IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 72/2022
[2022] NZSC 123

BETWEEN	PETER DANIEL STAITE, JEAN TANIRAU-CARSTON AND LYNETTE KATHLEEN PALMER AS TRUSTEES AND REPRESENTATIVES OF THE BENEFICIARIES OF THE WHAOA NO 1 LANDS TRUST First Applicants
	PETER DANIEL STAITE, JEAN TANIRAU-CARSTON, TERESSA HURIHANGANUI, DOROTHY RAROA AND LYNETTE KATHLEEN PALMER AS TRUSTEES AND BENEFICIARIES OF THE NGĀTI WHAOA MĀORI RESERVATION Second Applicants
AND	ANDREW MARUTUEHU KUSABS, CRAIG JOHN KUSABS, WALLY VICTOR HOHEPA LEE, ROBERT LESLIE MACFARLANE AND WIREMU MATAIA KEEPA AS TRUSTEES OF THE TUMUNUI LANDS TRUST First Respondents
	ANDREW MARUTUEHU KUSABS, DONALD MAIRANGI BENNETT, JULIAN KUMEROA KEEPA AND WIREMU WAAKA AS RETIRED TRUSTEES OF THE TUMUNUI LANDS TRUST Second Respondents

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	D G Chesterman and J P Koning for Applicants M S McKechnie for Respondents
Judgment:	20 October 2022

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

Background

[1] The applicants are the trustees of the Whaoa Trust, an ahu whenua trust, which owns Māori freehold land at Reporoa. On 16 February 1994 the Whaoa Trust executed a lease of the land in favour of another ahu whenua trust, the Tumunui Trust. The respondents are the trustees of the Tumunui Trust.

[2] In a proceeding commenced in 2009 the Whaoa Trust sought rescission of the lease on the basis of Mr Edward Moke's involvement in its negotiation. Mr Moke was a trustee of both trusts. The Whaoa Trust alleged that the terms of the lease were unfavourable to the Whaoa Trust both by reason of the duration of the lease and the rental being significantly below market value.

Decisions below

High Court judgment

[3] Heath J in the High Court accepted that Mr Moke breached his fiduciary duty of loyalty to the Whaoa Trust by acting on both sides of the lease transaction and that his involvement had provided material assistance to the Tumunui Trust in the lease negotiations.[1] However, the Judge made a positive finding that Mr Moke was not responsible for what the Judge considered to be an error in the drafting of the rental provision.[2] The Judge declined to order rescission of the lease but instead made an order for rectification of the lease.[3]

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1 *Staite v Kusabs* [2017] NZHC 416 (Heath J) at [167(a)], [170] and [262(a)].

2 At [169].

3 At [213] and [262(b)]. Note that the effect of the order for rectification was modified in the recall judgment of *Staite v Kusabs* [2017] NZHC 2299 (Heath J) at [46].

Court of Appeal judgment

[4] The Tumunui trustees appealed against the order for rectification to the Court of Appeal.[4] They further contended that Mr Moke's breach of fiduciary duty was not of such a character as to justify either rescission or rectification of the lease.[5]

[5] The Court of Appeal allowed the appeal against the order for rectification on the basis that it was not satisfied that the parties had a common intention that the rental provision in the lease should have been in the revised form the Judge proposed.[6]

[6] In terms of the alleged breach of fiduciary duty, the Court of Appeal held that "[t]aking a robust approach to the standard, Mr Moke's interests in the two blocks may be described as *de minimis*".[7] The Court of Appeal considered that the wider context supported this approach, including that all those involved were aware of Mr Moke's dual trusteeship, that no one had suggested a conflict of interest at any time prior to Mr Moke's death in 2003 and that the lease was not just a commercial agreement but also an expression of the whanaungatanga between the three hapū.[8] It was also significant that Mr Moke stood to gain far more financially by favouring the Whaoa Trust over the Tumunui Trust and thus had no financial incentive to favour the Tumunui Trust.[9] The Court also differed from the High Court's conclusion that Mr Moke's primary affiliation was to Tumunui and that this created a cultural conflict.[10]

[7] The Court of Appeal concluded that:[11]

> … a reasonable person cognisant of the nature of Māori land ownership, tikanga principles of whanaungatanga and mana, and the wider factual matrix, would not have considered there was a "real sensible possibility" that Mr Moke had a conflict at the time the Tumunui Lease was entered into or at any stage thereafter.

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4 *Kusabs v Staite* [2019] NZCA 420 (Cooper, Brown and Williams JJ) [CA judgment].
5 At [5].
6 At [112].
7 At [136].
8 At [137].
9 At [138].
10 At [139]–[141].
11 At [142].

[8] In coming to that conclusion the Court of Appeal applied the principles set out in this Court's decision in *Fenwick v Naera*.[12] The Court of Appeal described the approach in that case as follows:[13]

> [125] Although the Supreme Court was very clear that the self-dealing rule applied to Māori land trusts as it did for any other trust, Glazebrook J, writing for the majority, was very much alive to the distinctive context of Māori land ownership and tikanga. The Court reflected this firstly by emphasising the requirement in *Boardman v Phipps* that the facts must disclose a "real sensible possibility of a conflict," not a remote, speculative, or negligible risk. Furthermore, citing a passage from the speech of Lord Upjohn in *Boardman*, the majority emphasised that the test for breach is an objective one – that of a "reasonable man looking at the relevant facts and circumstances of the particular case…". Tikanga and the whanaungatanga context of Māori trusteeship is, obviously, an important context for that "reasonable man" to take into account.
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> [126] Second, the majority left open the possibility of a limited interest exception to the otherwise strictly applied rule against self-dealing. It did not finally decide the point as it would not have affected the result in that case. On the facts, one of the trustees was, like Mr Moke in this case, also a trustee of a counterparty, so even if that trustee did have a limited interest, the exception could not apply.
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> [127] Third, the majority acknowledged that, in any event, the self-dealing rule would not apply at all to a trustee who had, not just a limited, but a *de minimis* interest in the counterparty. Disapplication of the rule in such circumstances meant that cross-trusteeship would not be fatal. Instead, the focus for the Court should be the 'sensible possibility' test applied in light of the scheme of Te Ture Whenua Māori Act and the realities of Māori land ownership. William Young J, who wrote separately, was also cognisant of the whanaungatanga context. He suggested that it could be "accommodated by a robust application of the *de minimis* principle." We agree with that approach.
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> [128] Fourth, even if the trustee was found to have a conflict of interest and/or loyalty, the Court held that rescission would not be an automatic remedy at the election of the aggrieved party. Better to reserve to the trial court (whether the Māori Land Court or the High Court) a broad discretion in relation to relief. A full appreciation of the wider commercial and cultural context was required before a decision on remedy could be made. …
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> …
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> [133] … The approach in *Naera* was to seek to strike an appropriate balance by applying equitable doctrines with context, including the context implicit in the broader objects of Te Ture Whenua Māori Act, firmly in mind.

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12 *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354.

13 CA judgment, above n 4 (footnotes omitted).

[9] The Court of Appeal said that, even if Mr Moke had acted in breach of the rule against self-dealing, it still did not consider the Whaoa Trust should obtain a remedy for that breach.[14] In the Court's view the tikanga context was important to the issue of remedy.[15] It considered that the lease was not unfair at the time seen in its proper context.[16] Further, the Whaoa Trust was independently advised, the alleged drafting error was not a mistake and in any event it had nothing to do with Mr Moke.[17] The Whaoa Trust would also derive an inappropriate benefit from an order for rescission and unwinding the lease after so long would cause considerable difficulties.[18]

[10] The Court of Appeal considered that if, contrary to its view, equitable compensation was payable, it was not possible to equate this to the rental payable pursuant to the rectified lease.[19] A further hearing in the High Court would have been required.[20]

Leave application

Applicants' submissions

[11] The applicants seek leave to appeal against the Court of Appeal judgment primarily on the grounds that the finding that there was no conflict of interest was wrong. They also seek leave to appeal against the finding that, if there had been a conflict of interest, there should be no remedy. If necessary they say that the Court of Appeal was wrong to overturn Heath J's order for rectification and was also wrong in its findings on equitable compensation.

[12] The applicants submit that the appeal involves a matter of general or public importance[21] because there are over 5,500 ahu whenua trusts in New Zealand that together manage an estimated 800,000 hectares of Māori freehold land, that trustees of ahu whenua trusts commonly have beneficial interests in other Māori trusts and this

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14 At [143].
15 At [144].
16 At [146].
17 At [145].
18 At [145].
19 At [151].
20 At [153].
21 Senior Courts Act 2016, s 74(2)(a).

is the first case to apply the principles in *Fenwick v Naera* to concrete facts.[22] According to the applicants, it involves a matter of general commercial significance[23] because ahu whenua trusts are regularly involved in commercial transactions and have a growing significance in the New Zealand economy. It also involves a significant issue related to the Treaty of Waitangi.[24]

Respondents' submissions

[13] The respondents say that the issues raised in relation to conflict of interest and the de minimis finding were determined by this Court in *Fenwick v Naera* and the Court of Appeal correctly applied those principles in this case. This means that, while the case has commercial significance to the parties, it has no wider significance and there is no miscarriage of justice. They also say that it is proper to take into account the desirability of bringing an end to protracted litigation. They note that there is a boundary dispute currently adjourned before the Māori Land Court. The respondents further submit that the arguments raised by the applicant do not have sufficient prospect of success to warrant granting leave to appeal.

Our assessment

[14] This case relates to application of the principles set out by this Court in *Fenwick v Naera*.[25] We therefore accept the submission of the respondents that, while the proposed appeal might have commercial significance to the parties, it does not concern issues of general or public importance.[26] Nothing raised by the applicants suggests to us that the Court of Appeal misunderstood those principles or erred in their application. There is therefore no risk of a miscarriage of justice.[27]

Result

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

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22 They submit that the Court of Appeal's decision is not consistent with *Fenwick v Naera*, above n 12.
23 Senior Courts Act, s 74(2)(c).
24 Section 74(3).
25 *Fenwick v Naera*, above n 12.
26 Senior Courts Act, s 74(2)(a).
27 Section 74(2)(b). For the threshold required for a miscarriage of justice in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

[16] The applicants must pay the respondents costs of $2,500.

Solicitors:
Holland Beckett Law, Tauranga for Applicants
Le Pine & Co, Taupo for Respondents