

IN THE SUPREME COURT OF NEW ZEALAND

SC 120/2016
[2017] NZSC 11

BETWEEN

RAE BEVERLY ADLAM
Applicant

AND

JOHN TIONGA SAVAGE, LAWRENCE
TE AOKAHARI NIAO, PATRICK
MAYNE SAVAGE, SAMUEL KELVIN
BARNES AND TAMATI DRAWBRIDGE
AS TRUSTEES OF THE MATATA
PARISH 39A 2A AHU WHENUA TRUST
First Respondents

HELEN MARIA SAVAGE AND
RAE LYN ARIHIA PEITA AS TRUSTEES
OF THE OTONGA WHANAU TRUST
Second respondents

HUIA ANN PACEY, JOHN TIONGA
SAVAGE, LAWRENCE TE AOKAHARI
NIAO, REGINA VICTORIA RINTOUL
AND SAMUEL KELVIN BARNES AS
TRUSTEES OF THE MATATA PARISH
39A 2B 2B 2A AHU WHENUA TRUST
Third Respondents

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: J R Billington QC and D M Hughes for Applicant
D G Hurd for First Respondents
P J Andrew for Third Respondents

Judgment: 17 February 2017

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are awarded to the first respondents.**

**C The order for stay of the determination of the Court of
Appeal made on 23 November 2016 is discharged.**

REASONS

[1] This application for leave to appeal arises out of the development of two geothermal power stations on Maori freehold land at Kawerau.

[2] Both power stations are located on a block of land known as the Bath block, which is administered by an ahu whenua trust called the Bath Trust.¹ The applicant, Ms Adlam, was a trustee of the Bath Trust until her suspension in 2008 and later removal in 2014 by the Māori Land Court.

[3] The first power station (TG2) was developed in the early 1990s. The second (GDL power station) was commissioned in September 2008 by Geothermal Developments Ltd (GDL Ltd), a company established by Ms Adlam. Although the GDL power station is on the Bath block, it draws its geothermal resource from a well on an adjacent block known as the Farm block, which is administered by a separate ahu whenua trust called the Farm Trust. Ms Adlam was not a trustee of the Farm Trust.

[4] Ms Adlam received just over \$2.44m in royalties from the TG2 power station and in 2010 made a profit of \$11.2m from the GDL power station by selling her shares in GDL Ltd.

Māori Land Court

[5] Proceedings were brought by the second respondents in the Māori Land Court in relation to those profits.² Ms Adlam acknowledged at the Māori Land Court

¹ An ahu whenua trust can be constituted by a court under s 215 of the Te Ture Whenua Māori Act 1993 where “the court is satisfied that the constitution of the trust would promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land.” The land, money and other assets of an ahu whenua trust are held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land.

² The second respondents did not make submissions to this Court. Nor it appears in the Court of Appeal. The second respondents are trustees of the Otonga Whānau Trust, which is a beneficial owner in the Bath and Farm trusts.

hearing that she had acted in breach of her duties as trustee of the Bath Trust.³ With regard to the Farm Trust, Judge Coxhead concluded that no claim had been properly pleaded by that trust against Ms Adlam for breach of fiduciary duty.⁴

[6] Judge Coxhead was, however, of the view that apportionment of the profit between the two trusts (as argued by Ms Adlam) did not apply. Rather, any apportionment should be between the defendant, who breached the equitable duty, and the plaintiff, to whom the duty was owed, based on the proportion of the profits attributable to wrongful conduct. The Judge considered that, for the purpose of an account of profits, apportionment is not required between two innocent parties.⁵

[7] In relation to her breaches of duty owed to the Bath Trust, Ms Adlam was therefore ordered to pay to that trust \$2.44m in relation to the TG2 power station and \$11.2m in relation to the GDL power station.⁶

Māori Appellate Court

[8] On appeal to the Māori Appellate Court, the order to account for the \$11.2m was set aside and the matter remitted back to the Māori Land Court to determine what portion of the profits should be disgorged to the Bath Trust. The Māori Appellate Court was of the view that, because assets from both the Bath Trust and the Farm Trust contributed to the GDL profit, it was necessary to determine the actual contribution of each trust to determine the appropriate apportionment of the profit.⁷

[9] The causal link required between the profit and the breach was viewed by the Court as that between the fiduciary's breach and the principal's property.⁸ This meant that the accountability of Ms Adlam to account to the Bath Trust was limited to the profits attributable to the Bath Trust property. The quantification of interest in

³ *Savage v Adlam – Lot 39A 2A Parish of Matatā and Lot 39A 2B 2A Parish of Matatā* (2014) 95 Waiariki MB 176 (95 WAR 176) (Judge Coxhead) at [6].

⁴ At [144].

⁵ At [177]–[181].

⁶ At [225]–[235].

⁷ *Adlam v Savage* [2015] Māori Appellate Court MB 59, [2015] NZAR 746 (MAC) (Fox Deputy CJ, Judge Ambler, Judge Clark, Judge Reeves and Judge Doogan), at [74]–[77].

⁸ At [56].

relation to the TG2 award was also remitted to the Māori Land Court.⁹ The issue was when interest payments should commence: from the date the cause of action arose or from the date the proceedings were first filed.

Court of Appeal

[10] Ms Adlam appealed against the Māori Appellate Court decision to the Court of Appeal but abandoned her appeal prior to the hearing. This left the first respondents' cross-appeals. At the hearing the cross-appeal on the quantification of interest relating to the TG2 power station was allowed by consent.¹⁰ The judgment therefore only dealt with the cross-appeal in relation to accounting for the \$11.2m of profits. This cross appeal was allowed. The Court of Appeal was of the view that the correct focus was on an account of profits attributable to the breach of duty. The necessary causal link between the Bath Trust and Ms Adlam was established because the lease necessary for the power station to proceed (and therefore the \$11.2m of profits to be made) would never have been entered into but for the breach of duty. For the purpose of an account of profits, it did not matter that a third party's assets may have contributed to the arrangements entered into in breach of duty.¹¹

Leave submissions

[11] Ms Adlam now seeks leave to appeal to this Court. She argues that there is a need to apportion the profit between parties when the assets of both have contributed to the profit. The main ground appears to be that an order for the full amount cannot be made in circumstances where the Farm Trust is entitled to an as yet undetermined portion of that profit and where no claim as yet has been made out in relation to that trust. She seeks to raise issues of causation and remoteness, as well as unjust enrichment. She seeks the restoration of the Māori Appellate Court decision as regards apportionment and also the costs order in that Court, which the Court of Appeal indicated should be addressed once all outstanding issues were resolved.¹²

⁹ At [149].

¹⁰ *Adlam v Savage* [2016] NZCA 454, [2016] NZAR 1393 (Ellen France P, Randerson and French JJ) at [8].

¹¹ At [48].

¹² At [57].

[12] Submissions in opposition to her application for leave have been filed on behalf of the first, fourth and fifth named first respondents. These are three of the five surviving trustees of the Bath Trust. In their submission, it is sufficient for an account of profits that the profit was made as a result of the breach of fiduciary duty to the Bath Trust. They argue that any apportionment between the Farm Trust and the Bath Trust is between those trusts and it is agreed between them that there will be an appropriate division of the disgorged profit. It is submitted that there is no unjust enrichment of the Bath Trust at the expense of Ms Adlam.

[13] The first, second and fifth named third respondents are all trustees of the Farm Trust and support the submissions filed on behalf of the trustees of the Bath Trust.

Our assessment

[14] Nothing raised by Ms Adlam suggests that the Court of Appeal may have been in error in concluding that in this case a causal link between the breach and the profits made sufficed. Nor does anything raised suggest there was no such link. Further, nothing raised suggests that the discretion relating to an account of profits may have been exercised wrongly by the Court of Appeal.

[15] There was no valid reason raised for an allowance to be made for the existence of a third party's assets contributing to the profit.¹³ The Bath and Farm Trusts have agreed that the profit should be apportioned between them. Ms Adlam has not put forward any convincing reason why she should keep any of the profit made at the expense of innocent parties.¹⁴

[16] On 23 November 2016 a stay was granted (by consent) with regard to the order to account for the \$11.2m until further order of the court. As leave has been refused, the stay must be discharged.

¹³ We do not need to decide when (if ever) such an allowance may be appropriate.

¹⁴ There is no suggestion made by Ms Adlam that the Farm Trust was anything but an innocent party.

Result

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

[18] Costs of \$2,500 are awarded to the first respondents.

[19] The order for stay of the determination of the Court of Appeal relating to the order to account for \$11.2m made by this Court on 23 November 2016 is discharged.

Solicitors:

Anthony Harper, Auckland for Applicant

Dowthwaite Law, Rotorua for First Respondents

Wackrow Williams & Davies Limited, Auckland for Third Respondents