

IN THE SUPREME COURT OF NEW ZEALAND

SC 6/2014
[2014] NZSC 54

BETWEEN GLOVER No.2 LIMITED as Trustee of
the Glover No.2 Trust
Applicant

AND THE GLOVER TRUST LIMITED,
BAILEY TRUSTEE SERVICES
LIMITED and AUCKLAND WEST
LEGAL SERVICES LIMITED as Trustees
of the Glover Trust
First Respondent

AND CIT HOLDINGS LIMITED
Second Respondent

Court: Elias CJ and William Young J

Counsel: R C Knight and T A Chubb for Applicant
Z G Kennedy and M D Pascariu for Respondents

Judgment: 7 May 2014

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] The applicant seeks leave to appeal the decision of the Court of Appeal¹ upholding a decision of Allan J in the High Court² rejecting its contention that a deed of trust given by the applicant company as trustee of the Glover No 2 Trust be declared a sham and set aside. The effect of such declaration would be that property of which the Glover No 2 Trust is the registered proprietor after transfer from CIT

¹ *Glover (No.2) Ltd v The Glover Trust Ltd and CIT Holdings Ltd* (2013) NZCA 608.

² *The Glover Trust Ltd v Glover Trust Corp Ltd* [2013] NZHC 545.

Holdings Ltd would be held for the benefit of the discretionary beneficiaries of the Glover No.2 Trust instead of for the benefit of CIT Holdings Ltd (as is the effect of the deed of trust).

[2] The background is the development of a group of properties in St Heliers, Auckland, carried out by two of the discretionary beneficiaries in the Glover No.2 Trust, Mr Olliver and his former wife, Ms Sparks. The development, which began in March 2009, was undertaken through a group of inter-related trusts and companies set up by Ms Sparks and Mr Olliver.

[3] By 2010 the development and Mr Olliver were in financial difficulties and the marriage of Ms Sparks and Mr Olliver was under strain. In order to try to preserve her share of the matrimonial property while not incurring tax liabilities, some of the assets held through the trusts and companies were rearranged through a series of transactions of which the trust deed in issue was one. The Glover No 2 Trust was set up and properties were transferred to it from CIT Holdings Ltd (the shares in which were held by the pre-existing Glover Trust) on the basis of the deed declaring that the properties transferred were held on trust for CIT Holdings Limited. It is this trust that the trustee of the Glover No 2 Trust, at the direction of Ms Sparks, sought to have declared to be a sham.

[4] No other transaction in the sequence is impugned. The arrangements put in place entailed the creation of the Glover No.2 Trust in which Ms Sparks, her children, grandchildren and Mr Olliver are discretionary beneficiaries, authority to transfer the properties from CIT Holdings Ltd to Glover No.2 Ltd, as trustee of the Glover No.2 Trust, a memorandum of the wishes of Ms Sparks as settlor of the Glover No.2 Trust, a deed of novation by which Glover No.2 Ltd was substituted for Waimarie Trust Ltd in the joint venture agreement through which the developments were being carried out, and the trust deed entered into by Glover No.2 Ltd as trustee of the Glover No.2 Trust. The trust deed which is the subject of the litigation records that the trustee became the registered proprietor of properties effected by transfer from the beneficial owner, CIT Holdings Ltd, and that it was intended that the trustee would hold the property “merely as a Trustee, for the Beneficiary as the Trustee doth hereby acknowledge”.

[5] Glover No.2 Ltd subsequently became registered as owner of the four properties instead of CIT Holdings Ltd. Following a change of trustees of the Glover Trust as a first step in the replacement of the board of the directors of CIT Holding Ltd, the Glover Trust Ltd sought to have the properties transferred to the new trustees. That led to the present litigation.

[6] In concurrent findings, the High Court and Court of Appeal have held that the trust deed was not a sham. The resolution of the trustees approving the receipt of the distribution "as a distribution from the Glover Family Trust for the benefit of the beneficiaries of this Trust", on its face difficult to reconcile with a bare trust, was found by the High Court and the Court of Appeal to have been passed subject to the terms of the trust, without which it would have made "no legal sense". The result was, on the findings of fact made in the High Court and Court of Appeal, the properties were held by Glover No 2 Limited in trust for CIT Holdings Ltd.

[7] The deed was intended to be effective so that it would avoid significant tax liability. The result was that the properties were held by Glover No.2 Limited in trust for CIT Holdings Ltd.

[8] No novel legal issue arises. The principles relating to the circumstances in which transactions are treated as sham were not in dispute and were treated in both the High Court and Court of Appeal as settled. Although the applicant suggests that the proposed appeal is of public interest because "the general and commercial population would benefit from having the legal principles concerning the law of sham definitively determined by this Court", no basis for challenge to the well-settled principles applied in the lower courts is developed. In substance, the applicant seeks a further appeal against concurrent findings of fact in the High Court and Court of Appeal. There is no appearance of miscarriage of justice. The criteria for leave contained in s 13 of the Supreme Court Act 2003 are not made out.

[9] The appeal is dismissed with costs of \$2,500 to the respondents.

Solicitors:
Martelli Mckegg, Auckland for the Applicant
Minter Ellison Rudd Watts, Auckland for the Respondents