IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 9/2018
[2018] NZSC 28

BETWEEN	WILLIAM GEORGE GRAHAM CAMERON CLEARY Applicant
AND	EWART & EWART Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	L Herzog for Applicant P M Fee for Respondent
Judgment:	12 April 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 to the respondent.

REASONS

[1] The applicant applies for leave to appeal against a decision of the Court of Appeal,[1] upholding a decision of the High Court dismissing his claim against the respondent.[2] The application is advanced on the basis that the Court of Appeal made errors which are of such a substantial character that a miscarriage of justice will occur if leave is not granted.[3]

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1 *Cleary v Ewart & Ewart* [2017] NZCA 620 (Clifford, Dobson and Collins JJ) [*Cleary* (CA)].
2 *Cleary v Ewart & Ewart* [2017] NZHC 39 (Edwards J) [*Cleary* (HC)].
3 Senior Courts Act 2016, s 74(2)(b); Supreme Court Act 2003, s 13(2)(b).

[2] The applicant had instructed the principal of the respondent law firm, Mr Ewart, to document a verbal agreement between the applicant and a representative of Vunabaka Bays Fiji Limited (the company) under which the company would pay the applicant USD 440,000 to cancel an agreement between the company and the applicant relating to a section in the company's development in Fiji. The applicant and the company appeared to be under the impression that the applicant had an option to purchase a section in the development under the agreement, but it transpired that the agreement in fact provided that the company had an option to require the applicant to buy the section. On discovering this, Mr Ewart was concerned that if the company made payment to the applicant to cancel the agreement in circumstances where it conferred no rights on the applicant, this could give rise to tax problems, including the incurring of gift duty.

[3] Mr Ewart discussed these concerns with the applicant and the applicant's tax adviser. It seems no one at the meeting realised there were no gift duty implications arising from the transaction. Even if they did, they were also concerned about other potential tax consequences, but the precise nature of these concerns is unclear. Following that discussion, Mr Ewart approached the solicitor for the company suggesting that the company exercise the option and that the cancellation arrangement then take place in circumstances where the applicant would be foregoing substantive rights in exchange for the USD 440,000 payment. Once alerted to the true nature of the agreement the company decided not to proceed with the arrangement, but instead agreed to refund the deposit paid by the applicant of USD 165,000. The applicant claimed that as a result he lost the chance to receive the USD 440,000 that the company had been prepared to pay.

[4] Both the High Court and the Court of Appeal found that Mr Ewart had not been negligent in the circumstances and also found that, even if he had been negligent, that negligence would not have been causative of loss.[4] These concurrent findings were based on essentially the same reasoning.[5]

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4 *Cleary* (HC), above n 2, at [69] and [83]; *Cleary* (CA), above n 1, at [48] and [51]–[53].

5 The applicant also brought a second cause of action for breach of fiduciary duty. This was dismissed in the High Court for the same reasons as the negligence claim and was not pursued in the Court of Appeal: see *Cleary* (HC), above n 2, at [84]; and *Cleary* (CA), above n 1, at [30].

[5] The applicant emphasises Mr Ewart's error in relation to the risk of the incurring of gift duty, and argues that if Mr Ewart had simply documented the arrangement as initially instructed and presented the agreement to the company, there was a chance the company would have signed the agreement and paid the USD 440,000. He says he lost this chance as a result of Mr Ewart's negligence.

[6] As the applicant acknowledges, the miscarriage ground in civil appeals applies only in cases of a sufficiently apparent error of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case.[6] In the present case, there may be some room for debate about the conclusion that Mr Ewart was not negligent in the circumstances, but a contrary view to that reached by the Courts below would require this Court to take a different view of facts on which there have been concurrent findings in the Courts below. In any event, we do not consider that there is anything in the material before the Court that shows sufficient doubt about the correctness of the conclusion reached by the Courts below as to the absence of causation to justify the granting of leave.

[7] We therefore decline leave to appeal.

[8] We award costs of $2,500 to the respondent.

Solicitors:
Smith & Partners, Auckland for Applicant
Fee Langstone, Auckland for Respondent

6 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].