IN THE COURT OF APPEAL OF NEW ZEALAND

CA683/2013
[2015] NZCA 106

BETWEEN	NOLEEN MARGARET HILDRED First Appellant
	SHANE DAVID HILDRED Second Appellant
	GEORGE STEPHEN COLE Third Appellant
AND	ROWMATA HOLDINGS LTD (in liquidation) First Respondent
	HENRY DAVID LEVIN AND VIVIEN JUDITH MADSEN-RIES AS LIQUIDATORS FOR ROWMATA HOLDINGS LTD (in liquidation) Second Respondents

Hearing:	24 February 2015
Court:	Harrison, French and Cooper JJ
Counsel:	L A Andersen and M J Taylor-Cyphers for Appellants M T Davies and P C Murray for Respondents
Judgment:	30 March 2015 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to the respondents calculated as for a standard appeal on a band A basis.

REASONS OF THE COURT

(Given by Cooper J)

[1] The appellants appeal against a judgment of Williams J in a proceeding brought by the liquidators of Rowmata Holdings Ltd (RHL).[1]

[2] The Judge held the first and second appellants liable on various claims made against them in their capacity as directors of RHL and all three appellants liable on claims against them as trustees. The claims all arose out of deposit payments made by RHL to the vendor under an agreement for the purchase of land which were forfeited when the agreement was cancelled.

Background

[3] The first and second appellants, Mr and Mrs Hildred, are directors of RHL. Together with the third appellant, Mr Cole, they were also the trustees of two trusts, the Rowmata No 1 Trust and the Rowmata No 2 Trust (the trusts). The Hildreds held assets and ran their farming businesses through the trusts.

[4] On 15 August 2008 the Hildreds signed an agreement for sale and purchase purportedly "on behalf of Rowmata Trust" to buy a farm (the land) situated at Marshall Road, near Outram in Otago. It is common ground that there was no such entity as the "Rowmata Trust". The Judge held, and it is not now in dispute, that the expression "Rowmata Trust" was used as a shorthand for the trusts, which operated together as an informal partnership.[2] They were run as a single business with a combined bank account. The agreement was executed by the appellants as trustees of the trusts.

[5] The agreement for sale and purchase provided for payment of the sum of $6.4 million plus GST, a total of $7.2 million. The settlement date originally stipulated was 1 June 2009. The agreement for sale and purchase was conditional, amongst other things, on the purchaser arranging finance on terms and conditions

[1] *Rowmata Holdings Ltd (in liquidation) v Hildred* [2013] NZHC 2435.
[2] At [59].

satisfactory to it within 10 working days of the date of the agreement. The agreement required payment of a deposit of 10 per cent upon the agreement becoming unconditional. Subsequently, it was agreed the deposit of $720,000 could be paid in two instalments, each of $360,000.

[6] The Hildreds, and their trusts, were customers of ASB bank. ASB agreed to assist with financing the deposit, but Mr Homer, the ASB manager with whom they dealt, was concerned about their equity position and the fact that they would have to borrow the full amount of the purchase price. Mr Homer made it clear to them they needed additional equity in order for ASB to help fund the purchase.

[7] The agreement for sale and purchase was declared unconditional on 5 September 2008 without guaranteed bank funding to complete the purchase. Half the deposit was then payable.

[8] The Hildreds intended that title to the land would ultimately be taken by a new company to be formed, RHL. Mr and Mrs Hildred were to be directors of the new company. On the date the agreement was declared unconditional, RHL had not yet been incorporated. However, a bank account had been established in its name, and ASB provided finance for the first deposit instalment of $360,000. That sum was placed into an account in the name of the Rowmata Trust partnership, and then transferred into the RHL account. The money was next paid into the trust account of the Hildreds' solicitors, Rodgers Law. Mr Rodgers then transferred money to PGG Wrightson Real Estate, the land agent involved in the sale. A receipt issued by PGG Wrightson noted that the payment had been received from Rowmata Trust, for the credit of the vendors, M L and P J Lord.

[9] RHL was incorporated on 11 September 2008. Two shares in RHL were issued, one held by the trustees of the Rowmata No 1 Trust and the other by the same individuals as trustees of the Rowmata No 2 Trust. The Judge recorded that it was thought RHL would provide a "convenient vehicle" into which capital from equity investors could be placed, if such investors were needed.[3] The Judge however found the Hildreds' first preference was to buy alone, and they expected that by the time

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[3] At [18].

settlement took place the farm would have increased in value to the point where their own equity would be sufficient to meet the bank's requirements.[4]

[10] In order to facilitate the introduction of RHL as the new purchaser, a deed of novation was drafted by Mr Rodgers. The deed was intended to be between Mr and Mrs Hildred and Mr Cole as trustees of the trusts as "retiring purchaser", RHL as the "replacement purchaser", and the vendors. In the event, although the deed was signed by the Hildreds and Mr Cole, it was not signed by the vendors. Consequently, RHL never became a party to the agreement for sale and purchase.

[11] Despite that, RHL submitted a GST return to the IRD in early October 2008 claiming the GST payable under the agreement. A refund of the GST was paid, and deposited into RHL's account.

[12] On 20 October 2008, RHL used $360,000 of the refund to repay to the trusts the amount that had been used to pay the first deposit instalment due under the agreement. On 10 December 2008, a further $360,000 of that money was used to pay the second deposit instalment. This meant that RHL was able to bank and use the GST refund notwithstanding the fact it was not the purchaser under the agreement.

[13] When the agreement was made unconditional the Hildreds had not secured finance nor had they identified investors who would be prepared to contribute to the purchase price. For the following 10 months, they attempted to persuade ASB to fund the acquisition and, having failed to do so, to obtain other equity investors. But their attempts were unsuccessful, and they were unable to settle the purchase. These events occurred against the backdrop of the global financial crisis, reduced payouts for dairy produce and a consequent fall in land values.

[14] Downie Stewart, acting for the vendors, issued two settlement notices. The first, served on 8 June 2009, was directed to Rowmata Holdings Ltd. Ostensibly to "avoid any discrepancies", a second settlement notice was issued on 3 July 2009. That notice was to the "trustees of the Rowmata Trust". Both notices required

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4 At [13] and [18].

settlement of the purchase within 12 working days, and neither was complied with. Consequently on 10 September 2009 Mr De Courcy, a partner at Downie Stewart, wrote to Rodgers Law stating, amongst other things:

> The vendor cancels the agreement and forfeits and retains for its own purpose the deposit paid by your clients. This notice is given without prejudice to the vendor's other rights and remedies under the agreement or at law or in equity.

[15] Over the ensuing weeks Mr Rodgers negotiated with Mr Decourcy to settle various damages claims advanced on the vendor's behalf. A settlement was negotiated which Mr Rodgers incorporated in the form of a deed. The deed provided that the vendors would retain the deposit which had been forfeited and that the purchaser (referred to as Mr and Mrs Hildred "trading as or as trustees of the Rowmata Trust") should pay a further sum of $75,000 in full and final settlement of all disputes between those parties "and between the vendor and the Company relating to the sale and purchase of the Property." The "company" referred to was RHL.

[16] The deed was executed by the vendors, but not by the Hildreds. There was evidently an issue in the High Court as to whether Mrs Hildred agreed to the settlement. The Judge concluded there had been a settlement, and Mr Andersen conceded in this Court that there had been settlement, at least between the Hildreds as trustees and the vendors.[5] That is consistent with the evidence that the appellants called at the trial from Mr Rodgers, who said that he had negotiated the settlement with the vendors' solicitors, that it required payment of a further $75,000 and that that was agreed to by the Hildreds.

[17] The failure of the purchase meant that there was no right to retain the GST refund and in October 2009 RHL completed a GST return recording that it was obliged to repay $737,500 to the IRD. However, it was not in a position to do so, since the only funds it had ever had were those comprising the GST refund.

[18] Eventually, RHL was placed into liquidation by order of the High Court owing a total of $924,023.56.

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[5] At [40]–[41].

The claims

[19] The liquidator's case in the High Court involved various allegations against the appellants under relevant provisions of the Companies Act 1993 (the Act). It was alleged that the Hildreds had failed to act in good faith and in the best interests of RHL as required by s 131(1) of the Act; that they allowed RHL to trade recklessly in breach of s 135; that they allowed RHL to enter into an obligation it could not perform in breach of s 136 and that they failed to exercise the diligence, skill and care required of directors in breach of s 137.

[20] The liquidators also relied on ss 292, 297 and 298 of the Act. It was said that the payment of the deposits by RHL were transactions at an undervalue in breach of s 297 since RHL was not obliged to make the payments, and received nothing in return when the purchasers proved unable to settle the purchase. Further, those transactions were for inadequate consideration, in breach of s 298. RHL's reimbursement of the original $360,000 advance by the trusts was a repayment made when the company was insolvent and therefore voidable under s 292 of the Act. It was alleged further that the circumstances entitled the Court to hold Mr and Mrs Hildred personally responsible as directors for the whole or part of the loss occasioned by the breaches under s 301 of the Act.

[21] A further cause of action advanced was in restitution, claiming that RHL was entitled to repayment by the trusts of the equivalent in value of the deposits, because the condition on which RHL made the payment was that the company would receive title on settlement and that condition had completely failed.

The High Court judgment

[22] The Judge held that the Hildreds had breached their duties as directors in making the agreement for sale and purchase unconditional on 5 September 2008, and using the GST refund to repay the loan to the trusts and make the second deposit instalment.

[23] A key finding in this respect was that there was no reasonable basis for them to have believed that the agreement for sale and purchase would in fact be completed

or, if cancelled, that RHL would be in a position to repay the GST refund to the IRD.[6] Those findings were not challenged on appeal. The Judge concluded that by dispersing the GST refund in such circumstances, the Hildreds breached their duties under ss 131, 135, 136 and 137 of the Act. The Judge further held that the payments made by RHL had the effect of discharging obligations owed by the trusts under the agreement for sale and purchase.[7] In the circumstances, RHL could not recover the deposit from the vendor.[8]

[24] A further consequence was that RHL received no benefit. Further, the payments of the two deposit instalments were transactions at an undervalue under s 297 of the Act. As the Judge put it:[9]

> … I conclude that RHL paid $720,000 on behalf of the trustees of the Rowmata 1 and 2 trusts and received nil value in return. I am satisfied that both payments were made by RHL within two years of 29 July 2010, the date upon which the IRD applied to liquidate RHL. RHL was rendered unable to meet its debts [as] they fell due as a result of making the two payments.

[25] It followed that the liquidators had made out their claim under s 297 of the Act.

[26] The Judge also upheld the claim that the transactions were voidable under s 292(b), finding:

> [183] … At the time RHL repaid the advance from the Rowmata 1 and 2 trusts, it either owed the IRD $720,000 or carried a contingent liability to pay that amount but had no income, cash or other assets and no reasonable prospect of obtaining any such income, cash or assets prior to the contingent liability crystallising.
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> [184] It is also clear that the repayment to the Rowmata 1 and 2 trusts of that advance meant in terms of s 292(b), that the trusts received more by that means than they would have received when the company was liquidated.

[27] Finally, the Judge held RHL would be entitled to restitution by the trusts of the sums paid. He described this claim as a "common law version of the statutory restitution claim" that he had allowed under s 297.[10]

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6 At [118].
7 At [76].
8 At [77].
9 At [171].
10 At [194].

The appeal

[28] Although various issues were raised in the notice of appeal, only two arguments have been pursued. The principal contention advanced by Mr Andersen is that RHL could recover the $720,000 paid from the vendors. As a consequence, it was not insolvent. Further, the appellants could have no directors' liability for reckless trading under s 135 of the Act; they were not in breach of their duties as directors in relation to obligations incurred by the company under s 136; they were not in breach of their duties to exercise due diligence and skill under s 137; they did not breach their directors' obligations under s 131 to act in good faith and in the best interests of RHL; they had no obligation to RHL under s 297 because the payment of the deposits was not a transaction that was at an undervalue.

[29] In elaborating this argument, Mr Andersen submitted RHL was not the agent of the trusts. He noted it had been intended RHL would become the purchaser under the deed of novation and he submitted RHL was the appropriate entity to receive the tax invoice as the intended purchaser of the land. It had paid the $720,000 as part of the purchase price in anticipation of becoming the purchaser pursuant to the deed of novation. The $720,000 was accepted by the vendors as having been paid by RHL as the tax invoice for the purchase price had been made out to RHL.

[30] Mr Andersen submitted that because the deed of novation had not been executed, there was no contractual relationship between RHL and the vendors or between RHL and the trusts. He pointed out that under cl 9.4(1)(b) of the agreement for sale and purchase, the vendors' ability to retain the deposit was limited to a deposit paid by "the purchaser". Since RHL was not the purchaser, the vendors could not retain the deposit. On the contrary, RHL could recover the deposits since:

(a) there was no consideration for the payments;

(b) the basis of the payment of the deposits was defeated when the agreement for sale and purchase was cancelled by the vendors;

(c) the assertion in the draft deed that the deposits were forfeited to the vendors under the agreement was a misstatement of the legal position as the deposits were not paid by the purchaser; and

(d) there could be no estoppel arising from the draft deed of settlement. Even if it had been signed by the Hildreds there would be no estoppel, since RHL was not a party to the settlement and not bound by it.

Analysis

[31] We reject these propositions. We consider the proper analysis is that the payment was made by RHL on behalf of and for the benefit of the trusts who were the purchasers under the agreement for sale and purchase. While the Hildreds intended RHL to be the purchaser that situation never eventuated: the parties never agreed to vary or novate the agreement for that purpose. At the relevant times the agreement between the trusts and the vendors remained on foot, and the deposit payments were made to meet the purchasers' obligations under that agreement. We reach these conclusions for the following reasons.

[32] First, the initial deposit payment was made at a time when RHL had not been incorporated: the company was not then in existence. It cannot properly be described as a payment made by the company. The fact that the money had been placed in an account already opened in RHL's name and the money was paid out from that account cannot have the legal effect of converting the payment into one made by RHL. We note that it was receipted by the real estate agents as a payment made for the purchase of the land by "Rowmata Trust". That was entirely appropriate, and reflected the true position.

[33] Similarly, the fact that Downie Stewart subsequently issued a GST invoice to RHL for the full amount of the deposit cannot alter the nature of the payment already made, 20 days earlier. No doubt the invoice was intended at the time to facilitate the Hildreds' desire to achieve a GST refund and use that to pay the balance of the deposit when due. But the incorrect assertion that RHL was the purchaser, which is implicit in the invoice, cannot justify a finding that the deposit was one having been made by a company not then in existence.

[34] Of more significance is the fact that the invoice was clearly issued in respect of the purchase of the land. Any payment made pursuant to the invoice was for that purchase, and can only have been in fulfilment of the purchasers' obligations under the agreement. The second deposit payment was clearly of that nature.

[35] There has been no suggestion that the vendors were ever in any contractual relationship with RHL, so unless the deposits are treated as made to meet the obligations of the trusts the payments would have been gratuitous. But plainly they were not. As the High Court found, the payment of the deposit both discharged the trusts' obligation to pay the deposit and, in doing so, preserved the ability of RHL to subsequently become the purchaser and acquire the land in accordance with the Hildreds' aspirations at the time.[11] Counsel did not address the reasons the deed of novation was not executed, and that is not now relevant. The appellants do not contend that the vendors were obliged to proceed with it, and RHL never acquired any rights under the agreement for sale and purchase.

[36] We consider it clear on the basis of the Judge's findings that RHL made the second deposit payment intending it to have the effect of discharging the trusts' obligation to pay the deposit. On the facts the only possible inference is that both purchasers and vendors accepted the payment had been made on that basis. In these circumstances it is clear that the payment by RHL of the second deposit was in law the satisfaction of the trusts' debt.[12] The trusts obtained the benefit accordingly.

[37] It is also significant that the Hildreds, as trustees, accepted that the deposit had been properly forfeited and the settlement negotiated by Mr Rodgers involved payment of an additional sum. There is no evidence that, when the settlement was negotiated, the appellants advanced any contention in their capacity as directors of RHL that the company could recover the deposit payments from the vendors; while the deed of settlement was not executed by them, the drafting described the settlement reached as one also binding on the company. However, for present purposes it is the absence of any contemporaneous claim by the company that is significant.

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[11] At [76].

[12] See *Simpson v Eggington* (1855) 10 Exch 845 and *Customs and Excise Commissioners v National Westminster Bank Plc* [2002] EWHC 2204 (Ch), [2003] 1 All ER (Comm) 327.

[38] Mr Andersen placed considerable weight on the decision of the High Court in *Falls Road Properties Ltd v Fletcher*, which he claimed involved similar facts.[13] In that case, the plaintiff who was an intended nominee of purchasers under an agreement for sale and purchase, obtained a GST refund from the IRD in advance of the settlement date. That money was then paid as an advance on the purchase price to the defendant vendor, who used it to satisfy GST payable by it. The agreement for sale and purchase was cancelled, and the High Court found the plaintiff was entitled to recover the payment on the basis that it was money paid for the vendor's benefit, in anticipation of being confirmed as nominee in the agreement for sale and purchase. The Court held there had been no benefit to the plaintiff for the payment and it would be unjust for the defendant to retain the benefit of the payment.

[39] The present facts are different. The payment in *Falls Road* was a voluntary one made to assist the vendor to meet its obligations. In the present case, the payment made by RHL was to satisfy the trusts' obligations under the agreement for sale and purchase. *Falls Road* was distinguished by Williams J in the present case on that basis. We consider he was correct to do so.

[40] For these reasons, we are satisfied that the appellants' contention that RHL could recover the $720,000 paid from the vendors is incorrect. It follows that the appeal cannot succeed.

[41] The other contention advanced was that if the argument about the possibility of recovery from the vendors did not succeed, then RHL could have recovered the money it paid from the trusts. Mr Andersen endeavoured to support that proposition on the basis that the Judge had upheld RHL's restitution claim (advanced by the liquidators) against the trustees.

[42] While there may theoretically have been a right in RHL to claim against the trusts, there is a strong flavour of unreality about this proposition, involving as it does Mr and Mrs Hildred as the sole directors of the company taking action against trusts which they themselves control. There is no suggestion on the evidence that they would have been prepared to make the payments voluntarily: on the contrary,

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13 *Falls Road Properties Ltd v Fletcher* (2011) 25 NZTC ¶20-093 (HC).

they seem to have been content to rely on the protection apparently afforded them by RHL's status as a separate corporate entity.

[43] In addition, the appellants face the difficulty that there was no evidence before the Court establishing that the trusts would have been in a financial position at the relevant time to pay the money to RHL. In the circumstances this argument also cannot succeed.

Result and costs

[44] The appeal is dismissed.

[45] As agreed at the hearing, costs should follow the event. The respondents are entitled to costs calculated for a standard appeal on a band A basis.

[46] Mr Andersen suggested that the case on appeal had contained too much material and that disbursements associated with its preparation should be reduced accordingly. However, we are satisfied that the content of the case on appeal was justified by the breadth of the issues originally raised in the notice of appeal. The respondents are accordingly entitled to the usual disbursements.

Solicitors:
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