

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-008546

BETWEEN

GRAEME SOMERVELL LYNCH,
BRUCE FREELAND NACEY, IAN
LESLIE HAYNES
Plaintiffs

AND

AOTEA GALLERY LIMITED
Defendant

Hearing: 25 March 2009

Appearances: E Harding for Plaintiff

Judgment: 25 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitors: Kensington Swan, Private Bag 92101, Auckland

[1] The plaintiffs seek by way of summary judgment judgment against the defendant for the sum of \$1,339,127.33. There is no appearance at this hearing on behalf of the defendant. The defendant is a duly incorporated company. One of the directors namely Adonia Elizabeth Wylie is present. I have allowed her to address the Court. However, as counsel for the plaintiffs properly points out a company in the High Court can only be represented by a barrister of the High Court. A director of the company has no right of audience before the High Court. This is the result of a decision of the Court of Appeal in *Re G J Mannix Ltd* [1984] 1 NZLR 309. As stated in the head note of that decision, a body corporate has no right of audience in the superior Courts. It is not a natural person and cannot appear in person. The rule that allows a litigant in person to appear in support of his case should not be extended by analogy to allow laymen whether officers of a company or other agents of it to represent a company as of right in litigation in the Court of Appeal or the High Court. I know that in some instances it is not uncommon for the Court to hear from directors of companies particularly in a liquidation list when a director, to avoid costs, will seek an adjournment so that the director can negotiate a settlement of the claim.

[2] The situation in this case is entirely different. As I understand this position there appears to be a disagreement between the directors of this company. One of the directors, namely Judith Wylie does not to wish to oppose this application. Consequently, in the present case there are very good reasons why I should not allow one director to make submissions to the Court on behalf of the company where there is clear evidence that the other director does not support those submissions. If there was clear support in the company for the opposition to this application for summary judgment then the company would have instructed counsel to represent it.

[3] It is not appropriate for a Court in these proceedings to take sides, by supporting one director against the other. The evidence adduced by the plaintiff clearly establishes that the defendant is indebted to the plaintiff. The loan has its origins in the winding up of the estate of Ashton Wylie. At the date of his death he had advances to three entities. The defendant Aotea Gallery Ltd owed him \$867,600.

Margot Properties Ltd owed him \$1,537,241.84. Life Centre Ltd owed him \$2,272,050. Although these loans were not formally documented they were, according to the evidence before me, recorded in the accounts of the companies.

[4] In terms of his Will Ashton Wylie directed the trustees to establish a charitable trust to which Ashton Wylie bequeathed his shareholding in the companies. The plaintiffs are the executors of Ashton Wylie's estate. They say that none of the monies have been repaid. Ashton Wylie died in 1999. In 2002 the plaintiffs entered into formal loan agreements with the three companies. In particular they entered into a loan agreement with the defendant for the sum of \$867,600. They also entered into loan agreements with the other entities and there were deeds of cross guarantee whereby each company guaranteed the liability of the other. The defendant also executed a mortgage in favour of the plaintiff to secure the money that was owing.

[5] In September 2002 the defendant sold the property that was subject to the mortgage in favour of the plaintiffs. The proceeds of sale were approximately \$900,000. That amount has been held in the trust account of the plaintiffs legal firm from 2002 and has been accumulating interest. The plaintiffs now seek payment of \$1,339,127.33 being the total amount initially borrowed by the defendant from the late Ashton Wylie. The balance is money called up in respect of other advances to the other companies. Correspondence has been produced, including correspondence from Holland Bekett & Co, solicitors acting for Mrs Adonia Wylie in which they state and I quote "on a general basis these properties are clearly of significant value based on their returns. We also understand the trust has some \$4.7 million in cash reserves. Apparently around \$4.6 million is owed to Ashton Wylie's estate. Our client, rightly so in our view. would prefer that this debt was repaid so that a separation from the estate activities can be effected."

[6] These proceedings it seems to me will to a certain extent bring about that object. In the absence of any defence by the defendant and on the basis of the evidence I have reviewed I am of the clear view that the plaintiff is entitled to summary judgment for the amount claimed. There really can be no defence. There is no suggestion that these monies have been repaid. Indeed there are very good

reasons why payment should be made. The money is in cash and would be better used by the beneficiaries of the estate of the deceased than held up indeterminately in a solicitor's trust account. Consequently, I have decided that the plaintiff is entitled to summary judgment. There will accordingly be judgment against the defendant in favour of the plaintiff for the amount claimed namely \$1,339,127.33 with interest thereon of ten percent per annum from 27 August 2008 until today. In addition the plaintiff is entitled to costs on a 2B basis with disbursements as fixed by the registrar.

Associate Judge Robinson