ltd's funds. The funds[5] were used to purchase a property in New Lynn, Auckland, and the sale of that property in turn funded the purchase of the Henderson property.

[4] Both the High Court and the Court of Appeal determined the applicants had not established a reasonably arguable case for maintaining the caveat. Both Courts concluded there was insufficient basis to attribute the requisite knowledge to the trustees.[6] The Court of Appeal in its assessment treated knowing receipt as met by unconscionability.

The proposed appeal

[5] The applicants wish to argue the caveat should have been sustained because the respondents:

> (a) Had the appropriate level of knowledge to satisfy the test for knowing receipt.
>
> (b) Were unaware of any basis upon which Mr Ede [the second respondent's former husband who passed on the funds to enable the

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1 The Trust was settled by the second respondent, Iwona Grazyna Kotowska-Livaja. The first respondent, Boris Livaja, is Ms Kotowska-Livaja's husband.

2 *McLennan v Livaja* [2016] NZHC 889 (Associate Judge Doogue) [*McLennan* (HC)].

3 *McLennan v Livaja* [2017] NZCA 446 (Brown, Dobson and Brewer JJ) [*McLennan* (CA)].

4 At [3]–[23].

5 $330,000 plus $20,000 to the second respondent towards renovation costs. The second respondent had been married to (but at the time was separated from) John Ede. As the Court of Appeal noted, Mr Ede was treated as a "shadow" director of Neil Timber Ltd: *McLennan* (CA), above n 3, at [4].

6 *McLennan* (HC), above n 2, at [26]–[36]; and *McLennan* (CA), above n 3, at [57]–[68].

purchase of the New Lynn property to the trustees of the D'Angellis Trust[7]] might be entitled to [those] funds.

(c) Were not bona fide purchasers for value.

[6] In addition, they say the Court of Appeal should have proceeded on the basis that it was sufficient to show the funds in issue flowed from Neil Timber Ltd.

[7] There is no challenge to the principles applied by the Court of Appeal to determine whether there was a caveatable interest and nor to the approach to knowing receipt. Rather, the focus of the proposed appeal is on the application of those principles to the facts. Accordingly, no point of general public or commercial significance arises. Nor do the matters raised give rise to any appearance of a miscarriage. The question currently has been addressed only in the context of an application to sustain a caveat. The applicants can pursue the question of the respondents' knowledge in the context of their substantive claim.[8]

[8] The application for leave to appeal is dismissed. Costs of $2,500 are awarded to the respondents.

Solicitors:
Bruce Scott Stevens, Auckland for Applicants
Davies Law, Waitakere for Respondents

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7 See above n 5.

8 The proposed appeal is interlocutory in character and does not meet the threshold for leave: Supreme Court Act 2003, s 13(4); and Senior Courts Act 2016, s 74(4). See also *Bourneville v Marshall* [2013] NZSC 107.