IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-2027
[2014] NZHC 509

UNDER	the District Courts Act 1947
IN THE MATTER	of an appeal against a decision of the District Court at Auckland
BETWEEN	CAROLE ANN DYAS Appellant
AND	MANISHA SAINI and JEAN-PHILIPPE DIEL as trustees of the VALENCE FAMILY TRUST Respondents

Hearing: 28 February 2014

Appearances: DJG Cox for the Appellant
P Wright for the Respondents

Judgment: 19 March 2014

JUDGMENT OF WOODHOUSE J
(Application for leave to appeal, stay and costs)

This judgment was delivered by me on 19 March 2014 at 4:30 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr DJG Cox, Rennie Cox, Solicitors, Auckland
Mr P Wright, Barrister, Shortland Chambers, Auckland
Mr A Kashyap (respondents' instructing solicitor), Solicitor, Auckland

[1] The respondents have applied for leave to appeal against my judgment of 10 October 2013[1] and sought stay of execution of an order for costs. There is also an issue as to the quantum of costs.

The judgment under appeal

[2] For convenience I will reproduce some of the introductory paragraphs in the substantive judgment to provide background:

> [2] Two issues arise on the appeal. One is whether the breach of fiduciary duty by the appellant on the night of the auction was causative of loss to the respondents arising out of the sale to Ms Pepper. The second is whether the appellant was bound by a statutory obligation under s 63(3) of the Real Estate Agents Act 1976 (the Act) to repay commission to the respondents.
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> [5] This proceeding was commenced by the respondents against the appellant in 2010. Judgment was given in March 2013 in favour of the respondents on two claims.[2]
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> [6] The first claim was for breach of fiduciary duty in that the appellant failed to disclose to the respondents at the auction that Ms Pepper was a real estate agent employed by Realty and failed to advise the respondents at the auction of their statutory rights under ss 63 and 64. There was judgment against the appellant for $22,000 being the difference between the market value of the respondents' property at the date of the agreement and the agreed sale price.
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> [7] The second claim was pursuant to s 63(3) for recovery of the commission paid by the respondents to Realty. Judgment was given against the appellant for the total commission; a sum of $18,292.50.
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> [8] The causation issue relating to breach of fiduciary duties arises in the following circumstances. After the agreement for sale and purchase was entered into, but before settlement, the respondents were advised that the purchaser was an associated agent and that they had the right under s 63(3) of the Act to avoid the contract. Also before settlement the respondents received from Realty a valuation of the property in purported compliance with one of the obligations under s 64 of the Act. This supported sale at the price agreed with the purchaser at the auction. The Judge found that the valuation was defective. However, the respondents placed no weight on this valuation. They obtained their own valuation, before settlement, at a sum in excess of the market valuation as found by the Judge. They then consented to the sale. The appellant contends that any breach of fiduciary duty by her was not causative of any loss because the respondents proceeded to settlement

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1 *Dyas v Diel* [2013] NZHC 2645.

2 *Saini and Diel v Dyas* DC Auckland CIV-2010-004-001416, 21 March 2013.

armed with the range of information just described and uninfluenced by the defective valuation.

[9] The main issue that arises in relation to judgment for the commission is whether the obligation under s 63(3) to repay the commission applies to a person who was acting as a real estate agent but who was not the real estate agent appointed for the sale and was not the person to whom the commission was paid by the vendors.

Conclusion in summary

[10] I am satisfied that the appeal should be allowed and judgment on both claims against the appellant should be set aside.

[11] The principal reason for concluding that the appellant is not liable for breach of fiduciary duty is that, although there was breach of a duty of disclosure at the auction, this breach was not material to the loss claimed by the respondents. There cannot be liability for breach of fiduciary duty unless the breach is material to the loss that is claimed. The loss claimed by the respondents was a loss arising from sale at the price agreed at the auction. But before the respondents settled the sale three critical things happened. First, all of the information which the respondents contend should have been disclosed to them by the appellant at the auction was disclosed to them very soon after the auction and before the sale was settled. Second, when this information was disclosed to the respondents they also knew that they had the statutory right provided by s 63(3) to avoid the contract. Third, the respondents elected to proceed to sale at a price that they knew was materially less than the market value and which was significantly less than the market value advised to the respondents by their own valuer before they settled the sale.

[12] The essence of my reason for concluding that the appellant has no liability to repay the commission is that, as a matter of statutory interpretation, s 63(3) imposes an obligation to repay the commission only on the real estate agent appointed by the vendor as the real estate agent. Liability to repay the commission was a liability of Realty, not a liability of the appellant. If that conclusion is wrong, I am nevertheless satisfied that the appellant could only have liability to repay commission received by her, and she was not paid any commission.

Leave to appeal: general approach

[3] Mr Wright, for the respondents, conveniently summarised the broad principles applying on an application for leave, being a summary accepted by Mr Cox for the appellant. This was as follows:

(a) The High Court will grant leave to appeal in circumstances where the appeal meets two criteria:[3]

(i) The appeal must raise some question of law or fact capable of bona fide and serious argument; and

(ii) The appeal must involve some (public or private) interest of sufficient importance to outweigh the costs, both to the Court system and to the parties, and the delay of further appeal.[4]

(b) Upon a second appeal, the function of the Court is not a general correction of error, but to clarify the law and to determine whether it has been properly construed and applied by the Court below.[5]

(c) The first limb of the test necessarily involves some consideration of the merits of the appeal.

(d) The second limb of the test is a question of policy. It is not sufficient that there have been different results in the District Court and High Court, if the case is not otherwise of general importance.[6]

(e) Broadly speaking the question is whether there is an issue of sufficient importance to justify granting leave. In the end, the guiding principle must be the requirements of justice.[7]

The pivotal argument for the respondents

[4] The pivotal argument for the respondents was that, in allowing the appeal on the fiduciary breach claim, I had applied the common law test for causation applied

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3 The leading cases are *Waller v Hider* [1998] 1 NZLR 412 (CA) and *Snee v Snee* (1999) 13 PRNZ 609.
4 *Waller v Hider*, above n 3, at 413-414.
5 *Snee v Snee*, above n 3, at [22].
6 *Arnold v Livestock Traders International Pty Ltd* CA105/98, 10 December 1998.
7 *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 at 346-347.

in claims for tort or breach of contract and such an approach is contrary to decisions of the Supreme Court and Court of Appeal.[8]

[5] The argument was summarised by Mr Wright as follows:

> 5. The bona fide and seriously arguable question the appeal raises is whether the common law approach to causation adopted by Woodhouse J is available or appropriate in respect of a claim for breach of fiduciary duty.
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> 6. The respondents rely on *Premium* which states that once a breach of fiduciary duty has been established policy dictates that the only escape route for the fiduciary is the very narrow one of showing that the client/beneficiary would have proceeded with the transaction even if properly advised and informed.
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> 7. Further or alternatively if it is the subsequent actions of the client/beneficiary that are alleged to be the cause of the loss, (ie a novus actus interveniens) those actions must have been clearly unreasonable.
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> 8. Hence the second stage of the common law analysis of causation involving evaluation of the cause including as to proximity, forseeability, whether it was a relevant material and substantial cause and/or by way of policy and/or as a value judgment is not an ingredient of a claim for breach of fiduciary duty.

[6] Mr Wright developed the argument with care. In the course of this he placed emphasis on the discussions of causation in the cases referred to above and in particular the discussions in *BNZ v NZ Guardian Trust* and an earlier and leading discussion in this Court in *Everist v McEvedy*.[9] Central to Mr Wright's argument was the proposition that the sole causation test is: Was there a loss that would not have been incurred but for the breach? Mr Wright submitted that, if that is established, then the only escape route for the fiduciary is to establish the affirmative defence discussed in the cases and which requires the fiduciary to establish that the beneficiary would have entered into the transaction even if there had been no breach.

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8 *Maruha Corporation v Amaltal Corporation Ltd* [2007] NZSC 40, [2007] 3 NZLR 192; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384; *Bank of New Zealand v New Zealand Guardian Trust Company Ltd* [1999] 1 NZLR 664 (CA).

9 *Bank of New Zealand v New Zealand Guardian Trust Company Ltd*, above n 8, at 679-682 and 687-688; *Everist v McEvedy* [1996] 3 NZLR 348 (HC) at 352-355. See also *Maruha Corporation v Amaltal Corporation Ltd*, above n 8, at [30]-[31]; *Premium Real Estate Ltd v Stevens*, above n 8, at 85; and *Gilbert v Shannahan* [1998] 3 NZLR 528 (CA) at 535-536.

[7] I am not persuaded that the conclusion I reached on causation meets either limb of the threshold test; that is to say, the two matters referred to above at [3](a). As to a question of law or fact capable of bona fide and serious argument, the thrust of Mr Wright's argument, as indicated in the preceding summary, is that the decision is contrary to authority. This is a proposition that there is a seriously arguable point of law. I do not agree. The essence of the conclusion is in the summary provided in the substantive judgment at [11], reproduced above. These are conclusions of fact.

[8] Mr Wright submitted that the development of my reasons involved application of both stages of the common law enquiry into causation as discussed by the Court of Appeal in *ACC v Ambrose*.[10] With respect to Mr Wright, that argument draws from my reasons propositions which are not there. The full discussion in the substantive judgment on matters of law and fact relating to causation needs to be reviewed, not abbreviated statements such as the summary at [11] reproduced above.[11] There are conclusions in the substantive judgment which were not in any material way addressed by Mr Wright in his submissions. This includes the finding that, although there was an acknowledged breach at the auction, it was capable of being rectified and it was in fact rectified before any loss occurred. Mr Wright did acknowledge that breach by a fiduciary would not be causative of the loss if there were subsequent acts or omissions by the beneficiary found to be the cause of the loss; that is to say, *novus actus interveniens*. Mr Wright submitted that those subsequent acts or omissions would have to be found to be unreasonable. I did not express the judgment in that way, but there are conclusions are to that essential effect. They are conclusions of fact.

[9] The discussion to this point addressed the primary argument for the respondents. If I am wrong in my assessment, the respondents in any event have not made out the second limb; a question of law or fact involving an interest of sufficient importance to justify a second appeal, which is the exception rather than the rule. This is because, amongst other things, the appeal on the fiduciary breach claim was allowed on an alternative ground; that is to say, a ground independent from the one discussed to this point relating to causation. This is the conclusion, contrary to that

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[10] *ACC v Ambrose* [2007] NZCA 304, [2008] 1 NZLR 340 at [22]-[25].
[11] The full discussion is in the substantive judgment at [58]-[73].

of the District Court Judge, that the loss claimed by the respondents – sale of their property at an under value – would have occurred in any event; that it would have occurred even if there had been no breach by the fiduciary appellant. Mr Wright did not argue that there was an error of law in respect of that alternative conclusion. It was a conclusion based on the well established affirmative defence available to a fiduciary in breach.[12]

[10] An appeal on this point might be the subject of argument given the contrary conclusion of the District Court Judge. However, this would not involve a public or private interest of sufficient importance to outweigh the cost both to the court system and to the parties and the delay of further appeal. I also do not agree with Mr Wright's submission that my conclusion involved an appellate court rejecting credibility findings of the trial Judge. The conclusion flows from facts which were not in issue, being the facts relating to all of the information that was made available to the respondents immediately following the auction and the further evidence as to what they did.

[11] There are some further considerations weighing against the respondents' application. I will summarise these:

(a) The amount in issue is modest when compared with cost. The original judgment on the fiduciary duty claim was for $22,000. There is an affidavit from the appellant stating that her costs to date are close to $100,000. One of the respondents, Mr Diel, has acknowledged in his affidavit that the proceedings "have moved beyond economic viability".

(b) The separate claim to recover the commission does not alter this assessment. The judgment on that claim was for $18,000. Although leave to appeal against my decision on this claim is also sought, I am not persuaded that there are any questions of law or fact justifying a second appeal on the commission claim.

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[12] The cases are referred to above at [6] and n 9.

(c) There was inordinate delay by the respondents in bringing their claim. The auction was in July 2004. They had all the relevant information about the appellant's conduct within a few days. The claim was filed six years to the day after the auction.

(d) Related to the last point is the fact that the respondents made no claim against the real estate company, being the real estate agent appointed by the respondents. There was no action by the respondents against the real estate company even to recover the deposit when they had a statutory right of recovery. The only step they took was to lodge a complaint against the company with the Real Estate Institute. And it is not beside the point that they did not at the same time lodge a disciplinary complaint against the appellant.

[12] There are some fundamental points bearing on overall justice. There was breach of a fiduciary duty owed by the appellant to the respondents. But establishing that is not enough. In this case the respondents, with full knowledge of all relevant matters, and with independent legal advice, elected to proceed to settle for what they knew was less than the market price and when they were under no legal, or even moral, obligation to do so. This occurred notwithstanding the fact that, within little more than a few days of the auction, the respondents were in exactly the same position they were in immediately before the auction took place and the breach occurred. All of this happened almost 10 years ago. Without seeking to put this into some precise legal framework, these are circumstances which in my judgment would make it unjust to prolong litigation.

[13] For these reasons the application for leave to appeal is declined.

Application for stay

[14] The respondents sought an order for stay of execution pending determination of the appeal for which leave was sought. This related to enforcement of the award of costs in favour of the appellant. Although the application for leave has been dismissed, stay will be relevant if the respondents seek leave to appeal from the Court of Appeal. Against the possibility that there may be such an application, and

to save further time and expense for the parties, I will record my conclusion on this application. It is a conclusion based, in large measure, on the responsible approach of both counsel to the issue.

[15] In discussing the point with counsel I indicated that my provisional view was that, if there is leave to appeal, the appropriate course would be to order stay on condition that the respondents pay into a solicitor's trust account the total amount awarded for costs, with this to be held on interest bearing deposit. Mr Wright and Mr Cox indicated, in effect, that they could not reasonably argue against that course.

[16] Accordingly, I make the following directions in respect of the costs judgment recorded in the next section of this judgment:

(a) Enforcement of the costs judgment is stayed, pending further order of the Court of Appeal or of this Court, on condition that the respondents no later than 4:00 pm on Friday, 28 March 2014 pay into their solicitor's trust account the total sum of the costs judgment, being $29,847.30. This sum is to be held on interest bearing deposit by the solicitor as stakeholder for both parties and it is not to be paid out other than in accordance with the orders that follow, or any subsequent order of this Court or of the Court of Appeal, or in accordance with written instructions from both parties.

(b) If the respondents do not make application to the Court of Appeal for leave to appeal to that Court within the time limit specified in r 14 of the Court of Appeal Rules, the order for stay will lapse and the sum held by the respondents' solicitor together with all accrued interest shall be paid forthwith to the appellant.

(c) If the respondents do apply for leave to appeal to the Court of Appeal within the time limit specified in r 14, the money is to be held by the solicitor pending further order of the Court of Appeal, or this Court if the matter is referred back to this Court.

Costs

[17] The appellant seeks costs on a 2B basis with a 50% increase. The increase is sought on the grounds that the respondents failed, without reasonable justification, to accept an offer of settlement that was made before the hearing in the District Court. Rule 4.6.3(v) of the District Court Rules provides that the Court may order increased costs in such circumstances. This is the same as r 14.6(3)(b)(v) of the High Court Rules.

[18] The offer was made in writing about three months before the hearing. It set out the appellant's arguments as to why the appellant contended that the respondents would fail. The appellant's offer was not to seek costs if the respondents discontinued their claim.

[19] The claim for increased costs was for costs in this Court as well as in the District Court. In reliance on *Tournament Parking Ltd v The Wellington Company Ltd*,[13] Mr Cox submitted that the offer made when the proceeding was before the District Court may be taken into account in relation to costs in the High Court. However, the first question to be determined is whether it was unreasonable for the respondents to reject the offer at the time it was made.[14]

[20] I am not persuaded that the respondents failed to accept the offer without reasonable justification. The offer contained no realistic incentive to settle. It simply put forward defences in a letter and, in essence, suggested that the respondents should surrender. In respect of a broadly similar offer, although including an offer of money, Asher J said in *Craike v Tilsley*:[15]

> The Calderbank offer came down in essence to an elaboration of the statement of defence with the weaknesses in the plaintiffs' case being articulated, accompanied by an offer of $20,000. The $20,000 offer in the order of things was never going to be accepted unless the plaintiffs were prepared to give up. Successful defendants who in letter form record their defences and invite a settlement should not necessarily be in a stronger

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13 *Tournament Parking Ltd v The Wellington Company Ltd* HC Wellington CIV-2009-485-2508, 19 October 2010.

14 *NZ Sports Merchandising Ltd v DSL logistics Ltd* HC Auckland CIV-2009-404-5548, 19 August 2010 at [37]. And generally as to an absence of reasonable justification for failing to accept an offer see *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

15 *Craike v Tilsley* [2012] NZHC 2886 at [6].

> position than any other defendant who takes the same position without sending a letter.

[21] Although the question of reasonable justification is to be assessed at the time the offer was made, that does not exclude use of hindsight to assess reasonableness. In this case the respondents won on all issues in the District Court. That is a fairly clear indication that the assessment they made to reject the offer, before the hearing, was reasonable. What this also indicates is that it was reasonable for the respondents to seek to preserve their judgment by resisting the appeal. What is more, although one of the grounds for appeal was that the Judge was wrong in his conclusion that there had been breach of fiduciary duty, the challenge to that finding was not in the end pursued at the hearing of the appeal.

[22] The appellant's application for increased costs in the District Court and in this Court is dismissed for those reasons.

Quantum of costs

[23] The respondents did not challenge the proposed assessment of costs on a 2B basis but did challenge some specific items contained in the appellant's schedule of costs on a 2B basis ("schedule B"). The items in issue were detailed in Mr Wright's submissions on costs.[16] During the hearing Mr Cox accepted that the adjustments sought by the appellant were justified.

[24] Taking those adjustments into account, the costs and disbursements on a 2B basis to which the appellant is entitled in the District Court are:

(a)	Schedule B – excluding application for an adjournment: 7.75 days at $1,500 per day	11,625.00
(b)	Item 10 in schedule B – hearing	7,750.00
		19,375.00
(c)	District Court disbursements	223.50
	District Court costs and disbursements	19,598.50

[16] I also note that there are arithmetical errors in schedule B.

[25] The costs and disbursements in the High Court are:

(a)	Costs and disbursements as claimed	14,427.80
(b)	Less costs to the respondents in responding to appellant's original claim for indemnity costs and the subsequent claim for increased costs; as for an interlocutory application – filing opposition and submissions[17] – 2.1 days at $1,990 per day	(4,179.00)
	Costs and disbursements award to appellant in High Court	$10,248.80

[26] There is an order that the respondents pay the appellant's costs and disbursements for the proceeding in the District Court in a sum of $19,958.50 and on the appeal in a sum of $10,248.80, a total of $29,847.30.

Woodhouse J

[17] Filing opposition is used as the equivalent of the opposition to indemnity costs. There was no additional hearing time of any consequence in respect of costs at the conclusion of the hearing on the application for leave to appeal.