

IN THE SUPREME COURT OF NEW ZEALAND

SC 69/2016
[2016] NZSC 112

BETWEEN MURRAY ATHOL OSMOND AND
JANET DOREEN OSMOND
Applicants

AND DAVID MURRAY BLANCHETT AND
COLIN THOMAS MCCLOY AS
LIQUIDATORS OF ARAI KORP
LIMITED (IN LIQUIDATION)
Respondents

Court: William Young, Glazebrook and O'Regan JJ

Counsel: M A Osmond in person
M D Branch for Respondents

Judgment: 26 August 2016

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants are to pay the respondents costs of \$2,500.

REASONS

[1] The applicants seek leave to appeal from a judgment of the Court of Appeal¹ upholding a summary judgment order for possession made against them by Associate Judge Doogue in summary judgment proceedings.²

[2] In issue is a property at Cambridge. The legal owner of the property is Arai Korp Ltd, now in liquidation. The respondents are its liquidators. The applicants

¹ *Osmond v Blanchett* [2016] NZCA 240, (2016) 4 NZTR 26–011 (Kós, Keane and Dobson JJ) [*Osmond* (CA)].

² *Blanchett v Osmond* [2016] NZHC 467 [*Osmond* (HC)].

resisted the application for possession on the basis that Arai Korp holds the property on trust for Aniwaniwa Trustee Ltd (ATL) which is the trustee of their family trust.

[3] The applicants could not point to a document or documents which established the asserted beneficial interest in what might be regarded as an orthodox way. Rather they pointed to a series of documents and payments. The most critical document is what purports to be an assignment by Mr Osmond to ATL of debts owed to him by Arai Korp. The argument was that this transaction constituted ATL as a creditor of Arai Korp and that the purchase price of the property was met by set-off against the resulting debt. The assignment was dated 3 October 2003.³ Since ATL was not incorporated until 2005, the Associate Judge concluded, understandably, that it could not have been executed in October 2003.⁴ No explanation for the back-dating has been offered by Mr Osmond.

[4] The Associate Judge made findings which were generally extremely adverse to the applicants. He concluded that by 2005, Arai Korp was undoubtedly insolvent. It was therefore not in a position to repay Mr Osmond whatever it may have owed him. So a transaction entered into at that time which involved a swap between Arai Korp and ATL of the property for debt would have been indefensible.⁵ This was appreciated by Mr Osmond (who had, prior to being struck off, practised as a commercial solicitor) and this is why he back-dated the assignment.

[5] The Court of Appeal, having separately reviewed the evidence, also concluded that the assignment was fabricated.⁶

[6] In the submissions in support of the application, the applicants complain of the tax assessment which ultimately resulted in the liquidation of Arai Korp, an argument which we see as not material to the resolution of the present dispute. They also argue that the findings made in the High Court were not appropriate on affidavit evidence. Both the Associate Judge and Court of Appeal applied well settled principles to the facts as they saw them. There is no point of public or general

³ The assignment is set out in full at *Osmond* (HC), above n 2, at [53].

⁴ At [63].

⁵ At [64] and [113].

⁶ *Osmond* (CA), above n 1, at [54].

importance raised by the appeal and there is no appearance of a miscarriage of justice.

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

Solicitors:
Harkness Henry, Hamilton for Respondents