

IN THE SUPREME COURT OF NEW ZEALAND

SC 56/2015  
[2015] NZSC 120

BETWEEN

KENNETH ANGUS HOLMES  
First Applicant

KENNETH ANGUS HOLMES AND  
DAVID BRIAN RUSSELL AS  
TRUSTEES OF THE K A HOLMES 2003  
FAMILY TRUST  
Second Applicant

AND

KIRIWAI CONSULTANTS LIMITED  
Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: B D Gray QC and S D Williams for Applicants  
P J Dale for Respondent

Judgment: 4 August 2015

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**JUDGMENT OF THE COURT**

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

[1] The applicants seek leave to appeal against a judgment of the Court of Appeal dismissing an appeal by the first applicant, Mr Holmes, and allowing a cross-appeal by the respondent, Kiriwai Consultants Limited (Kiriwai).<sup>1</sup>

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<sup>1</sup> *Holmes v Kiriwai Consultants Ltd* [2015] NZCA 149 (Stevens, French and Miller JJ) [*Holmes* (CA)].

## **Background**

[2] The dispute between the applicants and Kiriwai arose from a transaction under which the second applicants (the Trustees) purchased the 10 per cent shareholding held by Kiriwai in Holmes Ventures Limited (HVL). The Trustees already owned the other 90 per cent of the shares. Kiriwai had acquired the shares as part of an employee share purchase plan for Mr Emmens, the sole shareholder in Kiriwai. Mr Emmens had been an employee of HVL. Mr Holmes was the sole director of HVL.

[3] The Trustees paid \$1 million for Kiriwai's 10 per cent shareholding. Mr Emmens was obliged to procure that Kiriwai sold the 10 per cent shareholding when he left his employment with HVL (in acrimonious circumstances). The Trustees had pressured Kiriwai to sell quickly, which it did.

[4] Before the sale occurred, Port of Tauranga Limited (PTL) had initiated discussions about a proposed purchase by PTL of a subsidiary of HVL, Quality Marshalling (Mt Maunganui) Limited (QML). Mr Holmes was involved in those negotiations but did not tell Mr Emmens about them. A month after the sale of the Kiriwai shareholding, the negotiations between PTL and HVL led to a sale of QML for \$34 million, which significantly increased the value of HVL.

[5] Kiriwai claimed that Mr Holmes had breached s 149 of the Companies Act 1993 because he (and his fellow trustee) had acquired Kiriwai's 10 per cent shareholding in HVL at a time when Mr Holmes held price sensitive information in his capacity as a director of HVL. Under s 149, a director in that position may not acquire shares for consideration that is less than their fair value. The Trustees acknowledged that \$1 million was not the fair value and paid a further \$605,726 plus interest. However, Kiriwai claimed this was still less than fair value and sued under s 149. It also argued that Mr Holmes had a fiduciary duty to Mr Emmens/Kiriwai. Mr Emmens said if he had known of the prospective transaction with PTL, he would have postponed selling Kiriwai's shareholding and benefitted from the sale of QML. Kiriwai claimed for the difference between the amount it had received for its shares

and the amount it would have received if it had postponed its sale until after the transaction with PTL was completed.

### **High Court decision**

[6] In the High Court, Courtney J found that Kiriwai was entitled to an additional \$564,274 under s 149, being the amount required to ensure it received fair value for its 10 per cent shareholding.<sup>2</sup> That calculation of fair value assumed that the PTL deal was too uncertain at the time the Trustees purchased Kiriwai's 10 per cent shareholding to influence the valuation of HVL. The High Court Judge also found that in circumstances where Mr Holmes held all the information about HVL, and Mr Emmens had no such information, Mr Holmes owed a fiduciary duty to Mr Emmens.<sup>3</sup> She calculated Kiriwai's loss for breach of that fiduciary duty at \$2,681,274, being the difference between what its shareholding would have been worth after the PTL transaction had occurred, and what it actually received. Judgment was entered against Mr Holmes for that sum, along with interest.

### **Court of Appeal decision**

[7] The Court of Appeal dismissed Mr Holmes' appeal against the finding of breach of fiduciary duty.<sup>4</sup> It also allowed a cross-appeal by Kiriwai against the award made under s 149 of the Companies Act, and increased that award from \$564,274 to \$1,932,908.

[8] Kiriwai's statement of claim alleged that the fiduciary duty owed by Mr Holmes arose because of the relationship of Mr Holmes as a director of HVL and Kiriwai as a shareholder and the fact that HVL was a joint venture company established for the benefit of all its shareholders. In short, the allegation was that a status-based fiduciary duty arose. The High Court found that there was no status-based fiduciary duty, but that on the facts of the case a fact-based fiduciary duty arose. The applicants argued in the Court of Appeal that Kiriwai was bound by its pleadings and the High Court Judge had exceeded her jurisdiction by adjudicating on a matter not properly before her.

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<sup>2</sup> *Kiriwai Consultants Ltd v Holmes* [2014] NZHC 512 (Courtney J).

<sup>3</sup> At [68].

<sup>4</sup> *Holmes* (CA), above n 1.

[9] The Court of Appeal determined that, in the absence of any meaningful prejudice, “substance should prevail over form”. It therefore rejected this pleading point.<sup>5</sup>

### **Application for leave**

[10] The applicants say that leave should be given on three points.

#### *(i) Pleadings*

[11] The first relates to the pleadings. In essence, the applicants argue that both the High Court and Court of Appeal were wrong to enter judgment on the basis of fact-based fiduciary duty when it had not been pleaded and wrong to find that Mr Holmes had not been prejudiced by the lack of an accurate pleading. They argued this is a matter of public importance because the pleading contravened r 5.26 of the High Court Rules and because clarification and settlement of the role and function of pleadings is a matter of general and public importance.

[12] We do not accept that this pleading point is a matter of public importance. Rather, it is a fact-specific inquiry about the nature of the pleading, the degree to which it failed to articulate the issue and the question of whether any prejudice resulted from the inadequacy of the pleading.<sup>6</sup> Nor do we consider that any miscarriage arises from the way the High Court and Court of Appeal dealt with the pleading point.

#### *(ii) Fiduciary duty*

[13] The second point relates to the finding that Mr Holmes owed a fiduciary duty to Kiriwai. The applicants take issue in particular with the finding that the former employment relationship between Mr Emmens and HVL was an important “special fact” supporting the existence of a fact-based fiduciary duty. They say this ground of appeal meets the criteria of general commercial significance on that basis that it is a finding contrary to the principle of separate corporate personality and because it

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<sup>5</sup> At [79].

<sup>6</sup> The alternative (and possibly preferable) course of seeking leave to amend the pleading does not seem to have been explored.

potentially affects all directors of closely held companies operating share incentive schemes.

[14] We do not consider that any question of general commercial significance arises. Rather, the analysis of the Courts below was an orthodox articulation of the factors leading to a conclusion that a fiduciary duty existed. We do not think that any matter of principle arises.

*(iii) Fair value*

[15] The third ground of appeal relates to the Court of Appeal's decision in relation to the cross-appeal, substantially increasing the amount payable by the Trustees to Kiriwai under s 149 of the Companies Act. The focus of this ground of appeal is the way the Court of Appeal dealt with the expert valuation evidence in relation to the fair value assessment under s 149. The valuation of HVL was significantly enhanced by the offer made by PTL for HVL's shareholding in QML. The \$34 million sale price that was ultimately reached substantially increased the value of HVL. But because the sale of Kiriwai's 10 per cent shareholding in HVL occurred before the PTL transaction was completed, there was an issue as to the probability of the PTL transaction coming to fruition at the time at which the Trustees purchased Kiriwai's shares.

[16] Courtney J accepted the probability analysis by the valuer for Mr Holmes, who had said that, at the relevant time, the prospect of the sale to PTL occurring was "negligible". She rejected that of the expert for Kiriwai who had said (incorrectly) that the transaction was so likely to occur that the full value of the price eventually agreed should be taken into account in assessing the fair value of the shares in HVL at the time they were purchased by the Trustees from Kiriwai.

[17] The Court of Appeal said that Courtney J seemed to think she had to accept the view of one expert or the other, but that this was wrong.<sup>7</sup> Rather, the probability analysis was a question of fact to be decided by the Court and not something to be decided by expert witnesses. It was a fact-specific inquiry. The Court of Appeal

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<sup>7</sup> *Holmes (CA)*, above n 1, at [33].

Judges actually disagreed on this: French J concluding that there should be a 15 per cent discount for the uncertainty of the PTL transaction coming to fruition and Stevens and Miller JJ considering that the discount should be 5 per cent.<sup>8</sup> However, they all found that the PTL transaction was very likely at the time the Kiriwai shareholding was purchased. Ultimately the Court concluded that the amount the Trustees should pay under s 149 was \$1,932,908, reflecting a fair value for Kiriwai's shares in HVL that took into account the likelihood of the PTL transaction coming to fruition.

[18] The applicants say that the Court of Appeal took on the role of expert valuers and departed from the evidence of both experts. They say this led to an arbitrary finding, reflected in the fact that the Court of Appeal Judges could not reach consensus. They argue that the appropriate response is to remit the matter of quantum back to the High Court where further expert evidence could be obtained.

[19] The applicants say this is a matter of general commercial significance and that this Court should clarify the role of the Court in respect of expert witnesses and provide guidance to commercial parties and other litigants in future cases.

[20] We do not consider that any point of public importance arises. Rather the Court of Appeal undertook a fact-specific inquiry based on the evidence before it. We do not consider that there is any appearance of a miscarriage of justice.

## **Result**

[21] We therefore dismiss the application for leave to appeal.

## **Costs**

[22] We award costs to the respondent of \$2,500.

Solicitors:  
Claymore Partners Limited, Auckland for Applicants  
Dawson Harford & Partners, Auckland for Respondent

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<sup>8</sup> At [49].