IN THE COURT OF APPEAL OF NEW ZEALAND

CA358/2015
[2016] NZCA 240

BETWEEN	MURRAY ATHOL OSMOND AND JANET DOREEN OSMOND Appellants
AND	DAVID MURRAY BLANCHETT AND COLIN THOMAS MCCLOY AS LIQUIDATORS OF ARAI KORP LIMITED (IN LIQUIDATION) Respondents

Hearing:	8 March 2015
Court:	Kós, Keane and Dobson JJ
Counsel:	M A Osmond in person M D Branch and K F Shaw for Respondents
Judgment:	1 June 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must jointly and severally pay the respondents costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Keane J)

[1] On 17 March 2015 in the High Court at Hamilton, David Blanchett and Colin McCloy, the liquidators of Arai Korp Ltd (Arai Korp), which holds the unit

title to a Cambridge house property, close to Lake Karapiro, obtained an order for immediate possession by way of summary judgment.

[2] In his decision Associate Judge Doogue held that Arai Korp was entitled to immediate possession as an ordinary incident of title.[1] He held that the occupiers, Murray Osmond, Arai Korp's sole director when it went into liquidation on 4 April 2014, a business consultant and former solicitor,[2] and his wife, Janet Osmond, had no reasonably arguable defence to Arai Korp's claim. He dismissed as unarguable their cross-application for summary judgment.

[3] On this appeal Mr and Mrs Osmond contend that in his central and wider conclusions the Judge was wrong in fact and law and seek judgment on their own summary judgment application.

High Court decision in essence

[4] Mr and Mrs Osmond then contended as they do still, that, despite the state of the title, the equitable owner of the property is Aniwaniwa Trustee Ltd (ATL). ATL is the trustee of Mr Osmond's family trust, and was Arai Korp's sole shareholder at the date of liquidation. ATL's directors are Mr and Mrs Osmond, and Mrs Osmond is the sole shareholder. The Judge held the contention that ATL is the equitable owner of the property to be unsustainable in contract and in equity.

[5] Although the Judge accepted that Arai Korp and Mr Osmond, as a trustee for his family trust, had executed an agreement for sale and purchase in September 2000 under which Arai Korp was to construct a house on the property before selling it to the trustees of the family trust (Mr Osmond and his wife) that agreement had no contractual effect. Mrs Osmond had not subscribed to it.

[6] The Judge also held that a contract in those terms between Arai Korp and Mr and Mrs Osmond as trustees, or later ATL when it became trustee, could not be

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1 *Blanchett v Osmond* [2015] NZHC 467.

2 On 18 March 1997 Mr Osmond was struck off the Roll of Barristers and Solicitors after having been convicted and sentenced to imprisonment for six months for theft from his then firm's trust account: *Complaints Committee of the Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC); *Waikato Bay of Plenty District Law Society v Osmond* HC Hamilton CP55/94, 26 September 1994; *Osmond v R* [1996] 1 NZLR 581 (HC).

inferred or implied. Nor could that agreement, or any conduct related to it, have the effect that Arai Korp held the property for the trustees, whether the Osmonds or ATL, on resulting or constructive trusts.

[7] On the evidence, the Judge held, Mr Osmond was the architect of the subdivision of which the property formed part, the Karapiro Farm Park Development, and throughout its evolution had acted in intersecting and conflicting capacities, particularly as to the property in issue here. He, and thus Mrs Osmond also, did not come to equity with clean hands. His critical evidence was unsupported by, or inconsistent with, the documentary evidence.

[8] The Judge's first principal reason was this. Having entered into the September 2000 agreement with Arai Korp on behalf of his family trust Mr Osmond then committed Arai Korp itself, on 30 January 2004, to a contract to construct the house on the property at a cost of $663,000, well in excess of that payable by his family trust to Arai Korp for the land and the house together, $500,000.

[9] The Judge's second reason was related. To establish that this disparity was justifiable Mr Osmond contended that on 3 October 2003 he had assigned to ATL, which by then had become trustee of his family trust, sums which Arai Korp then still owed to him for the land that had been subdivided, as he said at least $1,209,000. But ATL was not incorporated until 21 February 2005, in excess of 16 months after the purported assignment.

[10] The Judge concluded that Mr Osmond had backdated the assignment to 3 October 2003 from a date in 2005, after ATL was incorporated, to ensure that it took effect when Arai Korp was still arguably solvent. By 2005 the Judge found its assessed liability to income tax, which it never met and which led to its liquidation, had made it demonstrably insolvent. He held that Mr Osmond was culpable of a fraud on the revenue.

[11] By means of the assignment, the Judge held, Mr Osmond had set out to transcend his status as an unsecured creditor on Arai Korp's liquidation, ranking below the Commissioner of Inland Revenue, into an equitable right held by ATL on

behalf of his family trust to Arai Korp's sole asset of value, negating the Commissioner's recourse to that property.

Issues on appeal

[12] On this appeal, which is by way of rehearing,[3] we must make our own assessment of the applications, set against such evidence as there is.[4] But our focus must remain on the grounds of appeal which, we consider, reduce to three.

[13] First, Mr and Mrs Osmond contend, the Judge made a foundational error of law. Did he, as they contend, give summary judgment to the liquidators of Arai Korp without requiring them to establish first that the Osmonds had no reasonably arguable defence to the liquidators' claim or any material part? Did he instead impose on the Osmonds, as they contend impermissibly, the onus of establishing that they had such a defence?

[14] Secondly, they contend, the Judge exceeded his jurisdiction by resolving contested central issues on the affidavit evidence, which could only be resolved on evidence at trial. He also went beyond the evidence or contrary to it. In this second ground lies the main thrust of their appeal.

[15] Was the Judge wrong, as they say, to conclude that Mr Osmond had orchestrated all the relevant central transactions uninhibited by want of status or by conflict? Did he understate and then discount altogether, in each case impermissibly, Arai Korp's debt to Mr Osmond and his own ability to offset it against ATL's debt to Arai Korp under the 2000 agreement increased by the sum paid by Arai Korp under the building contract to the extent that it exceeded $250,000? Did he have any basis for backdating the assignment to 2003, or for concluding that Mr Osmond was complicit in a fraud on the revenue?

[16] Thirdly, they contend, the Judge was wrong not to give them summary judgment, recognising that ATL's right in equity to the property, on behalf of Mr Osmond's family trust, was superior to Arai Korp's registered title. Their

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3 Court of Appeal (Civil) Rules 2005, r 47.

4 *Austin, Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

assertion that Arai Korp held for ATL on a resulting or constructive trust, however, only arises if they succeed under their first two heads.

Karapiro Farm Park Development

[17] The unit title in issue lies within a unit title subdivision of a significant part of a 20 hectare block of farm land by Lake Karapiro, which Mr Osmond acquired in 1985 and on which he and his family then began to live and he at first raised Angora goats.

[18] In 1987 Mr Osmond subdivided this block into two: a 6.35 ha front block, abutting Maungatautapu Road, their point of access to the property, and a 13.87 ha rear block. He put a relocatable house on the front block and in 1998 had a home built on the rear block as his family home.

[19] By 1995, Mr Osmond says that he was under financial pressure. Angora goats had proved uneconomic. He was then leasing out both blocks mostly for grazing. He had wider liabilities. He decided to subdivide the block under the Unit Titles Act 1972 to create 12 unit titles with a residue of common property; a concept then novel for rural land. But he lacked the means.

[20] In 1996 Mr Osmond sold the front block to Mr and Mrs Hartridge, who only wanted what was then Unit F on his concept plan. They took the front block subject to a deed of trust requiring them to return the balance to Mr Osmond when they acquired registered title; and in 2003, when the subdivision was complete they transferred the balance to Arai Korp.

[21] In March 1997 Mr Osmond sold the balance of the front block (Units A, B, C, D, E, G, H and I on the concept plan) to Ran Kor Resources Ltd (Ran Kor), a recently incorporated entity, for $970,000. Ran Kor undertook at its own cost to complete the subdivision. Mr Osmond retained Units J, K and L (Unit J is the property in issue), which appear to have been partly on the front block and partly on the rear block, which he then still owned himself.

[22] In September 1999, Mr Osmond sold the rear block to Arai Korp, which had recently been incorporated. Settlement was to be on 26 November 1999. There was to be a $400,000 mortgage back, and the agreement was subject to terms the most material of which was this:

> … upon completion of the Farm Park and the issuing of the new titles, the Purchaser shall offer the lots shown in the attached plan as Unit J and Unit K to the Aniwaniwa Trust for $250,000 such offer to be in writing and to be open for acceptance within fifteen working days of receipt of the offer with settlement to be ten working days after acceptance.

[23] Then in September 2000 Arai Korp, and Mr Osmond on behalf of his family trust, executed the agreement relating to Unit J, which is critical to this appeal (the agreement related to Unit K also). Under that agreement Arai Korp undertook to build a house on the property and to sell both Unit J and Unit K and the house to the trustees of his family trust for $500,000.

[24] The house to be constructed, which was estimated by Mr Osmond to cost $250,000, was defined in the first of four special conditions, term (a), which said this:

> The agreement is conditional upon the vendor completing the erection of a new home on Unit J in accordance with plans to be provided by the purchaser such home to be of concrete block (plastered) and double glazed glass construction with a concrete floor with under floor heating with a floor area (excluding garaging) of approximately 250 sqm. Completion shall be once the Master builders building contract is completed, the local council has signed off the building consent and the maintenance period and work is completed.

[25] Under term (d) Arai Korp was to give possession of the house immediately once the builders' contract allowed, even if settlement was delayed. Under term (c) the agreement was conditional on Arai Korp completing the subdivision by sealing the driveway and by fencing, planting and providing water, power and telephone facilities. Term (b) required the trust to make an unspecified advance to Arai Korp on first mortgage or, if Arai Korp required, to arrange an interest free advance on demand.

[26] On 4 March 2003 Arai Korp sold most of the rear block, 10.86 hectares, to Mr and Mrs Bramley for $780,000 on conditions and subject to a deed of trust, the

effect of which was that when the subdivision was complete their boundary was to be altered to segregate their land from that in the subdivision, mostly pertinently that in Units J and K.

[27] On 17 October 2003, when the subdivision was complete, all units were sold except Units J and K, which at the date of liquidation, 4 April 2014, Arai Korp retained subject to charging orders in favour of the Commissioner of Inland Revenue, the first of which had been made in November 2008. The Commissioner had summary judgment for unpaid income tax and on judicial review Arai Korp had failed to have its default assessments set aside.[5]

[28] It remains to mention that Unit K was nevertheless then subject to an agreement for sale and purchase and this sale took place with the liquidators' agreement, leaving only Unit J in dispute.

First issue — jurisdictional error

[29] The first issue on this appeal is whether, as the Osmonds contend, the Judge made a foundational error as to his jurisdiction. Did he impermissibly spare the liquidators of Arai Korp having to establish that the Osmonds had no reasonably arguable defence to the cause of action expressed in the liquidators' statement of claim or any material part of it? Did he impose on the Osmonds a reverse onus? In our view he made no such error.

[30] The statutory principle on which summary judgment is given, as affirmed in *Krukziener v Hanover Finance Ltd*, and as the Judge set out, is that the Court must, before giving judgment "be left without any reasonable doubt or uncertainty" that the claim is indefensible and that "there was no real question to be tried".[6] Then, however, as this Court also said, and the Judge recorded, once the applicant discharges that threshold onus, the respondent comes under a persuasive onus "to respond if the application is to be defeated".

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5 *Commissioner of Inland Revenue v Arai Korp Ltd* HC Hamilton CIV-2008-419-1577, 18 February 2009; *Arai Korp Ltd v Commissioner of Inland Revenue* [2013] NZHC 958, (2013) 26 NZTC 21-014.

6 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

[31] To recover the property from the Osmonds, as the Judge held, all Arai Korp needed to do was to assert its right as registered proprietor of the property. Its title remained indefeasible unless the Osmonds were able to establish that they had a claim in personam to which Arai Korp's title was subject, relying on the rights they claimed for ATL in equity.[7]

[32] Then, as this Court also said in *Krukziener*, and as the Judge recorded, while it is not normal on summary judgment to resolve "material conflicts of evidence or assess the credibility of deponents" on the affidavit evidence, that did not require him to:[8]

> … accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable.

[33] Ultimately, as this Court said, and as the Judge recorded, his task on these cross-applications was to assess the evidence as "a matter of judgment", and to take "a robust and realistic approach where the facts warrant it".[9]

[34] In his analysis of the evidence, furthermore, the Judge was obliged to accept that Arai Korp had an unsatisfied liability to income tax for the years beginning with that ending 31 March 2004, because that had been established not simply by assessment, but by the decisions to which we have referred.[10] (We accept that the default assessments made, and the judgments given, do not preclude the Osmonds from asserting and relying on expenditure on the house or property relevant to their claim.)

[35] Finally, in assessing Mr Osmond's veracity the Judge was entitled to treat his two convictions as indications of his propensity for dishonesty or a lack of veracity, as do we.[11] Apart from the 1994 theft from his firm's trust account, for which he was sentenced to six months' imprisonment, he and two others were convicted in

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7 Don McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [9.040]–[9.047].

8 *Krukziener v Hanover Finance Ltd*, above n 6, at [26].

9 At [26].

10 Above n 5; see also *Russell v Taxation Review Authority* (2000) 19 NZTC 15,924 (HC).

11 Evidence Act 2006, s 37(3)(b).

February 2006 after trial for conspiring to defraud a finance company between 1 October 1998 and 14 April 1999. His sentence was two years, nine months' imprisonment.

Second issue — material errors of fact

[36] The main thrust of the Osmonds' appeal, as we have said, lies in their second ground, in which they contend that the Judge resolved contested issues of fact that could only be resolved at trial and went beyond or contrary to the evidence. We find that he did neither.

Mr Osmond's central and conflicting roles

[37] The first issue is whether the Judge was right to conclude that whatever Mr Osmond's formal status might have been, he was at the centre of each transaction, and often in reality if not formally on both sides; and whether those transactions were, therefore, non-consensual. Mr Osmond contends that each was between unrelated parties, who were independent of each other and that each was genuine.

[38] There is no issue that Mr Osmond and the Hartridges were independent of each other when he sold them the front block in 1996 subject to their duty in trust to return the balance to him once the subdivision was accomplished. There has to be an issue, however, as to whether Mr Osmond was independent of Ran Kor.

[39] Ran Kor was incorporated on 31 July 1996 and struck off the Register on 30 May 2000. Its sole director was Mrs Young, the mother of an employee of Mr Osmond's consultancy, Cantab Management Ltd. Ran Kor's shareholders were Mr Osmond's father, a Cambridge solicitor, and a Cambridge accountant, John Slavich.[12] Its registered office was at Cantab Management's own offices.

[40] That issue becomes even more acute as to Arai Korp, which was incorporated on 2 September 1999. According to Mr Osmond the original shareholder was the

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[12] On 21 November 2006 Mr Slavich was imprisoned for two years, three months for dishonesty offences unrelated to this case in October – November 2002; *R v Slavich* HC Hamilton CRI-2006-419-89, 21 November 2006.

Callaway Trust, of which Mr Osmond was one of the two trustees. The Callaway Trust was associated with Henry Holt, who was the first director of Arai Korp. Mr Osmond says this company remained a shelf company until he activated it and, we note that in any event Mr Holt must have been made bankrupt soon after, if not at the time he was a director and shareholder.[13]

[41] On 16 March 2000 Mr Holt resigned as sole director and Roger Giles, a friend of Mr Osmond, was appointed sole director and became sole shareholder. Despite that the part he played in the subdivision and related transactions must have been minimal at best. On 5 January 2002, as sole director, he subscribed to a sweeping series of resolutions in which he gave Mr Osmond the most complete ability to accomplish the subdivision and any related transactions.

[42] First, Mr Giles resolved that Arai Korp was to assume by nomination Ran Kor's rights and liabilities as purchasers under its March 1997 agreement with Mr Osmond relating to the transfer of the front block, even though Ran Kor had not made any formal assignment of either to Arai Korp before it was struck off the Register on 30 May 2000. Then, to complete the subdivision and unit sales, he appointed Cantab Management as Arai Korp's agent and Mr Osmond as Arai Korp's attorney.

[43] On 16 August 2004 Mr Giles resigned as a director. He had, however, been precluded since around December 2003 from playing any part as a director. He was then sentenced to three years' imprisonment for dishonesty offences, and became banned for five years from being a director.[14] That this was clearly so, as we shall say shortly, is evident from the building contract to which Mr Osmond committed Arai Korp on 30 January 2004 without express authority.

[44] On 16 August 2004 also Mr Osmond and his wife became the sole shareholders in Arai Korp as trustees for his family trust and then, on 22 February 2005, the day after ATL was incorporated, it became the sole shareholder.

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13 *Holt v District Court at Hamilton* HC Hamilton CIV-2005-419-1582, 13 December 2005; *R v Holt* [2006] DCR 669 (CA).

14 Companies Act 1993, s 382.

Mr Osmond retained control of Arai Korp as sole director from 16 August 2004 until 7 March 2006 when a friend of his, Mr McDonald, replaced him.

[45] In February 2006, as we have said, Mr Osmond was sentenced to imprisonment for two years, nine months, for his part in a fraudulent conspiracy. He says that his terms of parole precluded him from dealing with Arai Korp until May 2008, but he was also subject to a five year ban against remaining a director. He only resumed as a director on 1 March 2011, when that ban was complete.

[46] Finally, we return to ATL, the corporate trustee of Mr Osmond's family trust, and sole shareholder of Arai Korp after 22 February 2005. Though Mr and Mrs Osmond had resigned as trustees of his family trust in favour of ATL on 22 February 2005, Mr Osmond's control of ATL, and thus Arai Korp, remained unimpaired. He and his wife are ATL's directors and she is its sole shareholder. Its registered office is at the property in issue.

[47] As a result of our own review, therefore, we agree with the Judge that Mr Osmond remained central to the subdivision and related transactions, regardless of his status or any conflict, and especially so as to the two transactions critical to this appeal, Arai Korp's September 2000 sale of the property to his family trust, and his assignment to ATL of Arai Korp's debt to him (purportedly on 3 October 2003).

Building contract and debt assignment

[48] In subscribing to the 30 January 2004 building contract without express authority, Mr Osmond enlarged Arai Korp's liability under the September 2000 agreement far beyond his family trust's liability to pay for the property and house constructed on it together. That, as the liquidators say, could constitute a fraud on Arai Korp.

[49] The purported assignment, dated 3 October 2003, has also to be a significant cause for concern. In that document, which Mr Osmond addressed to ATL, he purported to assign to that entity:

> … all right title and interest in the net proceeds of the settlement of the funds due from my sale of land to Arai Korp Limited so as to enable Aniwaniwa Trust to complete the purchase of Units J + K from Arai Korp Limited and pay for the fitout of the house.

[50] Apart from the fact, as the Judge said, that ATL was not incorporated until 21 February 2005, in excess of 16 months later, the form of the assignment is troubling. It is not made by deed. It is in Mr Osmond's handwriting, it is not witnessed and it does not identify as a sum of money the debt assigned. Nor is there any objective evidence as to that debt on 3 October 2003, when the assignment was purportedly made, or in 2005 when the Judge found it must have been made.

[51] Mr Osmond contends that the debt assigned was what Arai Korp owed him, not just as the Judge found for the rear block for which there was an agreement for sale and purchase. It included Ran Kor's debt to him for the front block, which Arai Korp had unilaterally assumed by nomination without any express assignment by director's resolution in 2002. That is one difficulty.

[52] The larger difficulty is that there is no reliable evidence that Arai Korp accepted liability for the debt across the range of dates within which the assignment was ostensibly given. Just as Arai Korp never filed tax returns, it never issued audited financial statements; and the Osmonds' case on this issue rests only on Mr Osmond's unsupported word.

[53] Finally, we consider, the Judge was right to hold that the date on which Mr Osmond purported to make the assignment to ATL has to be distinctly significant. It was a date before Arai Korp became irretrievably liable to income tax on default assessments, which had begun with that for the year ending 31 March 2004. As they mounted year by year, and remained unmet, they became increasing proof of Arai Korp's insolvency, in the absence of proof to the contrary.

[54] Thus, we conclude, as did the Judge, that the assignment was a fabrication. One purpose it served, as we have found, was to validate Mr Osmond's rewriting of the 2000 agreement. The other, as the Judge found, was to translate Arai Korp's unsecured debt to Mr Osmond, whatever it was, into an equitable property interest in

favour of ATL as trustee for his family trust, supplanting on the liquidation any recourse to the property by the revenue.

Conclusions

[55] Our conclusion that the assignment was a fabrication, when set against our preceding conclusions, is fatal to the Osmonds' claim that Arai Korp at the date of liquidation held the property impressed with a resulting or constructive trust in favour of ATL, as trustee for Mr Osmond's family trust, entitling ATL to title and the Osmonds to retain possession.

[56] There is also this curiosity. Between 21 February 2005, when ATL was incorporated, and November 2008, when the property became subject to the first charging order, Arai Korp could have transferred it to ATL. Title had been issued in October 2003 and by August 2004 certainly, when Ms Osmond became sole director and Arai Korp's shares were held for his family trust, there was no obvious impediment to that happening. Why did it not happen?

[57] Whatever the answer to that question may be, we agree with the Judge in his central conclusions and we find that he made no error of principle.

Result

[58] The appeal is dismissed.

[59] The appellants must jointly and severally pay the respondents costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Harkness Henry, Hamilton for Respondents