IN THE SUPREME COURT OF NEW ZEALAND

SC 30/2015
[2015] NZSC 85

BETWEEN	DEREK NICHOLAS BLACKWELL AND CHARLES BASIL BLACKWELL as Executors and Trustees of the Estate of ROSS WINSTON BLACKWELL Applicants
AND	LEITH ROGER CHICK AND ROSEMARY CHICK First Respondents
AND	EDMONDS JUDD Second Respondent

Court:	William Young, Glazebrook and Arnold JJ
Counsel:	C T Gudsell QC for the Applicants M D Branch for the First Respondents M Ring QC and J R Parker for the Second Respondent
Judgment:	19 June 2015

JUDGMENT OF THE COURT

A **The application for leave to appeal in CA 481/2013 is dismissed.**

B **Costs of $2,500 are payable by the applicants to the first respondents.**

C **The application for leave to appeal in CA 476/2013 is granted.**

D **The approved question is whether the Court of Appeal was correct in its conclusion that, on the findings in the High Court, the negligence of the second respondent caused no loss.**

REASONS

[1] The applicants, Derek and Charles Blackwell, apply for leave to appeal against a judgment of the Court of Appeal.[1] The Court of Appeal judgment dealt with two appeals arising from a single High Court judgment:[2] the first appeal (CA 481/2013) dealt with affirmative defences (lack of mental capacity and unconscionability); the second appeal (CA 476/2013) dealt with the issue of whether Edmonds Judd, the second respondent and a firm of solicitors, was negligent and caused the loss to the applicants.[3]

[2] In relation to the appeal in CA 481/2013, the Court of Appeal upheld the High Court decision that the applicants' brother, the late Ross Blackwell (Ross), had sufficient mental capacity at the time he entered into a number of impugned transactions with the first respondents, the Chicks.[4] In addition, and in agreement with the High Court, the Court of Appeal held that there was no basis for the applicants' claims that the impugned transactions constituted unconscionable bargains.[5] In relation to the appeal in CA 476/2013, the Court of Appeal allowed the appeal and held that while Edmonds Judd, the second respondent, was negligent, the applicants had failed to show that this negligence had caused any loss.[6] The cross appeal in CA 481/2013 was dismissed.[7]

Background

[3] The applicants' brother, Ross, was diagnosed with a brain tumour in 2000 and received radiotherapy. Over the following years, the tumour and treatment had a detrimental impact on his cognitive ability. There was evidence that MRI scans from 2001 to 2007 showed that, as a result of the radiotherapy treatment, Ross was suffering rational encephalopathy (or softening of the brain). One of the experts

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1 *Blackwell v Chick* [2015] NZCA 34 (Ellen France P, Randerson and Harrison JJ) [*Blackwell* (CA)].
2 *Chick v Blackwell* [2013] NZHC 1525 (Rodney Hansen J) [*Blackwell* (HC)].
3 There was also a cross appeal in CA 481/2013 by the first respondents claiming against Edmonds Judd in the event the applicants succeeded.
4 See *Blackwell* (CA), above n 1, at [22]–[66].
5 See [67]–[83].
6 See [84]–[120].
7 At [83].

opined that this would have produced "irreversible cognitive decline and progressive impairment of memory and judgment".[8] There was, however, medical and other evidence of fluctuations in his mental and physical state. For example, despite suffering a small stroke in 2006 and this consequentially affecting his balance and coordination, a specialist who saw Ross in 2007 stated that Ross had shown a "remarkable improvement" over the previous year.[9] In 2008, further scans showed that Ross had suffered another small stroke and that his condition had deteriorated.

[4] After the diagnosis in 2000, Ross leased his farm to his friends and neighbours, the first respondents, Mr and Mrs Chick. The lease included a right of first refusal should Ross decide to sell the property. The lease was renewed in 2004 with an option to purchase the farm at $1.5 million GST exclusive (as against a market value of $2.07 million) if settlement occurred by 30 April 2007 or at market value if settled after that date. On Ross' instructions, Edmonds Judd drafted the lease. The option to purchase was extended in 2005 to 30 April 2010 and, in 2007, there was a renewal of lease, with the same option price. By 2007 the value of the property had substantially increased to $3.2 million. At all times, the rent payable under the lease agreement was less than market rental.[10]

[5] In 2010 Mr and Mrs Chick requested a further extension of the lease from Ross.[11] Terms were agreed but the applicants, in exercise of a power of attorney,[12] intervened and refused the extension. The Chicks then served notice of their intention to exercise the option under the existing lease but the applicants (who were by then managing Ross' affairs) refused to settle.

[6] The Chicks initiated proceedings seeking specific performance of the contract. In defending those proceedings, the applicants, as Ross' litigation guardians, claimed that the 2004 lease and option to purchase and the subsequent variations and renewals were invalid due to Ross' lack of capacity. They also used

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8 *Blackwell* (HC), above n 2, at [46].
9 At [44].
10 *Blackwell* (CA), above n 1, at [16]–[17].
11 The Chicks sought two further rights of renewal and an extension of the option exercise to 30 April 2016.
12 In 2000, Ross executed an enduring power of attorney in favour of his two brothers but this was not acted upon until 2008: see *Blackwell* (CA), above n 1, at [10].

lack of capacity as the basis for a claim of unconscionable bargain. Additionally, the applicants, if the first respondents' claim for specific performance succeeded, claimed from Edmonds Judd (in negligence) the difference between the agreed rental and the market rental and between the purchase price under the option and the market value of the property.

The High Court decision

[7] Rodney Hansen J held that "until [Ross] was incapacitated by the strokes in 2008, he was able to manage his financial affairs".[13] He held that, while Ross had diminishing cognitive functioning over the period, he had sufficient capacity to understand the general nature of all the impugned transactions.[14] In 2005, Ross had presented to the doctor with strange behaviour but the Judge found that to be an isolated episode and the likely result of delirium.[15]

[8] As to the claim of unconscionability, Rodney Hansen J held that, any imbalances in financial terms in these transactions were the result of a "series of deliberate, rational decisions which, seen in a wider context, sought to achieve and brought about a fair and morally defensible outcome".[16] In finding that there was no special disadvantage and that these were rational decisions, the High Court relied on a number of factors.

[9] The factors taken into account by the High Court included that: financial considerations were not paramount for Ross who originally suggested the lease;[17] the lease and the variation were simply an extension of the close and mutually supportive relationship which had grown between Ross and the Chicks (and, in particular the Chicks' son Adam) and was not a normal arms-length commercial relationship;[18] Ross, through the lease, was able to enjoy the farm to the extent his health permitted and thus he shared in the pleasures of ownership, without the burdens;[19] the retention of ownership of the farm during his lifetime was very

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13 At [91].
14 See at [62] and [98].
15 At [56].
16 At [145].
17 At [111]–[112] and [116].
18 At [117].
19 At [118].

important to Ross and a side agreement ensured that the option would not be exercised while he was alive;[20] the benefit of the 2004 option must be viewed in the context that the Chicks were seeking to buy their own farm and a commitment to lease Ross' farm effectively took them out of the market – a fixed price option was a hedge against increasing farm prices;[21] Ross wanted the farm to be run as a dry stock operation, rather than dairy grazing, knowing that this would not optimise returns and that this would reduce its market value;[22] the Chicks had both forgone capital gains which they would have inured if they had purchased their own farm, and had spent substantial sums on Ross' farm on the basis that it would be theirs one day;[23] and in 2004 the Chicks had insisted on a much higher price for the option than the one Ross initially proposed ($900,000).[24]

[10] As to the claim against Edmonds Judd, it was accepted in the High Court that the firm was in breach of duty on each occasion in failing to obtain informed consent to act for both parties or to ensure that both parties were referred to independent solicitors.[25] It had also been alleged that there had been a failure to identify that Ross lacked the mental capacity to understand the transactions and that the firm had failed to advise Ross adequately on the implications of the transaction, including the wisdom of obtaining a valuation at market value. The Judge was not persuaded that there were any failures relating to identifying Ross' mental capacity but did accept that Edmonds Judd had failed to ensure that Ross understood the full implications of the transactions.[26]

[11] As to causation, Rodney Hansen J held that it was unlikely that, if properly advised, Ross would have entered into the impugned transactions on the terms that he did.[27] As to the 2004 transaction, he held that, at the very least, had independent advice been given, there would have been a mechanism to adjust the option price in the event of a change in the market value of the farm.[28] He also held that there

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20 At [119]–[120].
21 At [123].
22 At [124].
23 At [127].
24 At [19] and [129].
25 At [156].
26 See [157]–[161].
27 See [162]–[167].
28 At [164].

would not have been the variation in 2005, which was a unilateral and, in the Judge's opinion, unnecessary initiative instigated by Ross.[29] He also held that the advice received in 2007 before entering into another lease was deficient in a number of respects and, while the Judge believed that Ross was content to continue leasing the farm at below market rates, the Judge considered it unlikely, if properly advised, that Ross would have entered into a lease at a rental so far below market rates.[30]

The Court of Appeal decision

[12] The Court of Appeal upheld the High Court's decision on mental capacity and unconscionability.[31] With regard to the claim against Edmonds Judd, the Court of Appeal considered that, on the facts as found by the High Court, the negligence was not a material and substantial cause and had no real influence on any loss suffered, because Ross intended throughout to bear any financial detriment inherent in the transactions.[32]

Applicants' submissions

[13] The applicants seek leave to appeal on a number of grounds. First, they submit that the terms of the option are inexplicable at a time of a general expectation of rising farm prices. In their submission, the Courts were presented with two competing bodies of evidence: that of the Chicks seeking to explain why the option was so advantageous to them and the applicants' evidence showing Ross' limited pre-morbid intellectual capacity, medical evidence addressing the effects of Ross' brain tumor and treatment, as well as anecdotal evidence of his decline.

[14] The applicants argue that, while the broad legal principles relating to lack of capacity and unconscionable bargain are not in dispute, the way the evidence from the applicants was evaluated, together with factual errors, simplification and omissions, has led the courts to the wrong conclusions. It is submitted that both the

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29 At [165].
30 At [166].
31 *Blackwell* (CA), above n 1, at [62]–[66], and [79]–[80].
32 At [115]. Given that the applicants' appeal was dismissed, the Court of Appeal did not need to determine the first respondents' cross appeal: at [83].

High Court and the Court of Appeal failed to assess the Chicks' evidence properly and therefore placed too much reliance on it.

[15] With regard to the claim against Edmonds Judd, the applicants say that, while the general legal principles as to causation are not in dispute, the Court of Appeal made a number of errors in applying those principles in the present case. For example, the applicants submit that the Court of Appeal erred in failing to analyse what would have occurred had Ross been properly advised as to the full implications of the option and advice given on measures to protect his position.

Our assessment

[16] We consider that leave should be granted on the issue of causation.

[17] On the capacity and unconsionability issues, the applicants do not challenge the test applied in the courts below. There is thus no legal question of general or public importance arising. The challenges sought to be made relate to the particular factual circumstances, where there are concurrent findings in the courts below. As to the use of the Chicks' evidence, Rodney Hansen J accepted the Chicks as "truthful and careful witnesses".[33] The Court of Appeal came to similar conclusions from reading the transcript[34] and, in any event, the Court of Appeal recognised that the Chicks' evidence was material but not decisive with regard to the capacity issues.[35]

[18] It is not this Court's role to engage in a further exercise of error correction.[36] In any event, we do not consider that anything raised suggests that the conclusions of the High Court and the Court of Appeal on the issues of capacity and unconscionability may have been in error, even assuming there were some factual errors. The applicants have failed to show that this may be one of those rare cases where there have been such apparent and substantial errors that it would be repugnant to justice to leave them uncorrected.[37]

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33 *Blackwell* (HC), above n 2, at [70].
34 *Blackwell* (CA), above n 1, at [54]–[55].
35 At [56].
36 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4].
37 At [5].

Result

[19] The proposed appeal in CA 481/2013 does not meet the test in s 13 of the Supreme Court Act 2003. Thus the application for leave to appeal is dismissed, with costs of $2,500 payable to the first respondent.

[20] Leave to appeal in CA 476/2013 is granted. The approved question is whether the Court of Appeal was correct in its conclusion that, on the findings in the High Court, the negligence of the second respondent caused no loss.

Solicitors:
Brent Kelly & Associates, Te Awamutu for Applicants
Gallie Miles, Te Awamutu for First Respondents
Morrison Kent, Wellington for Second Respondent