IN THE COURT OF APPEAL OF NEW ZEALAND

CA647/2015
[2016] NZCA 608

BETWEEN	DUNCAN JOHN NAPIER AND SARA ANN NAPIER Appellants
AND	TORBAY HOLDINGS LIMITED First Respondent
AND	TORBAY REST HOME LIMITED Second Respondent

Hearing:	17 October 2016
Court:	Asher, Dobson and Williams JJ
Counsel:	S O McAnally and B M Hojabri for Appellants DPH Jones QC for First and Second Respondents
Judgment:	15 December 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellants, Duncan and Sara Napier, were the Administration Manager and Nurse Manager of a Torbay Rest Home owned by the respondent companies (the Torbay companies). The Napiers effectively ran the rest home business. They were given untrammelled control on the basis of trust.

[2] In 2012 representatives of the Torbay companies began to receive troublesome indications that all was not right financially with the rest home. Their investigations indicated that in excess of $1.9 million, including $281,087.01 of unauthorised remuneration, had been paid to the Napiers or their associated interests out of the bank accounts of the Torbay companies between 1 April 2005 and 30 April 2012.

[3] Proceedings were filed by the Torbay companies. Torbay was successful after a three-week hearing before Woolford J.[1] Mr Napier was held to be liable for money had and received, and Woolford J entered judgment against Mr Napier in favour of the Torbay companies in the sum of $1,419,351.20. Mrs Napier was held to be personally liable on the same cause of action for $720,310.53 that she received, and the Napier Family Trust was held to be liable for $308,080.08 for money had and received, which after deductions was for $95,735.08. The total amounts of the collective judgments came to $2,235,396.81, but the net amount recoverable by the Torbay companies was $1,458,288.56. There were other consequential orders.[2]

[4] The Napiers appeal that decision, submitting that the judgment is "unsafe and cannot stand". The Napiers had not been represented by counsel in the High Court, and Mr Napier had run the defence. Before us, Mr McAnally and Ms Hojabri appeared for them.

Background facts[3]

[5] The first respondent, Torbay Holdings Ltd, was incorporated on 8 June 2001. Its principal shareholder was Mr Michael Single's family trust, which held

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1 *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839.
2 See [262]–[265].
3 For a full summary of the facts see *Torbay Holdings Ltd v Napier,* above n 1, at [9]–[28].

approximately 40 per cent. Mr Single was also a director. There was another significant shareholder, the family trust of Mark Kayes, which held 20 per cent. The Napier Family Trust held 20 per cent. The shareholding of Torbay Rest Home Ltd was similar.

[6] Mr and Mrs Napier had been directors of a toy retailer, Henderson Toys Ltd, that had got into financial difficulties in 2000. It ceased trading in April 2001 and entered into a creditor scheme of arrangement in 2002. Mr Single and Mr Napier knew each other personally. Mr Napier was instrumental in introducing Mr Single to the previous owners of the rest home business in Torbay. The business was purchased by Torbay. Mr Single, Mr Kayes and Mrs Napier were appointed directors of the two companies. Mr Napier was not initially appointed as a director because of his personal debts and the scheme of arrangement.

[7] Mr Napier was appointed as Administration Manager of the rest home, while Mrs Napier was appointed as Nurse Manager. Mr Napier had no other employment but Mrs Napier continued part-time work as a nurse tutor. Mr Napier remained Administration Manager from 2001 until the end of April 2012. During this period he had responsibility for the financial management of the rest home as well as its physical maintenance and he dealt with all expenses, wages, PAYE returns and GST returns. He was also required to maintain the companies' primary books of accounts using the Mind Your Own Business (MYOB) accounting software package.

[8] Each year Mr Napier supplied the companies' accountant, Mr Williams, with the information necessary to complete the annual accounts for the Torbay companies. Mr Williams relied on the information supplied by Mr Napier and did not audit the accounts or, save on odd occasions, examine the source documents. The annual accounts prepared by Mr Williams on information supplied by Mr Napier between 2005 and 2011 generally showed the rest home business as breaking even. No dividends were paid to the shareholders.

[9] In September 2011 it came to Mr Williams' attention that two Inland Revenue Department (IRD) payments had not been made for the financial year ended 31 March 2011. Mr Napier provided an explanation that was accepted by Mr Single.

However in April 2012 Mr Single received a telephone call from Mr Napier saying he had not filed the necessary returns with the IRD and there would be difficulties arising from unpaid PAYE and GST. Later the same day Mr Single received a letter from the IRD advising that various payments, contributions and deductions had not been made, and claiming approximately $196,000.00. This is what initiated an investigation into the rest home finances, which led to these proceedings.

[10] Mr Napier left his employment as Administration Manager within a month and now claims he was unfairly dismissed. Mrs Napier stayed on as Nurse Manager for another four months while investigations continued and left in August 2012. Again it is claimed she was unfairly dismissed.

[11] According to Mr Williams there has been a substantial turnaround in the business since Mr Napier's departure. Profits were made in 2013 and 2014 despite substantial increases in overheads.

[12] The Judge carried out an exhaustive analysis of the amounts the Napiers received. In his calculation Mr Napier personally received at least $1,459,323.81.[4] We are advised by Mr Jones QC for the Torbay Companies, without disagreement from Mr McAnally, that the principal financial document used at trial, which had been prepared by the accounting firm Deloitte from banking records, was not contested. It traced the origin of the funds, being accounts of the Torbay companies, to the recipients of the funds, the Napiers or their Family Trust or third parties whose receipt was for the Napiers' benefit. The figures showed that the money received by the Napiers or third parties under their control well exceeded their gross combined income for each year from the rest home.

[13] The figures were not disputed before us by the Napiers. The fundamental issue was whether the payments were legitimate or not. Mr Single for the Torbay companies had given evidence at trial that there was a limited ability of the Napiers to legitimately claim reimbursement of funds, and that the payments were unauthorised.

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4 *Torbay Holdings Ltd v Napier,* above n 1, at [148].

[14] Mr Napier, who represented the defendants personally at the trial, and who gave evidence, asserted that the receipt of these payments was legitimate. At the trial the essence of Mr Napier's defence was that:

(a) all payments by way of salary or reimbursement of expenses were in conformity with the Napiers' entitlements;

(b) the Torbay companies had failed to distinguish between payments to or for the Napiers and those made to genuine third parties; and

(c) all other payments to the Napiers outside their employment arrangements, or alternatively to creditors, were legitimate reimbursements of other expenses of the Torbay companies, which the Torbay companies were required to meet and which the Napiers paid because of the exigencies of the business.

[15] Mr Napier gave extensive evidence to the effect that the extra moneys he received were legitimate reimbursements for amounts spent on behalf of the rest home or expenses that had been incurred for which there was an entitlement to reimbursement. There were many conflicts of evidence between him and Mr Single as to what was said between them and the extent of Mr Napier's authority. In a detailed factual finding, Woolford J accepted the evidence of Mr Single and rejected the evidence of Mr Napier.[5] Where there were direct conflicts between their evidence he preferred the evidence of Mr Single and other witnesses called for the Torbay companies, Mr Kayes, Mr Williams and Mr Crawford (the companies' lawyer), over that of Mr Napier.[6]

[16] There were seven causes of action. The Judge found the first cause of action, breach of fiduciary duty, was made out against Mr Napier for acts subsequent to his appointment as a director on 27 June 2008.[7] He held both Mr and Mrs Napier and the Trust liable for moneys had and received in the amounts we have set out earlier

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5 At [115]–[116].
6 At [37].
7 At [158].

in this judgment.[8] He held Mr Napier liable for breach of his duties as a director as well as knowing receipt, without specifying amounts.[9] He declined to enter any judgment for breach of fiduciary duty against Mrs Napier.[10] He declared that a property owned by Mr and Mrs Napier was held on constructive trust for the Torbay companies.[11]

First ground of appeal — money had and received

Background position

[17] The first ground of appeal expanded on in oral submissions before us focussed on the finding of the Judge that Mr and Mrs Napier were liable on the cause of action of money had and received. It was argued that this cause of action was not available, because the relevant accounts from which the money was taken were in overdraft, and the accounts into which it was paid were also in overdraft. To assess this submission it is necessary to consider the basis for the action of money had and received.

[18] The common law cause of action based on money had and received is well recognised in New Zealand. In *Thomas v Houston Corbett & Co*[12] the summary of Baron Parke in *Kelly v Solari* was quoted:[13]

> I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.

[19] As was observed by Turner J, all that is necessary is, first, the payment of money by A to B and, second, proof that the money would not have been paid but for a mistake of fact A made.[14] When these two essentials are shown, an action will lie

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8 See [3] above.
9 At [262].
10 At [162] and [263].
11 At [266].
12 *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA) at 166.
13 *Kelly v Solari* (1841) 9 M & W 54 (Exch of Pleas) at 58.
14 *Thomas v Houston Corbett & Co,* above n 12, at 167.

in quasi-contract for money had and received, and all that is left by way of defence is estoppel or the defence provided by s 94B of the Judicature Act 1908.[15]

[20] It was observed by this Court in *Martin v Pont*[16] a case which, like the present, involved misappropriation of funds by an agent, that *Bowstead on Agency* was a convenient starting point:[17]

> … if the principal has entrusted money to his agent for a particular purpose which the agent has not carried out, the principal can recover that money as had and received to his use.

[21] There are a number of cases that support this proposition that were traversed in *Martin v Pont.*[18] The claim for money had and received is a personal claim, not a proprietary or in rem claim.[19] It does not depend on proof of any wrongdoing or impropriety on the part of a recipient.[20] It does not turn on the continued existence or retention of the money received. Although unjust enrichment may be seen as underpinning a claim for money had and received, there is no actual requirement of unjust enrichment.[21]

[22] Although the primary cause of action was money had and received, it seems to us that it could have been breach of trust. We are unable to see why there was a cut-off made in the breach of fiduciary duty claim in 2008 when Mr Napier became a director, rather than the fiduciary duty commencing at the outset of the employment relationship. A fiduciary duty would have arisen in 2001 given Mr Napier's role as the trusted manager of the rest homes. If he did take money to which he was not entitled, that would have been a breach of trust, whether or not he was a director.

[23] However, as we have set out, a claim for money had and received can be brought directly against a person who has wrongly taken money. We have

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15 At 167.
16 *Martin v Pont* [1993] 3 NZLR 25 (CA) at 27.
17 FMB Reynolds *Bowstead on Agency* (15th ed, Sweet & Maxwell, London, 1985) at 197; and see Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at [6–100].
18 *Parry v Roberts* (1835) 3 AD & E 118; *Ehrensperger v Anderson* (1848) 3 Exch 148; and *Hill v Smith* (1844) 12 M & W 618 (Exch).
19 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL) at 572.
20 *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 (Ch) at 282.
21 *Martin v Pont,* above n 16, at 30.

already referred to *Martin v Pont.* In a decision of the Court of Exchequer, *Neate v Harding*,[22] the money had and received cause of action was applied against a defendant who had gone directly to the plaintiff's home and misappropriated the money. In such a situation there is not only the unconscionability of the recipient of the funds refusing to return them, but an added factor of the unconscionability of the initial taking. However, the latter is not an element of the cause of action.

Submission that the cause of action could not succeed

[24] Mr McAnally did not take issue with the availability of the cause of action for money had and received against the party who misappropriates the money. He focussed on two key points. First, he submitted that the cause of action was not available because the funds were not all the property of the Torbay companies because some of the funds came from accounts that were in overdraft. Second, he relied on the fact that a large proportion of the payments were paid into accounts controlled by the Napiers that were in debit. No "money" was taken from the Torbay companies, and no "money" was received by the Napiers.

[25] These arguments relied in particular on the analysis of Lord Goff of Chieveley in *Lipkin Gorman (a firm) v Karpnale Ltd,* where it was held that the innocent recipient of stolen money had to give full payment to the owner of the money.[23] He referred to the Privy Council case of *Commercial Banking Co of Sydney Ltd v Mann* where a partner of a law firm who did not share joint ownership of its assets but had signing authority misappropriated trust account cheques for his own purposes.[24] Mr McAnally submitted that it was not possible to treat as authorised one part of the transaction, namely the drawing of the cheques, without authorising the subsequent dealing with them.[25] The cause of action of money had and received failed.

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22 *Neate v Harding* (1851) 6 EX 348.
23 *Lipkin Gorman (a firm) v Karpnale Ltd*, above n 19.
24 *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1 (PC).
25 At 11.

Our analysis

[26] Like many restitutionary claims, this cause of action is about recovering money from a defendant who has received it from the plaintiff when there was no intention on the part of the owner of the money, Torbay, to transfer it to the recipient, Mr Napier, or his associates.[26] Alternatively, if such an intention could be construed it was vitiated by Mr Napier's wrongful actions. Money is the universal medium of exchange and while "money" can constitute notes and coins, it may also include a sum debited from the plaintiff's account and credited to the defendant's account. This is so even though the money has come from the plaintiff's overdrawn account.

[27] Mr Napier, in obtaining payments to accounts of his choosing from the accounts of the Torbay companies, was utilising the Torbay companies' contractual arrangement with the bank that it would provide funds to the Torbay companies, presumably up to a certain limit. He was exploiting the entitlement that the Torbay companies had to receive funds from its bank. This crediting of a sum from an account to another account is the equivalent to a payment.[27] Given that it was the Torbay companies' money, and it was received by Mr Napier and his associates, the cause of action of money had and received was made out. The fact that this was through the medium of banks is irrelevant.

[28] The arguments for Mr Napier drift from the cause of action for money had and received into the law of tracing to focus on the credit or debit state of the accounts. However, tracing is not a cause of action in its own right. It is the process:[28]

> … by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.

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26 This was recognised by Goff J in the Queen's Bench decision of *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) at 799.

27 *Ward & Co v Wallis* [1900] 1 QB 675 at 679.

28 *Foskett v McKeown* [2001] 1 AC 102 (HL) at 128.

[29] The ability to trace funds is important for a proprietary claim based on breach of trust where there is an ability to trace funds. In contrast, a claim based on money had and received is a personal action.[29] It does not turn on the ability to trace funds.

[30] Given the personal nature of the action, technical arguments about the credit or debit state of the account that the money came from, and the credit or debit state of the account into which it was paid, are irrelevant. Providing the funds received were controlled by the plaintiff, in this case the Torbay companies, and providing they were received by the defendants, in this case Mr and Mrs Napier and the Family Trust, the cause of action is made out. A technical analysis of what happened to the electronic flow of funds, while possibly relevant in relation to tracing, is irrelevant to establishing the cause of action.

[31] Mr McNally's argument that *Lipkin Gorman (a firm) v Karpnale Ltd* and *Commercial Banking Co of Sydney Ltd v Mann* and other cases relied on by him involved claims by or against innocent third parties, and who among them should receive the benefit of a judgment.[30] This submission offers little assistance in a case such as this, where the claims do not involve a third party, but the persons who actually took the money. We do not see Mrs Napier or the Family Trust as a third party in the way the gambling club was in *Lipkin Gorman (a firm) v Karpnale Ltd*. Mr Napier paid the money directly into the accounts of Mrs Napier and the Family Trust from the accounts of the Torbay companies.

[32] Similarly, when Mr or Mrs Napier or the Family Trust received the funds it was irrelevant whether they went directly into a bank account that was in overdraft or not. The funds were still directly paid into an account under their control. While the state of that account might be relevant if they were in the position of a bank, it is quite irrelevant when they have received the money directly from the Torbay companies without any right to retain it. Mr Napier arranged for the funds to come to himself, Mrs Napier and the Family Trust for the Napiers' use and benefit, and the

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29 *Lipkin Gorman (a firm) v Karpnale Ltd*, above n 19, at 572.

30 *Lipkin Gorman (a firm) v Karpnale Ltd*, above n 19; *Commercial Banking Co of Sydney Ltd v Mann,* above n 24; and *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310, (2014) 87 NSWLR 552.

receipt of the money in the accounts was sufficient for the cause of action to be established.

[33] For these reasons we reject the argument that judgment should not have been entered for money had and received. There may have been a breach of trust cause of action more naturally tuned to Mr Napier's wrongdoing, but money had and received was available. The appeal fails on this point.

Second ground of appeal — onus of proof

Submission that the Judge reversed the onus of proof

[34] It was submitted by Mr McAnally that the Judge had effectively reversed the burden of proof and placed it squarely on the Napiers by:

> (a) recognising that "[c]omprehensive evidence matching cash cheques with payments into the bank account of Mr and Mrs Napier has not been provided",[31] yet requiring Mr Napier to justify the so-called "fraudulent" payments (having rejected his evidence that supporting documentation did exist and, if in the control of anyone, was within that of [the Torbay companies]); and
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> (b) applying what might be called the "maelstrom" theory, which is a construct of equity (if anything), to overcome the shortcomings in the proof of a money hand and received claim.

[35] It is also submitted that the Judge made a general credibility finding against Mr Napier based on an unfair preference, and then proceeded to draw unduly negative inferences against him.

Our analysis

[36] We do not accept these submissions. Woolford J set out the reasons for his factual findings in considerable detail. The Judge had before him the uncontested fact that the Napiers had received the very considerable sums analysed by Deloitte, which went far beyond their employment entitlements. On the face of it those moneys had been wrongly taken. Mr Napier put forward a considerable number of elaborate explanations as to how it came about that he had received all this money. In the end Woolford J made a generous assessment that 30 per cent of the total

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[31] *Torbay Holdings Ltd v Napier,* above n 1, at [106].

amount the Napiers and the Family Trust received over and above their employment entitlements could be justified.[32] He effectively gave them the benefit of the doubt on these topics. He in great part used Mr Napier's own evidence to assess the amount of the unauthorised payments.[33]

[37] There was therefore a careful analysis by the Judge of credibility issues and, on our analysis of the evidence, the conclusion he reached was amply justified. Mr Napier's attempts to justify the very large amounts of money he took beyond his salary and permissible expenses on the face of it lacked veracity and do not withstand scrutiny. For instance, he wrote out cash cheques on the Torbay companies' accounts of $509,341.62 without any written authorisation and despite the rest home not being a cash business. He attacked the main witnesses called by the Torbay companies, including its lawyer and accountant, as being dishonest. His attempts at explanation were, as the Judge observed, unconvincing and contrived.[34]

[38] The Judge recorded that he was applying a higher standard to that of the usual balance of probabilities, taking a strict view of the evidence given the nature of the case:

> [133] The plaintiffs do, of course, only have to prove their case on the balance of probabilities, but here in effect they allege that Mr Napier is a thief. In those circumstances, I take a strict view of the evidence, such that stronger evidence will be required to prove the issue to my satisfaction on the balance of probabilities.[35]
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> [134] The assessment I have made is that, at most, only 30 per cent of the suspect payments can be justified. In making that assessment, I have not accepted Mr Napier's explanations in their totality, but I have more than doubled Mr Single's assessment of what can be justified. I therefore find that the amount received by Mr and Mrs Napier and/or the Napier Family Trust as unauthorised payments over the seven year period at issue from Torbay Holdings and Torbay Rest Home amounts to $1,159,201.55. The sum of $281,087.01, being the overpayment of salaries, should be added to this total to make the total sum of the losses to Torbay Holdings and Torbay Rest Home $1,440,288.56.

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32 At [134].
33 At [132].
34 At [35].
35 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [49]–[55], [102], [105], [116] and [145].

[39] He also formed the view that Mr and Mrs Napier and the Napier Family Trust were financially interdependent and acted as one entity.[36] All these findings seem to us to have been entirely justified by the evidence.

[40] The Judge did not "require" Mr Napier to justify the payments he appeared to have made with the money he took from the Torbay companies. He did at one point invite Mr Napier to consider money he had received over a random six-week period, and explain how that money was spent for the benefit of the Torbay companies rather than himself.[37] He offered him time to do so. This was doing no more than giving Mr Napier a second chance to explain how the obvious inference that he had taken the money for his own ends was not correct. Woolford J was undoubtedly right when he considered that he had a significant discretion to make a broad assessment of the sum misappropriated, even where it was unable to be determinatively ascertained.[38] Effectively what he did was to indicate during the trial that the plaintiffs had made out their case that on the balance of probabilities the moneys had been wrongly taken by Mr Napier, and to give Mr Napier a chance nevertheless to, in a specific way, put forward material to show that that assessment was wrong. Mr Napier singularly failed to do this.

[41] In considering the quantum of losses the Judge did not rely on any "maelstrom doctrine". He discussed that doctrine but specifically did not apply it.[39] We can see no basis for any criticism of his approach. It appears to us that he has been more than fair to Mr Napier. We are satisfied on our examination that it was a feature of the case that Mr Napier was unable to provide any credible evidence to displace the strong inference that very large amounts of money he had taken over and above the Napiers' employment benefits were for his own benefit. This was proven on the balance of probabilities.

[42] We have reached the view that this ground of appeal must be dismissed. The Judge's factual findings were amply justified on the facts, and he did not err in his approach.

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36 *Torbay Holdings Ltd v Napier*, above n 1, at [141].
37 At [59]–[70].
38 At [124].
39 See [119]–[124].

Third ground of appeal — negligence

[43] Woolford J found that Mr Napier had breached his duty of care to the Torbay companies to perform the companies' tax obligations.[40] He found Mr Napier liable for $18,000, being the additional amount that the Torbay companies' accountant estimated was paid to the IRD by way of interest. Mr McAnally did not challenge the finding of a duty of care or breach thereof. Rather, his submission was that the negligence claim fell within the exclusive jurisdiction of the Employment Relations Authority and that the High Court, not having any jurisdiction, should not have made any order. He argued that the employment relationship was the source of the duty of care, relating as it did back to 2001 and the years that followed when Mr Napier was an employee and not a director. Mr Jones for Torbay argued that the breach arose when Mr Napier was a director and rested on his position as a director rather than as an employee. Moreover, he argues that the tax had not been paid because the funds had been misappropriated by Mr Napier.

[44] The defence that is now put forward by Mr McAnally was not pleaded. It was for Mr Napier to make out. The material before us indicates that the failures to pay tax that led to the penalties and interest occurred after 2008 when Mr Napier was a director of the Torbay Companies. At this time the central relationship was of director and company. Thus the negligence claim does not relate to a breach of an employment agreement in terms of s 161(1)(b) of the Employment Relations Act 2000 or an action arising from or related to the employment relationship under s 161(1)(r). We are not persuaded that Woolford J lacked jurisdiction to make the award for damages of $18,000 based on negligence.

Other points raised

[45] There can be no criticism of the Torbay companies for not carrying out a full audit over the period. An audit was not possible because Mr Napier had not kept adequate records.

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[40] At [237].

[46] The record shows that the Judge was careful in how he restrained Mr Napier when he was personally cross-examining, and when he did so the intervention was entirely justified.

Result

[47] The appeal is dismissed.

[48] The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Keegan Alexander, Auckland for Appellants
Sellar Bone & Partners, Auckland for First and Second Respondents