

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 102/2019
[2020] NZSC 6

BETWEEN PETER DANIEL STAITE, JEAN
TANIRAU-CARSTON, LYNETTE
KATHLEEN PALMER AND CHYNELLE
PICARD AS TRUSTEES OF THE WHAOA
NO 1 LANDS TRUST
Applicants

AND ANDREW MARUTUEHU KUSABS,
DONALD MAIRANGI BENNETT,
JULIAN KUMEROA KEEPA AND
WIREMU WAAKA AS TRUSTEES OF
THE TUMUNUI LANDS TRUST
First Respondents

ANDREW MARUTUEHU KUSABS AND
DONALD MAIRANGI BENNETT AS
RETIRED TRUSTEES OF THE TUMUNUI
LANDS TRUST
Second Respondents

Hearing: 5 February 2020
Court: O'Regan and Ellen France JJ
Counsel: D G Chesterman and J P Koning for Applicant
M S McKechnie and A F S Vane for Respondents
Judgment: 18 February 2020

JUDGMENT OF THE COURT

- A The application for leave to amend the application for leave to appeal is granted.**
- B The application for leave to appeal is dismissed with leave reserved as set out in [16] below.**

REASONS

Introduction

[1] The applicants, as trustees of the Whaoa No 1 Lands Trust (the Whaoa Trust), seek leave to appeal a decision of the Court of Appeal allowing an appeal by the respondents, as trustees of the Tumunui Lands Trust (the Tumunui Trust).¹ The Court of Appeal set aside an order for rectification made by the High Court of a lease of Māori freehold land executed by the Whaoa Trust in favour of the Tumunui Trust.²

Background

[2] The background to the lease and the proceeding is set out in the judgment of the Court of Appeal and we need not repeat that detail.³ It is sufficient to note the following matters. First, there were discussions between the parties as trustees of their respective ahu whenua trusts in the late 1980s about the Tumunui Trust acquiring the then current lease over the land. Tumunui went into possession of the land in mid-1989 and began work to convert the dry stock farm to a dairy unit before any formal arrangement was concluded. In fact, no assignment of the lease was executed. Rather, as the High Court Judge recorded, discussions “morphed into negotiations about the terms on which Tumunui Trust would take a new lease over the land”.⁴

[3] The new lease was ultimately executed in 1994. Subject to rights of renewal, the lease may run to 2032. Under the lease rental payments are calculated as follows:

... at a yearly rental calculated on the basis of five dollars per centum of the capital value of the said land according to a special valuation carried out by Valuation New Zealand for the purpose at the expense of the lessee ... provided always that for the purposes of such valuation there shall be deducted from the said capital value the value of all improvements made on or to the said land by the lessee or its predecessor since the 13th day of December 1961

¹ *Kusabs v Staite* [2019] NZCA 420, (2019) 20 NZCPR 445 (Cooper, Brown and Williams JJ) [CA judgment].

² *Staite v Kusabs* [2017] NZHC 416 (Heath J) [HC judgment].

³ CA judgment, above n 1, at [1]–[30].

⁴ HC judgment, above n 2, at [57]. See also CA judgment, above n 1, at [15].

and during the terms hereof by the lessee and subsisting at the date of valuation

[4] In 2009 the Whaoa Trust sought rescission of the lease on the basis that the involvement of Edward Moke, a trustee of both trusts, in discussions over the lease was a breach of Mr Moke's fiduciary duty of loyalty to the Whaoa Trust of which the Tumunui Trust had knowledge. The Whaoa Trust claimed the lease terms were favourable to the Tumunui Trust and unfavourable to the Whaoa Trust both because of the duration of the lease and the rental (calculated as above) being considerably below market value. As against the Tumunui Trust, the Whaoa Trust sought rescission of the lease or damages.

[5] In the High Court, Heath J found that Mr Moke was in breach of his duty of loyalty to the Whaoa Trust.⁵ However, the Judge did not consider Mr Moke was responsible for what the Judge said was an error in drafting the rental calculation provision.⁶ Heath J also found the trustees of the Tumunui Trust had actual knowledge of the breaches of duties.⁷ Accordingly, on the basis of *Fenwick v Naera*,⁸ the Judge said:⁹

... subject to questions of limitation or laches, any transaction entered into between parties involving a trustee with a conflict of loyalty between the two may, as a matter of discretion, be set aside by the Court, or some alternative (and more appropriate) remedy may be granted.

[6] Heath J declined to order rescission of the lease. The Judge said, first, that:

[204] While difficulties arising from the need to unwind events that have occurred over the last 23 years would not provide an insuperable hurdle to relief, an inappropriate benefit could be obtained by the Whaoa Trust, were such an order to be made without some compensation being awarded in favour of the Tumunui Trust. Compensation could be ordered on the basis that the Whaoa Trust is deemed to have held its interest as a constructive trustee for the Tumunui Trust during the period that the rescinded lease was operative.

(footnote omitted)

⁵ HC judgment, above n 2, at [170].

⁶ At [168]–[169].

⁷ At [178]–[179].

⁸ *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354.

⁹ HC judgment, above n 2, at [180].

[7] Second, Heath J noted the alternative pleading was that the Whaoa Trust was entitled to “any other relief this Court saw fit”.¹⁰ On that basis the Judge considered and then granted rectification. Ultimately, the Judge made an order for rectification of the lease:¹¹

... to remove the words “or its predecessor since the 13th day of December 1961 and” from the Tumunui Lease. The effect of that order is to require rental to be fixed in accordance with the formula in the lease but taking into account only improvements to the land made by the Tumunui Trust from the date the Tumunui Trust went into occupation of the land in 1989. A consequence of this order is that adjustments will need to be made to the rent fixed for earlier periods.

[8] On appeal by the Tumunui Trust, the Court of Appeal allowed the appeal and set aside the order for rectification.¹² In essence, the Court considered rectification was not available because the evidence did not support a finding that the parties had a common intention that the rental provision in the lease should have been in the revised form the Judge had ordered.

[9] The Court of Appeal said that the conclusion on rectification was sufficient to dispose of the appeal. The Court stated:¹³

Hence it is unnecessary to engage with the further issue of whether there was a breach of duty by Mr Moke of such a character as to justify the Tumunui Lease being set aside. As noted, there was no cross-appeal against the refusal to grant rescission of the lease.

The proposed appeal

[10] The central point the applicants wish to argue on the proposed appeal is that they should not have been left without a remedy, in the form of either rescission or equitable damages. In developing this point the applicants say that, given *Fenwick v Naera*, the High Court’s undisturbed finding of breach of fiduciary duty required the Court of Appeal to either grant rescission or to exercise its discretion to grant an alternative remedy such as equitable damages.¹⁴

¹⁰ At [205].

¹¹ At [46] of a later judgment granting recall of the primary judgment: *Staitte v Kusabs* [2017] NZHC 2299.

¹² CA judgment, above n 1, at [112].

¹³ At [113].

¹⁴ The applicants would also challenge the Court of Appeal’s decision to set aside the order for rectification on the basis it ignores the fiduciary backdrop.

[11] The applicants also sought leave to amend the application for leave to add a further factor which the applicants say supports their argument as to the public importance of these issues, namely, the discussion of the Treaty of Waitangi in the preamble to Te Ture Whenua Maori Act 1993.

[12] In opposing leave, the respondents say that the leave criteria are not met. They submit that the Court of Appeal correctly set aside the order for rectification because there was no common mistake. Further, it is said that, given there was no cross-appeal, the Court did not err in not considering any alternative remedy.

[13] The respondents also oppose the grant of leave to amend the application for leave on the basis that this amendment would widen the proposed grounds and have this Court undertake a *Fenwick v Naera* analysis when that was not a basis for the judgments below.

Our assessment

[14] Taking the latter aspect first, Mr Chesterman for the applicants points out that the trustees of the Tumunui Trust in their amended notice of appeal in the Court of Appeal put both the finding of breach of fiduciary duty and the appropriateness of granting rescission in issue. In light of that indication, we did canvas with Mr Chesterman whether consideration had been given to seeking a recall of the Court of Appeal's judgment on the ground these issues were live.

[15] For present purposes, the relevance of the fact that these questions were not addressed in the Court of Appeal is that this Court would effectively be dealing with them as a court of first instance. There are practical and other difficulties in our doing so. For example, in terms of equitable damages, the parties do not agree as to whether or not further evidence would be required. Nor, if leave was granted, would we have the benefit of the views of the Court of Appeal on these questions.

[16] Given these constraints on the prospective appeal, we do not consider it is necessary in the interests of justice for the matter to be heard in this Court.¹⁵ The

¹⁵ Senior Courts Act 2016, s 74.

application for leave to appeal is accordingly dismissed. But we do so on the basis that leave is reserved to the applicants to make a further application for leave to appeal to this Court if an application is made to the Court of Appeal asking that Court to re-visit the matter but without success.

[17] Against this background we see no reason for refusing leave to the applicants to amend the notice of application for leave to appeal. Leave is accordingly granted to amend.

[18] In the circumstances we make no order as to costs.

Solicitors:
David Pawson Law, Te Puke for Applicants
Le Pine & Co, Taupō for Respondents