

IN THE SUPREME COURT OF NEW ZEALAND

SC 50/2015
[2015] NZSC 115

BETWEEN ANTONY THOMAS GOUGH, TRACY
OWEN GOUGH AND HARCOURT
DAVID GOUGH
Applicants

AND GOUGH HOLDINGS LIMITED
First Respondent

GINA LOUISE SATTERTHWAITE,
BENJAMIN THOMAS GOUGH AND
FIFE HOLDINGS LIMITED
Second Respondents

ALEXANDER MALCOLM
MCKINNON, AVENAL BERYL
ELIZABETH MCKINNON, LISA
ANGELIQUE D'HARCOURT GOUGH,
WYNTON GILL COX, NICHOLAS
RICHARD WILLIAM DAVIDSON,
JAMES TRACEY GOUGH, RACHEL
CORALIE COOPMAN-GOUGH,
MATTHEW OWEN MCKINNON AND
SOPHIA AVENAL ANNA MCKINNON
Third Respondents

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: J A Farmer QC and P A Robertson for the Applicants
T C Weston QC and A V Foote for the Second Respondents

Judgment: 29 July 2015

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay costs of \$2,500 to the second respondents.

REASONS

[1] The issue in this proposed appeal is the interpretation of a clause in the third schedule to the constitution of Gough Holdings Ltd. The clause provides:

No person shall be appointed as a Director who:

...

(c) Is a member of the Gough family unless all Shareholders unanimously agree.

[2] The issue for determination is whether the phrase “no person shall be appointed” refers only to the initial act of appointment or whether it is being used in a continuous sense so as to include the status that the initial act of appointment confers.

[3] MacKenzie J held in the High Court that it had the latter meaning, which he described as a “term of appointment” meaning, as distinct from a “time of appointment” meaning.¹ The Court of Appeal allowed the appeal, holding that it referred to the initial appointment.²

[4] The applicants now apply for leave to appeal to this Court.

Background

[5] Gough Gough & Hamer Ltd (GGH) was established by the late Mr T T Gough,³ who died in 1955. At the time of his death, he owned almost all the shares in GGH. Mr T T Gough was married twice and the shareholding in GGH is divided between the resulting two branches of his family, the O T Gough branch and the B T Gough branch.⁴ The ownership of GGH is governed by a relatively complex trust and company structure.

¹ *Strahl v McKinnon* [2014] NZHC 1257 at [46].

² *Satterthwaite v Gough Holdings Ltd* [2015] NZCA 130 (France P, Harrison and French JJ) at [69].

³ This background is largely taken from the Court of Appeal judgment.

⁴ O T Gough was a son of the first marriage and B T Gough a son of the second marriage.

[6] As part of a major restructuring that took place in 1986 and 1987, Gough Holdings Ltd was formed to hold the estate's interest in GGH and also to acquire shares held by family interests separate from the estate's holding. At the same time, trust arrangements previously in place were restructured with the creation of a head trust and two sub-trusts of the estate trusts, one for each branch of the family. The trustees of the head trust (the head trustees) comprise one trustee from each of the two sub-trusts, with a third person appointed by those trustees.

[7] When Gough Holdings Ltd was re-registered under the Companies Act 1993, it required a new constitution. The new constitution was registered in 1997. Under cl 13 of the 1997 constitution, the power to appoint and remove directors is vested in the head trustees during such time as there are head trustees. The clause further provides for directors to retire by rotation at three-yearly intervals. Directors who are in the full-time employment of the company are not subject to any rotation requirement.

[8] Clause 13.7 provides that, if there are no head trustees, then the provisions of the third schedule to the constitution are to apply in addition to some but not all parts of cl 13. Under the third schedule, instead of being appointed by the head trustees, directors are elected by the ordinary shareholders by a simple majority vote. The directors are also subject to removal by ordinary shareholder resolution. The three-year rotation provision continues to apply, as does the exemption from rotation for directors who are full-time employees.

[9] The trustees of the head trust have (in separate proceedings in the High Court) applied for directions as to whether the head trust has already come to an end or whether it should be wound up. If it has come to an end or will be wound up, this renders the third schedule operative.⁵

[10] The dispute relating to the meaning of the word "appointed" and the ramifications of cl 3(3) is of significance for existing directors who are members of

⁵ Dobson J directed on 15 October 2013 that the trustees of the head trust be served with all documents filed in the current proceedings. On 13 July 2015, the trustees filed a memorandum in this Court outlining the nature of the directions proceeding and indicating that the head trustees have reserved all rights to support or oppose the making of any orders in the current proceeding.

the Gough family.⁶ There are currently two directors in that position, one from each branch of the family. One of the two family directors is also a full-time employee of Gough Holdings Ltd. As noted above, that directors who are full-time employees are exempt from the three-yearly rotation requirement.

[11] If cl 3 refers only to the initial act of appointment (as the Court of Appeal held), the existing family director who is also a full-time employee could potentially remain in office indefinitely without unanimous agreement of all the shareholders of Gough Holdings Ltd.

Grounds of application

[12] The applicants submit that the interpretation of cl 3(c) of the constitution by the Court of Appeal was wrong. In their submission, this matter is one of general commercial significance because it raises the issue of the correct approach to contractual interpretation and the extent to which extrinsic evidence can be used in interpretation.

Our assessment

[13] The proposed appeal relates to the interpretation of a particular clause in a particular company constitution. The clause is tailored to the unusual situation of that particular company and its shareholders. How the clause is interpreted therefore will have no significance beyond the parties.

[14] The applicants say that the proposed appeal would allow this Court to examine the principles of interpretation of contracts and the role of extrinsic evidence.⁷ This Court has recently considered the principles relating to the interpretation of contracts.⁸ This case, given its particular facts, does not appear a

⁶ “Gough family” is defined in the constitution as the descendants of the late T T Gough.

⁷ As to whether a company’s constitution is a contract, see P Watts, N Campbell and C Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 132–142 and L Taylor “Company Constitutions under the Companies Act 1993” (2005) 11 NZBLQ 45. For the purposes of this application, we assume, without deciding, that the principles of interpretation of a constitution and a contract would be similar.

⁸ See the majority judgment in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [77]–[79], [84], [88]–[93] [*Zurich*] per McGrath, Glazebrook and Arnold JJ.

suitable vehicle for any further elaboration of those principles, even assuming further elaboration may be necessary. Further, a company constitution is a public document upon which third parties (including future shareholders) are likely to rely. In such circumstances, as noted in *Zurich*, extrinsic evidence will have a limited role.⁹

[15] For the above reasons we do not consider that the proposed appeal raises any issues of general or public importance or general commercial significance. Further, nothing has been raised with regard to the Court of Appeal's judgment that suggests the risk of a miscarriage of justice¹⁰ if this Court does not hear the proposed appeal.

Result

[16] The application for leave to appeal is dismissed.

[17] The applicants must pay costs of \$2,500 to the second respondents.¹¹

[18] A copy of this decision is to be provided by the Registrar to the head trustees.

Solicitors:
Mortlock McCormack Law, Christchurch for Applicants
Clark Boyce, Christchurch for First Respondent
Duncan Cotterill, Christchurch for Second Respondents
Wynn Williams, Christchurch for Third Respondents

⁹ At [62].

¹⁰ For the application of the "miscarriage of justice" ground in s 13(2)(b) of the Supreme Court Act 2003 in civil cases, see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

¹¹ Gough Holdings Ltd was the first respondent in the Court of Appeal. It says it will abide the decision of the Court and asks to be excused from appearing with regard to the application. It is duly excused. The third respondents filed no submissions in response to the applicants' application for leave to appeal but reserved their position if leave was granted.