

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 11/2022
[2022] NZSC 53

BETWEEN CLIVE ANTHONY QUINN AND PHILIP
SAMPSON WELLS
Applicants

AND VICTORIA TOON
First Respondent

BRUCE JAMES THOMPSON
Second Respondent

CAROLINE MARY THOMPSON AND
STEWARTCO TRUSTEE SERVICES
LIMITED
Third Respondents

PAMELA ISABEL QUINN
Fourth Respondent

Court: Glazebrook, O'Regan and Ellen France JJ
Counsel: S P Bryers for Applicants
G P Blanchard QC and J M Alexander for First Respondent
Judgment: 6 May 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicants must pay the first respondent costs of \$2,500.**
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REASONS

[1] The applicants seek leave to appeal against a decision of the Court of Appeal,¹ which reversed a decision in their favour in the High Court.²

[2] The decisions of the courts below dealt with an application by the first respondent, Ms Toon, for approval of her remuneration in connection with the liquidation of Investacorp Holdings Ltd (Investacorp). The High Court did not approve the fees and awarded a sum much lower than that claimed by Ms Toon. This was reversed by the Court of Appeal, which awarded her the fees and costs she claimed.

[3] Ms Toon was appointed as liquidator as part of the settlement of a dispute between the shareholders, which is described in further detail below. The background to the dispute leading up to the appointment of Ms Toon is set out in detail in the Court of Appeal's judgment.³ We summarise this briefly.

[4] At the relevant time the shareholders in Investacorp were three siblings, Pamela Quinn, Bruce Thompson and Elizabeth Bakker, Pamela Quinn's husband, Clive Quinn, and interests associated with Mr Thompson and Mr and Mrs Quinn, including the applicants. Mr and Mrs Quinn were the only directors, Mr Thompson having been removed as a director in 2015. There was considerable longstanding acrimony between Mr and Mrs Quinn and Mr Thompson. This concerned, among other things, professional, management and directors' fees charged to Investacorp by Mr and Mrs Quinn.

[5] In 2016, Mr Thompson, the second respondent to the present application, initiated proceedings under s 174 of the Companies Act 1993 (the Act), alleging prejudicial and oppressive conduct by Mr and Mrs Quinn. During the trial in May 2017, a settlement was reached, to which all directors and shareholders were parties. This agreement was "to settle all matters at issue", including the allegations

¹ *Toon v Quinn* [2021] NZCA 696 (Cooper, Brown and Courtney JJ) [CA judgment].

² *Quinn v Toon* [2020] NZHC 816 (Associate Judge Bell) [HC judgment].

³ CA judgment, above n 1, at [10]–[56].

of overcharging by Mr and Mrs Quinn. Under it, Investacorp was to be placed into liquidation. Consent orders were made in terms envisaged by the settlement agreement. Investacorp itself was not a party to the agreement.

[6] Ms Toon was appointed as liquidator. She gave a fee estimate of approximately \$5,000 to \$7,500 plus disbursements (of \$1,000) and GST. This estimate was given without knowledge of the extent of the animosity that existed between the parties.

[7] The liquidation of Investacorp became extremely contentious. This was primarily because of Ms Toon's attempt to recover what were suggested to be excessive fees charged by Mr and Mrs Quinn to Investacorp. She did so under pressure from Mr Thompson and on the basis of legal advice. Although the full details of the advice have not been disclosed, it appears to have been to the effect that as Investacorp was not itself a party to the settlement agreement, the agreement did not preclude Investacorp (and, thus, her as liquidator) from claiming back the allegedly excessive fees, notwithstanding Mr Thompson's agreement to settle his s 174 claim in the settlement agreement. Ms Toon's pursuit of these fees resulted in the applicants instigating proceedings under ss 284 and 286 of the Act against her.

[8] In the end, Ms Toon decided not to pursue claiming back the allegedly excessive fees on the basis that it would not be economic to do so.

[9] Over three months later, Ms Toon applied to the High Court for approval of her remuneration. It is this application which initiated the litigation leading to the present application for leave to appeal.

[10] Ms Toon's application was opposed. There was a three-day hearing before Associate Judge Bell. Ms Toon was substantially unsuccessful. The Associate Judge was of the view that Ms Toon had been wrong to pursue the overcharging issue; this given the settlement agreement which, on the basis of (inter alia) the principle in *Re Duomatic Ltd*, bound Investacorp.⁴ Ms Toon's actions in relation to the issue were found to have been the cause of the complexity of the liquidation and the associated

⁴ HC judgment, above n 2, at [92]–[93], referring to *Re Duomatic Ltd* [1969] 2 Ch 365 (Ch).

costs.⁵ The Associate Judge reduced Ms Toon’s remuneration very substantially, from that claimed (\$101,729 plus GST and expenses (including \$63,158 plus GST for legal fees))⁶ to \$28,000, an allowance of \$4,000 for accounting fees saved, \$4,000 for legal fees plus “normal expenses” and GST.⁷

[11] Ms Toon’s appeal to the Court of Appeal was successful. Her remuneration was approved at \$101,729.⁸ She was entitled to her legal expenses as incurred.⁹ The Court of Appeal saw the case as turning not on whether the settlement agreement bound Investacorp but rather the reasonableness of Ms Toon’s actions in pursuing recovery of the allegedly excessive fees.¹⁰ The Court held that, on the basis of (inter alia) the advice she had received, she had acted reasonably.¹¹

[12] The primary bases of the proposed appeal to this Court are that (a) the Court of Appeal wrongly concluded that the settlement agreement was irrelevant; (b) to the extent to which Ms Toon acted on legal advice, this is something that she can pursue with her legal advisor; (c) the Court of Appeal did not address whether it was fair and reasonable for shareholders to be liable for costs associated with an allegedly unnecessary investigation; and (d) the Court of Appeal’s award of Ms Toon’s full legal expenses and scale costs (in both the High Court and Court of Appeal) contravened principle.

[13] As to point (a), the applicants maintain that the proposed appeal raises issues of general commercial significance as to the legal consequences of a settlement agreement.¹² We do not accept this. There was, in fact, no dispute that the settlement agreement was binding on Investacorp and that the legal advice obtained by Ms Toon to the contrary was wrong. So we do not see the proposed appeal as triggering any requirement to evaluate the legal consequences of the settlement agreement. Nor do

⁵ At [124].

⁶ At [1].

⁷ At [150].

⁸ CA judgment, above n 1, at [114].

⁹ At [114].

¹⁰ At [9].

¹¹ At [88] and [108].

¹² Senior Courts Act 2016, s 74(2)(c).

we see any risk of a miscarriage of justice in the way the Court of Appeal addressed the settlement agreement.¹³

[14] In relation to point (b), we accept that the proposed appeal would raise an issue as to the limits, if any, on the extent to which a liquidator can claim remuneration for work carried out and expenses incurred on the basis of erroneous legal advice and that this is an issue of commercial significance which could be worthy of consideration. But we do not see this case as an appropriate vehicle for consideration of the issue because the advice itself is not in evidence and the decision of the Court of Appeal was based on an evaluation of what the liquidator did, which was essentially a factual assessment in light of the expert evidence before the Court. We do not consider a further evaluation of these facts by this Court is justified.

[15] We do not consider there is any basis for granting leave in relation to point (c). The Court of Appeal was tasked with evaluating the fairness of Ms Toon's remuneration. If it was fair, it was obvious it would be met from the assets of Investacorp. There was no requirement to make a separate evaluation of the fairness to the shareholders of Investacorp.

[16] We consider that point (d) is based on a misunderstanding of the Court of Appeal judgment. That judgment cannot sensibly be construed as providing for recovery by Ms Toon beyond the legal expenses she actually incurred.

[17] We are not satisfied that it is in the interests of justice to grant leave to appeal.¹⁴

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

[19] The applicants must pay the first respondent costs of \$2,500.

Solicitors:
McVeagh Fleming, Auckland for Applicants
Heaney & Partners, Auckland for First Respondent

¹³ Senior Courts Act, s 74(2)(b).

¹⁴ Senior Courts Act, s 74(1).