IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 116/2023
[2024] NZSC 11

BETWEEN	MARK JAMES MCLAUGHLIN AND ANDREW ASHLEY MCLAUGHLIN Applicants
AND	JOHN DAVID MANUEL MCLAUGHLIN Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	A A H Low for Applicants E D Peers and G G Dill-Russell for Respondent
Judgment:	15 February 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

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

REASONS

Introduction

[1] The applicants seek leave to appeal from a decision of the Court of Appeal.[1] The Court dismissed their appeal from a decision of the High Court rejecting their claim for a disgorgement of profits from an allegedly errant trustee.[2]

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1 *McLaughlin v McLaughlin* [2023] NZCA 473 (French, Courtney and Clifford JJ) [CA judgment].
2 *McLaughlin v McLaughlin* [2021] NZHC 3015 (Gendall J) [HC judgment].

Background

[2] The issues the applicants wish this Court to consider arise in this way. The applicants and the respondent are brothers. Their parents, Jim and Edna (now deceased), settled a trust in February 2004 (the Trust) with the wish that the "Trustees shall realise the value of [Jim and Edna's] farm property by way of subdivision". John (the respondent), along with Jim, Edna and the family solicitor, were appointed as trustees of the Trust. Jim, Edna and their children, along with other family members, were the discretionary beneficiaries of the Trust. The final beneficiaries were Jim and Edna's children.

[3] The Trust undertook a residential subdivision which included the Trust's own land plus adjoining land belonging to John and his wife. The Court of Appeal said it was clear "from the overwhelming weight of evidence that the primary reason for the creation of the Trust was to provide a vehicle whereby the land would be preserved for subdivision and the subdivision work able to be continued after Jim's death".[3]

[4] For the three years prior to Jim's death in 2007, John was engaged in the subdivision process. By the time Jim died, John "had taken over all aspects of the management of the project".[4] Up until June 2008 the work John did on the project was unpaid, and he was concurrently in full time work as the Chief Executive Officer of a building company. A company controlled by John (John's Company) subsequently took up the role of project manager for the development. The trustees approved payment of a management fee to John's Company, although that fee was not paid until March 2016 when the arrears owing ($800,000) were paid. Development of the project proceeded.

[5] The respondents issued the current proceedings in the High Court in August 2017. There were three causes of action:

(a) The first cause of action sought removal of John as trustee and replacement with a professional trustee, on the grounds John had

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3 CA judgment, above n 1, at [24].
4 At [31].

misconducted himself in administering the Trust.

(b) The second cause of action was an allegation of breach of duties owed by John and Glasgow Harley Trustee Limited[5] to the beneficiaries. For example, it was alleged there was a breach of the duty of prudent investment in undertaking subdivision of one of the blocks.

(c) The third cause of action was an allegation of breach of fiduciary duty by John in obtaining personal benefits while acting in a position of conflict of interest. An account of profits was sought.

[6] The first cause of action was resolved by John's resignation as trustee after the evidence concluded in the High Court proceedings. Gendall J dismissed the second cause of action.[6] In doing so, amongst other matters, he emphasised the settlors' intentions for the Trust. The Judge also accepted expert evidence called by the trustees about the profitability and quality of the subdivision and took the view John had performed his role as project manager competently.

[7] On the third cause of action, the Judge addressed two aspects of the alleged self-dealing, namely, the effect of John's appointment as trustee when he owned land adjoining the project, and payment of John as project manager.

[8] In relation to the first aspect, the High Court found that Jim and Edna authorised that conflict by appointing John as a trustee at a time when he had an interest in the land. On the second aspect, the finding was that any additional conflict of John acting as project manager was "also effectively authorised by Jim and Edna as settlors through their actions from the outset."[7] While it was not necessary to address the point, the Judge was also satisfied there was no mismanagement by the trustees of the acknowledged conflicts. Finally, Gendall J considered that cl 13, the charging

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5 Around September 2007, Glasgow Harley Trustee Limited replaced the family solicitor as trustee of the Trust.

6 HC judgment, above n 2, at [304].

7 At [346].

clause in the Trust deed, "may well" have authorised payment of John as project manager.[8]

[9] The appeal to the Court of Appeal related only to the third cause of action. In dealing with this appeal ground, the Court of Appeal discussed the approach to exceptions to the self-dealing rules, referring relevantly to situations where self-dealing was either expressly authorised by the Trust deed or impliedly authorised by the settlor. The Court of Appeal said that the High Court had primarily relied on implied authorisation and in particular on *Sargeant v National Westminster Bank plc* (a decision of the English Court of Appeal).[9]

[10] In terms of conflict between John's duties as trustee and his interests as an adjoining landowner, the Court of Appeal agreed that the High Court's findings of an implicit authorisation were "well founded on the evidence" and that this approach was consistent with *Sargeant*.[10]

[11] The Court departed from the High Court in relation to John's conflict as a paid project manager, finding that express authorisation was required for payment. The Court concluded that, on a strict construction of the Trust deed, payment of the cost of reasonable and just fees was expressly authorised by cl 13. That clause includes provision for any trustee "being a Solicitor or a Chartered Accountant or other person engaged in any profession or business" to:

> … be paid all usual or professional or other charges for business done by him or his firm in relation to the execution of the trusts of these presents whether in the ordinary course of his profession or business or not … .

[12] The Court of Appeal took the view that "the provision of project management services, whether undertaken by a professional or nonprofessional" was capable of coming within the clause's scope.[11] The key issue was whether John "had been

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8 At [363].

9 *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518 (CA). The Court of Appeal in the present case noted that "*Sargeant* has been cited with approval in New Zealand and in Australia and regarded as authoritative in the leading English text, *Lewin on Trusts*" (footnotes omitted): CA judgment, above n 1, at [125]. See: Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Thomson Reuters, London, 2020) vol 2 at [46-005] and [46-041].

10 CA judgment, above n 1, at [129] and [136].

11 At [165].

engaged in that business or in a business involving relevant skills and knowledge".[12] The Court found he was and that, based on the evidence, the fee was reasonable and just.

The proposed appeal

[13] On the proposed appeal, the applicants wish to argue as follows:

(a) The Court of Appeal was wrong to apply cl 13 to remuneration paid to John by a third party (namely, an alter ego, in this case John's Company), that is, to money paid other than out of the Trust fund.

(b) Having found that express authorisation for payment of the fee was needed, the Court was wrong to effectively permit John to appoint himself to a new and conflicting role and to authorise him to create a role meeting his skillset and then charge for it. In other words, the Court incorrectly allowed the charging clause to be treated as authorising conflict.

(c) The burden of proof was on John to demonstrate that he was entitled to benefit from the charging clause. The evidence here, however, was "thin at best."

[14] The first proposed ground is new. It is too late to raise the point now where the parties have not had any opportunity to address it. The case has, until now, proceeded on the basis the money paid to John's Company could be treated as money received by him. It would not be appropriate for this Court to address the issue effectively as a court of first instance and without the benefit of the views of the Court of Appeal.

[15] We turn then to the other two proposed grounds of appeal. As is apparent from the description above, the scope of the claim has now narrowed significantly. There is no challenge to the Court of Appeal's approach to self-dealing more generally.

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[12] At [165].

Rather, the remaining two proposed grounds concern the Court's interpretation of the charging clause and what is, essentially, a challenge to the forensic analysis of the High Court. That latter point is primarily factual and, in any event, has insufficient prospects of success, particularly given the limited scope of cross-examination on these issues.

[16] As to the approach to the charging clause, we accept the submissions for the respondent that the findings arose from the specific facts and wording of the charging clause. No question of general commercial significance arises.[13] Importantly, these findings were made against the background of the significant contextual findings about matters such as the settlors' intentions, the primary purpose of the Trust, and why John was selected as a trustee in relation to this purpose. Further, the factual findings indicate there has been no abuse. In these circumstances, nothing raised by the applicants gives rise to any appearance of a miscarriage of justice in the Court of Appeal's approach to the charging clause.[14]

Result

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

[18] The applicants must pay the respondent costs of $2,500.

Solicitors:
Hannan & Seddon, Greymouth for Applicants
Buddle Findlay, Christchurch for Respondent

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13 Senior Courts Act 2016, s 74(2)(c).
14 Senior Courts Act, s 74(2)(b).