IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1700

BETWEEN	LYNNE RITA SCHWASS AND HERITAGE TRUSTEE COMPANY LIMITED Plaintiffs
AND	JOHN MILTON LYTTLE AND CMS TRUSTEES (NO 10) LIMITED First Defendants
AND	JOHN MILTON LYTTLE AND CMS TRUSTEES (NO 10) LIMITED Second Defendants

Hearing: 19 October 2009

Counsel: B A Corkill QC for plaintiffs
M J Moohan for defendants

Judgment: 23 October 2009

RESERVED JUDGMENT OF DOBSON J

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[1] These proceedings represent one part of what is essentially a relationship property dispute. The plaintiffs seek the appointment of an independent trustee to each of the defendant Trusts.

[2] The plaintiffs are the trustees of the L R Schwass Family Trust (the Schwass Trust), which appears to be controlled by Ms Schwass. The first defendants are sued as the trustees of the J M Lyttle Family Trust (the Lyttle Trust), which was settled in 1997 by Ms Schwass.

[3] When the Schwass Trust and the Lyttle Trust were settled, Ms Schwass and Mr Lyttle resided together in a de facto relationship, but they separated in October 2003. They have a nine year old daughter.

[4] It appears that the major asset in both the Schwass Trust and the Lyttle Trust are those Trusts' respective shares in a Wellington residential property (the property) owned jointly as to 15 percent by the Lyttle Trust and 85 percent by the Schwass Trust.

[5] In March 2009, Mr Lyttle arranged for the settlement of a second trust called the John Lyttle Family Trust of which he and a trustee company operated by his solicitors were appointed as trustees. They are now sued as the second defendants and it is convenient to refer to that Trust as Mr Lyttle's Second Trust. The trustees of the Lyttle Trust purported to re-settle the property of that Trust on Mr Lyttle's Second Trust, but the state of confusion in respect of the assets involved has apparently precluded that re-settlement being effected.

[6] The Schwass Trust claims that the Lyttle Trust has throughout been responsible for 15 percent of all outgoings on the property, whilst the Schwass Trust itself is responsible for 85 percent of all outgoings. A partial denial in the Statement of Defence denies that as being the historical situation, but acknowledges that the trustees of Mr Lyttle's Second Trust are currently responsible for 15 percent of all *authorised* outgoings.

[7] It is claimed on behalf of the Schwass Trust that the Lyttle Trust has failed to honour its obligations in relation to the property, leaving Ms Schwass to arrange financial resources to meet mortgage outgoings and substantial maintenance obligations in respect of the property. The extent of work required appears to be largely a factor of the property constituting a leaky home. Mr Lyttle was the builder of the property and is therefore among the potential defendants in any claim brought by the owners of the property for the damages represented by the cost of remedial work to make it watertight.

[8] Mr Corkill QC's submissions were very critical of the conduct of Mr Lyttle, contending that he has ignored the obligations incumbent on the Lyttle Trust in contributing to the property, that he has sought to frustrate and delay resolution of the difficulties, and that the latest attempted re-settlement of the assets of the Lyttle Trust on Mr Lyttle's Second Trust was an attempt to avoid the creditor of the Lyttle Trust, namely the Schwass Trust.

[9] Without accepting the criticisms, Mr Moohan's rejoinder was to observe that the Lyttle Trusts have nothing apart from any equity in the 15 percent interest in the property, that Mr Lyttle's exclusion from the management of the property precludes his participating in a sensible debate as to whether the preferable economic outcome would be achieved by selling the property "as is", or investing the substantial amounts required to make it watertight, with a view to a later realisation which might be at a level that would not recover the further money still to be invested in it.

[10] Progress in other aspects of the dispute has included a recent judgment in Family Court proceedings commenced by Ms Schwass against Mr Lyttle. They are both guarantors in their personal capacities of the obligations of their respective Trusts as mortgagors of the secured borrowings from a trading bank. Given the unavailability of cash within the Trusts as the principal borrowers, Ms Schwass as guarantor has been funding the costs of that mortgage.

[11] A judgment delivered on 8 October 2009 by Family Court Judge Grace accepted Ms Schwass's claim for reimbursement of Mr Lyttle's proportionate share of their obligations as guarantors of the mortgage, and ordered an adjustment in her favour in the sum of $63,133.38. In the course of that, which is the Judge's third decision in the Family Court proceedings, he observed:

> As I have previously indicated these parties have made their situations as complicated as they possibly could. To what end they elected to do this is open to speculation. They are however the authors of their own misfortune, and regrettably Mr Lyttle has "stuck his head in the sand" and not proactively sought to resolve the situation. Whether his lack of co-operation in trying to resolve the dispute over the house owned by the parties' respective trusts, his lack of contribution towards the mortgage, and his lack of seeking to resolve the watertightness issues, was designed to put pressure on Ms Schwass in order to bring matters to a head can only be conjecture. If

> that was the case, then it was a tactical decision on his part without adequate thought as to day to day reality of what was going on.

[12] This range of frustrations for the Schwass trustees in getting any constructive engagement about the property, or financial contributions from the 15 percent owner of the property, has led to the present proceedings seeking appointment of an independent trustee to Mr Lyttle's Trusts. The rationale is that an independent trustee would impose discipline on Mr Lyttle's Trusts, require them to accept their lawful responsibilities, and provide a conduit for co-operative progress in dealings with the property.

[13] Subsequent to delivery of the Family Court's 8 October 2009 judgment, Mr Lyttle had completed an updating affidavit in which he advised that the trustees of the defendant Trusts had resolved to vest ownership of their 15 percent in the property in him to enable him to partially meet his indebtedness to Ms Schwass under that Family Court judgment. Having so resolved, in circumstances where the Trusts would be holding no further assets, he advises that the Trusts had resolved to be wound up "immediately". His affidavit annexed resolutions of both Trusts purporting to wind them up.

[14] Ms Schwass's objection to accepting this position and simply taking the 15 percent interest in settlement of the claims against Mr Lyttle is that she has incurred personal liabilities in servicing the mortgage not via her Trusts, and is entitled to a 15 percent contribution to that from Mr Lyttle in his personal capacity, given his liability as a guarantor. Ms Schwass reasons that he ought not to be able to appropriate any equity his Trusts have by virtue of their 15 percent interest in the property, to meet his personal liability when there are existing claims against those assets in respect of the default by Mr Lyttle's Trusts in meeting other aspects of the ongoing obligations incurred by the property. In essence, as Mr Corkill put it, avoiding his personal liability by use of Mr Lyttle's Trusts' interest in the property is to defeat the creditors of those Trusts, namely the Schwass Trust.

[15] At one point in the hearing, Mr Corkill indicated on behalf of Ms Schwass that the Schwass Trust would accept, by way of settlement of these present proceedings, the assignment by Mr Lyttle's Trusts of their 15 percent interest in the

property, in settlement of those Trusts' past obligations in relation to maintenance of the property, leaving Mr Lyttle to be pursued in his personal capacity for the outstanding Family Court judgment. However, after an adjournment enabling Mr Moohan to take instructions, those terms were not acceptable to Mr Lyttle.

[16] I had real reservations about the potentially inappropriate nature of the relief sought, to address the concern motivating the present application. It is hardly the classic situation in which the Court would exercise its power to appoint new trustees. That power is provided by s 51 of the Trustee Act 1956, which provides as follows:

51 Power of Court to appoint new trustees

(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who—

(a) Has been held by the Court to have misconducted himself in the administration of the trust; or

(b) Is convicted, whether summarily or on indictment, of a crime involving dishonesty as defined by section 2 of the Crimes Act 1961; or

(c) Is a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or whose estate or any part thereof is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or

(d) Is a bankrupt; or

(e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section shall give power to appoint an executor or administrator.

(5) Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[17] I am prepared to find that Mr Lyttle has misconducted himself in the administration of his Trusts. However, where there appears to have been inadequate accounting records maintained, and muddlement or simple default in the governance of Mr Lyttle's Trusts, the appointment of an independent trustee may not enable an efficient resolution of the claims pursued by the Schwass Trust against Mr Lyttle's

Trusts. Any independent trustee must conduct itself in accordance with the terms of the Trust Deed, and ultimately in the interests of the beneficiaries of those trusts. As Mr Moohan speculated, an independent trustee, once fully appraised, may well agree with Mr Lyttle that the best interests of those Trusts is to pursue a sale of the property in its existing condition.

[18] Mr Corkill accepted that the Schwass Trust must accept the risks inherent in not being able to influence decisions by a new independent trustee. However, having an independent trustee in place who would respond to the lawful obligations of those Trusts is seen as preferable to any possible alternatives in the attempt to procure an overall resolution of the present difficulties. The application is made on the basis that an independent trustee would be more cost efficient than a Court-directed analysis of the rights and liabilities of all the Trusts by an independent accountant.

[19] In the end, I am persuaded that the defaults by Mr Lyttle's Trusts, and the apparent attempt to avoid liabilities to the Schwass Trust, do justify the imposition on them of the discipline represented by an independent trustee. However, such relief cannot be granted with any certainty that it will produce a satisfactory and final outcome.

[20] If I reached this point, Mr Corkill invited an indication that the relief sought would be available, then affording the Schwass Trust a period of seven days in which to secure the appointment of an appropriate independent trustee, and to provide evidence of the agreement by such trustee to act.

[21] I accordingly find that the plaintiffs are entitled to an order appointing an independent trustee to both the defendant Trusts. Anyone proposed ought to be provided with a copy of this judgment. I anticipate that the identity of such trustee will be confirmed by Memorandum within seven days, in which event I will simply issue a Minute confirming such appointment.

[22] There will be no order as to costs.

Dobson J

Solicitors:
John Langford, Wellington for plaintiffs
Collins & May Law Office, Lower Hutt for defendants