

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 42/2025
SC 49/2025
[2025] NZSC 131

BETWEEN

ANTHONY MIKHAL SCHMIDT
First Applicant in SC 42/2025 and
Second Applicant in SC 49/2025

TAYLOR JADE SCHMIDT
Second Applicant in SC 42/2025 and
First Applicant in SC 49/2025

AND

EBADA PROPERTY INVESTMENTS
LIMITED
First Respondent

BRIAN PATRICK GARRITY
Second Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: First Applicant in SC 42/2025 in person
A J Woodhouse for First Applicant in SC 49/2025
N J Scampion and S O H Coad for Respondents

Judgment: 3 October 2025

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B Costs are reserved.

REASONS

[1] In late 2005, the applicants, Mr and Ms Schmidt, were in default under mortgages over their two properties at Kaiaua Rd and Bell Rd, near Mangatāwhiri. In November 2005, they were both found guilty of failing to provide the necessities of

life in connection to the death of their two-year-old daughter. They were each sentenced to two and a half years' imprisonment. This added to their immediate economic woes.

[2] Mr Schmidt had rekindled a friendship with the second respondent, Mr Garrity, a solicitor. Mr Schmidt raised the possibility of Mr Garrity purchasing Kaiaua Rd as a means of resolving their difficulties, on the basis that Mr Garrity would discharge the mortgage and allow Mr Schmidt's father to remain there paying rent.¹ In November 2005, shortly before their criminal trial concluded, the Schmidts signed powers of attorney appointing Mr Garrity as their attorney. At some point Mr Garrity was also given access to the bank account of the Schmidts' family trust, the Excel Estate Trust (Excel).

[3] In December 2005, Mr Garrity signed an agreement on behalf of the first respondent, eBada Property Investments Ltd, a new company controlled by him, to purchase Kaiaua Rd from Schmidt Trustee Ltd (STL), the corporate trustee of Excel. The price was \$290,000, close to market value. On settlement eBada paid STL \$160,000 and the remainder of the consideration was "paid" by way of a deed of forgiveness of debt in the amount of \$130,000 (which all parties now acknowledge was a fiction).

[4] In November 2006, Bell Rd was sold by STL to eBada under a similar arrangement. The sale price was \$495,000—substantially lower than the market value of \$665,000—with \$200,000 paid to STL (though some of this was ultimately paid to Mr Garrity) and the remaining \$295,000 "paid" by way of another fictional forgiveness of debt.

[5] Between December 2005 and February 2008, Mr Garrity also acted on the Schmidts' behalf in negotiating Public Works Act 1981 compensation with agents of Transit New Zealand. As tranches of compensation came through, payments were

¹ *Schmidt v Ebada Property Investments Ltd* [2019] NZHC 3548 (Venning J) [HC judgment] at [40]. The Schmidts claimed they had instead discussed the possibility of Mr Garrity setting up a corporate trustee to hold the properties on trust for them, but this version of events was not accepted by the Judge. See also *Schmidt v Ebada Property Investments Ltd* [2025] NZCA 125 (Goddard, Brewer and Osborne JJ) [CA judgment] at [192].

made to Mr Garrity's account rather than to the Schmidts' (or STL's or Excel's) accounts.

[6] The Court of Appeal ultimately found there was "a shared understanding that Mr Garrity had [ongoing] obligations to the Schmidts in relation to the properties"; that "Mr Schmidt was proceeding on the basis that he was entitled to the benefit of the equity in the properties after discharge of the debts secured over those properties"; and that "Mr Garrity did not demur from that understanding".² The Court recorded an email from Mr Garrity in October 2008 stating:³

I will ... forward your fair share from whatever is left over from the net proceeds of the sale [after paying off the mortgage] (and I will be fair about it).

[7] From 2008–2009, Mr Schmidt attempted to purchase the properties back from eBada, making various proposals which were all rejected—including a proposal to buy the properties one at a time, which Mr Garrity said was untenable as both properties were cross-securitised with the rest of his portfolio.⁴ The relationship broke down. Mr Garrity sold Bell Rd to a neighbouring landowner in December 2008 without telling the Schmidts.⁵ Kaiaua Rd was sold by the new mortgagee in 2013. The Schmidts received nothing from either sale.

[8] The Schmidts brought proceedings in the High Court pleading breach of express trust and institutional constructive trust by eBada; and, against Mr Garrity personally, knowing receipt of the proceeds of eBada's breach of trust, breach of fiduciary duty, and undue influence.⁶

[9] At trial, the Schmidts produced an unexecuted declaration of trust, claiming a copy of it had been executed by eBada and themselves on 12 December 2005. The document had a number of unusual features which cast doubt on its authenticity

² CA judgment, above n 1, at [90].

³ At [91].

⁴ At [93].

⁵ They were still resident at the property and were required to leave when the new owner took possession.

⁶ HC judgment, above n 1, at [23]–[27].

and, as discussed below, Venning J found it to have been fabricated by the Schmidts in order to improve their prospects at trial. That finding was not challenged on appeal.⁷

Lower Courts

[10] Venning J found for eBada and Mr Garrity on all grounds. He found that the unsigned trust deed produced by the Schmidts was “a fiction and a document created solely for the purposes of this hearing” and so rejected the claim founded on express trust.⁸ The Judge also found no evidence of a shared understanding giving rise to a constructive trust, saying there was nothing more than a “general understanding” that Mr Schmidt might purchase the properties back in the future.⁹ As for the claims against Mr Garrity, Venning J rejected the knowing receipt claim on the basis there was no prerequisite breach of trust,¹⁰ and found there was no solicitor–client relationship or other relationship of trust, confidence and vulnerability giving rise to fiduciary obligations between Mr Garrity and the Schmidts.¹¹ He rejected the claim of undue influence for similar reasons.¹²

[11] The Schmidts appealed the High Court’s findings on the constructive trust, breach of fiduciary duty and undue influence claims.¹³ They did not challenge the finding of fabrication of the unsigned trust deed. The Court of Appeal upheld Venning J’s finding that the evidence did not point to a constructive trust; rather, the Schmidts intended to sell the properties outright to eBada.¹⁴ The shared understanding referred to at [6] above was only ever informal, and not enforceable in any of the ways pleaded by the Schmidts.¹⁵ The Court also agreed there was no fiduciary relationship in relation to the sale and purchase of the properties.¹⁶ While it acknowledged Mr Garrity “plainly did owe [the Schmidts] fiduciary duties” under the powers of attorney, the Court suggested this only applied to his dealings with

⁷ See below at [11].

⁸ HC judgment, above n 1, at [135].

⁹ At [163]–[166].

¹⁰ At [177].

¹¹ See at [199].

¹² See at [216].

¹³ CA judgment, above n 1, at [170].

¹⁴ At [196]–[197] and [200].

¹⁵ See at [16]–[18] and [187].

¹⁶ At [208].

Transit New Zealand, about which no complaint was made.¹⁷ The findings as to fiduciary obligations were in the Court's view sufficient to dispel any claim of undue influence.¹⁸ Finally, the Court rejected as baseless allegations of bias and predetermination on the part of the trial Judge,¹⁹ and declined the Schmidts' application to file a fifth amended statement of claim raising new arguments founded on common intention constructive trust and reasonable expectation constructive trust claims.²⁰

Proposed appeals

[12] The Schmidts now (separately)²¹ seek leave to appeal against the judgment of the Court of Appeal, focussing on its determinations on the institutional constructive trust and breach of fiduciary duty grounds, as well as its exclusion of the fifth amended statement of claim. Their submissions largely reprise arguments advanced in the Courts below, with emphasis now on extracts from the Court of Appeal's judgment which they say support their case.²² They argue the proposed appeal raises matters of general and public importance and commercial significance, and discloses a risk of a substantial miscarriage of justice.

[13] The respondents oppose leave, pointing to the concurrent findings below.

Our assessment

[14] We do not consider the proposed appeal raises any matter of general or public importance, or of general commercial significance.²³ The applicants' submissions challenge concurrent findings in the Courts below which ultimately turn on the particular facts of this unusual case. They would entail disturbing findings of fact, based on credibility findings, that outright sale was intended. One matter of wider

¹⁷ At [209] and see at [210].

¹⁸ At [211].

¹⁹ At [215].

²⁰ At [223]–[225].

²¹ While Mr Schmidt seems to be the driving force behind the proceedings, he did not want to take part in the High Court. He was added as second plaintiff at the Judge's direction. He now seeks leave alone, and unrepresented. Ms Schmidt seeks leave by her counsel, Mr Woodhouse. Each names the other as a second applicant or co-applicant.

²² The Schmidts no longer argue express trust or knowing receipt. Mr Schmidt raises undue influence, briefly, but Ms Schmidt does not.

²³ Senior Courts Act 2016, s 74(2)(a) and (c).

importance does arise from Mr Garrity’s conduct in relation to the property transactions—namely, the nature and extent of the fiduciary obligations imposed on a donee exercising powers of attorney.²⁴ But the Schmidts’ case was not pleaded in this way and, for the reasons set out below, it would not be in the interests of justice to grant leave on that issue in the present case.

[15] Nor does the proposed appeal raise any evident risk of a substantial miscarriage of justice as that term applies in the civil context.²⁵ To the extent any claim as above could be mounted on the basis of trustee or other fiduciary obligations, relief for breach lies only in equity.²⁶ Here, however, the applicants’ fabrication of the unsigned trust deed, undertaken to improve their litigation prospects and adduced in evidence, must disentitle them to equitable relief.²⁷

[16] In these circumstances we do not consider it is necessary in the interests of justice for this Court to hear and determine the proposed appeal.²⁸

[17] Given the forgoing conclusions, it is unnecessary for us to consider the several interlocutory applications filed in these applications. These comprise applications by Ms Schmidt to file an amended notice of application and new affidavit evidence, and applications by Mr Schmidt to file an amended notice of application and to append voluminous schedules to his submissions. Formally, they are dismissed.

[18] Given Ms Schmidt has previously received legal aid, and has applied for its renewal here, formally we reserve costs.

²⁴ Mr Garrity expressly acknowledged that he was “acting pursuant to two POA’s [sic] signed by Taylor and Anthony” in a fax sent to his friend, Michael Taia, whom he instructed to act for the Schmidts in the property transactions, even saying candidly “I’m in a conflicted position (ie. acting as agent for the vendors, and as the purchaser)”.

²⁵ Section 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

²⁶ Whether a constructive trust arose from such a relationship is essentially moot because the Courts have already found in separate proceedings that the properties cannot be traced, having been disposed of to bona fide third parties for value: see *Schmidt v Ebada Property Investments Ltd* [2015] NZCA 6. Only an in personam claim against Mr Garrity (lifting the veil on eBada, if necessary) can survive.

²⁷ On the principle that they who come into equity must come with clean hands: see Andrew S Butler “Basic Concepts” in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 21 at [2.7.4]; and *Milloy v Dobson* [2016] NZCA 25 at [99].

²⁸ Senior Courts Act, s 74(1).

Result

[19] The applications for leave to appeal are dismissed.

[20] Costs are reserved.

Solicitors:

Woodhouse Law, Auckland for First Applicant in SC 49/2025

Smith and Partners, Auckland for Respondents