

IN THE SUPREME COURT OF NEW ZEALAND

SC 34/2015
[2015] NZSC 81

BETWEEN SUISSE INTERNATIONAL LIMITED
 Applicant

AND BEVERLEY JEAN MONK
 Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: S A Keall for the Applicant
 P F Dalkie and D A Watson for the Respondent

Judgment: 10 June 2015

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are to be paid to the respondent. The applicant and Mr Reginald Watt are jointly and severally liable for these costs.**
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REASONS

[1] The applicant, Suisse International Ltd (Suisse), applies for leave to appeal against a judgment of the Court of Appeal,¹ dismissing an appeal against the judgment of the High Court,² which rejected Suisse's claim against the respondent, Mrs Monk, for \$500,000.

¹ *Suisse International Ltd v Monk* [2015] NZCA 46 (Randerson, Winkelmann and Venning JJ) [*Suisse* (CA)].

² *Suisse International Ltd v Monk* [2014] NZHC 853 (Goddard J) [*Suisse* (HC)].

Background

[2] On 21 November 2002 the solicitors for Suisse paid \$500,000 to Mrs Monk. Suisse and a number of other companies associated with Mr Reginald Watt (the Watt group) had borrowed substantial sums of money from companies associated with Mrs Monk to assist the Watt group in its business as a property trader.

[3] At the time the payment was made, Mr Watt was bankrupt. Suisse and other companies in the Watt group were being managed by Mr Suren Sharma as their sole director.

[4] The payment was challenged by Suisse through a solicitor's letter of 11 December 2007. Suisse did not bring proceedings until November 2011. Suisse claimed that it had not discovered the payment to Mrs Monk until July 2007 and alleged that the payment had been made without Suisse's knowledge or consent. Suisse further alleged that Mrs Monk and/or Suisse's solicitors had concealed the payment. It was said Mrs Monk had never advanced any money to Suisse and that Suisse did not owe any money to her.

[5] The case eventually went to trial before Goddard J in October 2013. The Court of Appeal recorded that the "lengthy delays had a serious impact on documentary evidence available at trial and on the ability of those involved to recall relevant events."³

The High Court Judgment

[6] Goddard J dismissed Suisse's claim.⁴ In summary, the Judge found there was no fraud or deceit and that the money was not paid by mistake.⁵ She held that the payment was authorised by Mr Sharma in full knowledge of the indebtedness between the Watt group and Mrs Monk. In any event, the Judge found that the claim was statute-barred under the Limitation Act 1950.

³ *Suisse* (CA), above n 1, at [3].

⁴ *Suisse* (HC), above n 2.

⁵ Suisse initially pursued four causes of action: money had and received; fraudulent breach of trust; deceit; and unlawful means conspiracy. However, two of these causes of action were abandoned during the course of the trial and only the first and third causes of action remained for determination: *Suisse* (HC), above n 2, at [1].

[7] Goddard J did not accept that the payment was unauthorised or paid out on any mistaken basis. She held that the money was owing to Mrs Monk and that it was immaterial whether it was paid under a mortgage covering existing and future advances or whether it was simply paid out on Mr Sharma’s authority in reduction of Watt group indebtedness.⁶ The payment was duly authorised by Suisse’s sole director, Mr Sharma, acting within his responsibilities and in line with the customary practice of the Watt group.⁷ Goddard J rejected the claim in deceit, finding it “entirely misconceived and verging on the vexatious”.⁸

[8] Finally, the Judge found that there was no credible basis for the assertion that Mr Watt could not with due diligence have discovered the payment earlier than 2007.⁹ The Judge accepted evidence that Mr Watt was, despite being an adjudicated bankrupt, heavily involved in the business, was in the “office every day” and being paid as a “manager”.¹⁰ The High Court therefore was satisfied that the claim was statute barred by virtue of s 4(1)(a) of the Limitation Act.

The Court of Appeal judgment

[9] Suisse applied to adduce further evidence in the Court of Appeal. The documents related to advances made by Mrs Monk’s companies to two other companies in the Watt group.¹¹ The Court held that the documents at issue were not fresh since Mr Watt admitted he had had the documents in his possession from 2007 onwards and that there was no reason why the documents were not produced at trial.¹² In any event, on the view the Court of Appeal took of the case, the further documents would not have assisted Suisse.¹³

[10] The Court was satisfied, on the basis of the oral and documentary evidence, that sums in excess of \$500,000 were due by one or more of the companies in the

⁶ At [53]. The Judge recorded that, at the time of the payment, the Watt group owed almost \$3 million to Mrs Monk: at [52].

⁷ At [47].

⁸ At [55].

⁹ At [57].

¹⁰ At [19] and [52].

¹¹ *Suisse (CA)*, above n 1, at [28].

¹² At [29].

¹³ At [29].

Watt group to the Monk interests.¹⁴ In these circumstances, the Court held that there was no evidential basis to support the claim of mistake nor to suggest that Mrs Monk acted in bad faith.¹⁵

[11] The Court also agreed with Goddard J that it was not possible to isolate the payment made by Suisse from all the other dealings between the Watt group of companies and Mrs Monk's companies, both before and after the payments were due. In order to show there had been an overpayment, it would have been necessary in the circumstances for a complete analysis to be made of all relevant transactions involving the Watt group and Mrs Monk's companies. Only then could it be determined whether any payment was due in one direction or the other. Suisse made no attempt to place evidence of that kind before the Court.¹⁶

[12] The Court of Appeal did not conclusively determine the limitation issue given it had found that Suisse's claim failed on its merits.¹⁷

Applicant's submissions

[13] It is submitted that Mr Sharma made the payment on a mistaken basis believing that the payment was required to discharge a collateral security which had already been discharged. Therefore the payment was made under a mistake of fact. This mistake was not discovered or discoverable until, at its earliest, July 2007 and thus the limitation period had not expired by the time the proceedings were filed.

[14] It is submitted that the Court of Appeal decision leaves the law in an unsatisfactory state because the apparent reasoning is that when the controlling mind of a company has all of the relevant information, and is authorised, he or she cannot also be mistaken.

[15] It is also submitted that the Court of Appeal erred in not accepting new evidence to show that the \$500,000 was not owing. Suisse submits it should have done so because of the cogency of the evidence, despite it not being fresh.

¹⁴ At [42].

¹⁵ At [42].

¹⁶ At [43].

¹⁷ At [45]–[53].

Our assessment

[16] This was a matter decided on its particular facts. The Courts below merely decided that, in the particular circumstances of the case, money was owed, the payment was authorised and any mistake as to whether or not there was any money owing under the security was immaterial.¹⁸ The High Court was also satisfied the claim was statute-barred.

[17] Nothing raised by Suisse suggests that these conclusions may have been erroneous. In essence, Suisse seeks to challenge factual findings made in the context of particular and unusual facts. No point of general or public importance arises.

[18] Finally, the decision not to admit the further evidence was one well open to the Court of Appeal. In any event, as noted by that Court, the evidence would have made no difference to the result.

Result and costs

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

[20] The respondent seeks a costs order against Mr Watt personally on the basis that Suisse has no assets and Mr Watt stands behind Suisse as the sole beneficiary of the claim.

[21] Suisse accepts that there is jurisdiction for this Court to order non-party costs. In the High Court, Goddard J was satisfied, on the basis of evidence put before that Court, that Suisse had no assets and that Mr Watt was the only possible beneficiary of the claim.¹⁹ She thus made a costs order against Mr Watt personally, as well as a costs order against Suisse.

[22] Nothing has been put forward by Suisse to suggest that the position at the time of the High Court costs judgment has changed. Therefore costs of \$2,500 are

¹⁸ See *Suisse* (HC), above n 2, at [53] and *Suisse* (CA), above n 1, at [34].

¹⁹ See *Suisse International Ltd v Monk* [2015] NZHC 341 at [10]–[11].

ordered, with Mr Watts and Suisse being jointly and severally liable for the costs payment.

Solicitors:
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Bruce Reid Law, Auckland for the Respondent