IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA208/2017
[2018] NZCA 135

BETWEEN	DOUGLAS JOHN SUTCLIFFE First Appellant	
	TERENCE SUTCLIFFE AND BRADEN MATSON AS PARTNERS OF FROST & SUTCLIFFE LAWYERS Second Appellants	
AND	PHILIP CLAUDE TARR Respondent	

Hearing: 7 March 2018

Court: Asher, Brewer and Collins JJ

Counsel: P J L Hunt and J Heard for First and Second Appellants
R D Butler and L V F Ingram for Respondent

Judgment: 3 May 2018 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The respondent's proceeding against the first appellant is an abuse of the process of the Court. It is struck out.

C The respondent must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Tarr is suing Mr Sutcliffe.[1] His action relates to a property purchase which took place in 1996. Mrs Tarr, at that time Mr Tarr's estranged wife, was also involved. Mr Sutcliffe, a solicitor, acted on the purchase of the property, which was bought in the name of a company incorporated for the purpose, Great Empire Ltd (GEL). Mr and Mrs Tarr were the shareholders.

[2] Mr Tarr claims:

(a) Mr Sutcliffe exerted undue influence on Mr Tarr in breach of a solicitor/client relationship to persuade Mr Tarr to sign a blank share transfer by use of which Mrs Tarr later deprived Mr Tarr of the benefit of his shareholding in GEL.

(b) Mr Sutcliffe breached fiduciary duties owed to Mr Tarr as his solicitor by failing (in paraphrase) to act in Mr Tarr's best interests, the result of which was Mr Tarr's loss of the benefit of his shareholding in GEL.

[3] Mr Sutcliffe applied to the High Court for summary judgment against Mr Tarr, or for strike-out of the causes of action against him. His application was heard by Associate Judge Christiansen on 20 March 2017. Mr Sutcliffe argued:

(a) the defence of laches applies as the alleged acts/omissions took place 20 years prior to the bringing of proceedings and Mr Sutcliffe cannot recall the events and has no records relating to them; and

(b) the claim is an abuse of process, or is barred by issue estoppel, because the Family Court and the High Court have already determined that Mr Tarr held the shares on trust for Mrs Tarr, and rejected the factual assertions Mr Tarr relies on for this new action.

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[1] His claims against the second appellants were discontinued shortly before the hearing before us.

[4] Associate Judge Christiansen dismissed Mr Sutcliffe's application.[2] He now appeals the dismissal.

Background

[5] Mr Tarr first brought the issue of ownership of the shares to the courts when he filed relationship property proceedings against Mrs Tarr in the Family Court in April 2007, some 14 years after he and Mrs Tarr separated. Judge de Jong held:[3]

> [28] This Court is satisfied on the balance of probabilities that 500 GEL shares issued in the husband's name were held by him by way of express trust for the benefit of the wife. In summary, the reasons for reaching this conclusion are is [sic] follows:
>
> (a) The uncontested evidence is that it was the wife's idea to purchase the GEL property. The only way the bank would grant an application for 100% finance needed to purchase this property was to involve the husband. For that reason the wife arranged to incorporate GEL and distribute an equal number of shares to each party.
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> (b) The wife contemporaneously arranged for a share transfer form to be prepared by the conveyancing lawyers handling the finance and purchase arrangements. This share transfer form is more likely than not to have been prepared by the lawyers because of the language used in the document e.g. "pursuant to Declaration of Trust."
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> (c) The share transfer form was signed by both parties. The husband signed as the "transferor" and the wife signed as the "transferee." Their signatures were witnessed.
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> (d) The husband believes the share transfer form was not filled out before it was signed but this Court does not accept that. His suggestion the wife later filled out the form is rejected by the wife and not accepted by this Court. The language used in the form is legal terminology. The parties signed the share transfer form at the same time before a professional witness. The husband would have known he was signing the form as transferor and that the wife was signing as transferee of the same bundle of shares.
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> (e) While the husband suggests the share transfer form was signed as "part of some pre-nup/contracting out documents" there is no evidence of other documents being prepared or signed. Even if other documents had been prepared and signed, that does not explain why the shares were being transferred to the wife. Finally, if pre-nuptial or contracting documents had been signed, it is more likely than not that at least one copy of the signed documents would have been retained by the law firm in their deeds safe, or possibly a record kept of where the documents had been sent to.

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2 *Tarr v Sutcliffe* [2017] NZHC 547.

3 *Tarr v Tarr* [2013] NZFC 8921 [*Judge de Jong decision*].

(f) Although the husband suggests the GEL venture was a joint enterprise, and consistent with a joint Kawau Island inquiry, this Court is not satisfied this was a joint enterprise or that there was a joint Kawau Island inquiry. This Court accepts the wife's evidence that she went to Kawau Island with the parties' daughter believing the trip to be a family outing.

(g) The husband produced a letter at hearing sent 10 years after separation, from his wife's then lawyer, as evidence that the wife has accepted the GEL shares are relationship property. There are two reasons why this Court attaches little weight to this letter. The first is that the wife's evidence is she did not see the letter before it was sent to the husband. Otherwise she says she would have discussed a change to how the GEL shares were referred to. The second reason is that the letter is very general in nature. It does not contain any proposals. Although the letter makes reference to the parties holding an equal number of GEL shares it does not make specific reference to the PRA status of those shares nor does it address any other significant issues such as post separation contributions and loans.

(Footnotes omitted.)

[6] Mr Tarr then appealed Judge de Jong's decision to the High Court. The appeal was dismissed by Thomas J on 26 June 2014.[4]

[7] Thomas J considered the merits of the case afresh in accordance with the approach directed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*,[5] and bearing in mind that, pursuant to the interaction of s 39 of the Property (Relationships) Act 1976 and s 75 of the District Courts Act 1947, the appeal was by way of rehearing.[6]

[8] Having summarised and considered the respective submissions on behalf of Mr Tarr and Mrs Tarr, Thomas J concluded:

> [31] There are two main points relied on by the appellant in connection with GEL. The first is that there was no declaration of trust. However, even though it is referred to in the share transfer, the declaration does not have to be a written document.
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> [32] The second point relied on is the letter from Mrs Tarr's then solicitor. I accept Mrs Tarr's evidence that she did not review the letter before it was sent. Furthermore the letter was written in the context of a preliminary approach to commence discussions about relationship property. The interpretation placed on paragraph 5 of the letter is not the only possible

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4 *Tarr v Tarr* [2014] NZHC 1450 [*Thomas J decision*].
5 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
6 *Thomas J decision*, above n 4, at [11]–[15].

interpretation. Paragraph 5 is somewhat equivocal. It accurately records the position as to ownership of the properties. I agree with the appellant that there would be an assumption on reading paragraph 5 that property owned by GEL was relationship property. However, in the context of the circumstances in which the letter was written, there was no need for specificity.

[33] The weight of the evidence on this issue supports Mrs Tarr's claim. Mr Tarr's allegation that he signed the document as part of signing a number of other documents was shown in cross-examination to be incorrect when he could not identify what other documents those might have been. Mr Tarr alleged that the transfer document was blank when he signed it. However, the suggestion that a solicitor would have witnessed the parties' signatures to a blank document is not credible. I note that Mr Tarr conceded his memory about the transfer document was "hazy" and he originally claimed he did not sign the share transfer document at all but later accepted it was his signature.

[34] The fact that the share transfer was signed the day following the formation of the company strongly supports Mrs Tarr's version of the evidence. Furthermore, there was no logical explanation as to why Mrs Tarr would incorporate GEL if the parties intended to be joint owners of the property. They would simply have purchased the property in their joint names in the same way as they did in respect of their other investment properties. Indeed the impression which the appellant has tried to create (that there was a certain detente between the parties) supports Mrs Tarr's version of events.

[35] For these reasons I agree with the Judge's findings on ownership of the GEL shares.

The decision of Associate Judge Christiansen

[9] Associate Judge Christiansen considered the defence of laches. His Honour concluded:[7]

[51] As earlier noted *laches* is about balancing competing equities on available evidence. The availability or otherwise of the firm's records may but then may not hamper the Court's enquiry upon present issues. No assessment can be made in that regard at this time.

[52] It will provide an exceptional case where a defence of *laches* would permit a strike out or summary determination to occur. The Court does not consider this is such a case.

[10] As to issue estoppel:

[53] Likewise it is arguable there is an issue that remains and upon which the Court has not given any consideration and therefore principles of issue estoppel do not apply.

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7 *Tarr v Sutcliffe*, above n 2.

[11] Associate Judge Christiansen did not mention abuse of process in his reasoning.

Approach on appeal

[12] Mr Sutcliffe's appeal to this Court is by way of rehearing.

Grounds of appeal

[13] Mr Sutcliffe's main ground of appeal is that Associate Judge Christiansen erred in not finding that Mr Tarr's action against him is an abuse of process of the Court. That is not because the causes of action have been determined previously (they have not) but because in order to prove loss Mr Tarr would have to challenge specific findings of the Family Court, confirmed on appeal in the High Court, in the proceedings Mr Tarr commenced in 2007.

[14] On the face of Mr Tarr's statement of claim against Mr Sutcliffe this is palpably correct. We will quote relevant pleadings from the statement of claim and set out how they were decided in the Family Court in 2013 and the High Court in 2014.

[15] Firstly:

> 21. The Couple purchased the GEL Property in order to carry on business in common with a view to making profits.
>
> 22. The GEL Property purchase was, from the date of its purchase, the Couple's joint venture.

[16] Judge de Jong decided these claims. He set out the background as follows:

> [15] The wife says the husband agreed he "would have no beneficial interest in the shares in GEL and he would transfer his shareholding back to me once funding from the bank was obtained." The wife says the share transfer was signed "once funding was obtained from the bank" but the transfer was not registered until more recent years.

> [16] The husband disputes the wife's evidence that he became a joint owner for lending purposes only. He says the purchase was a "joint acquisition" because it was always intended to be a joint venture. To prove his point the husband says the parties also looked at a Kawau Island property to purchase together in 1994/95 when there was a prospect of NZ winning the America's cup and the parties making a capital gain.
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> (Footnotes omitted.)

[17] Judge de Jong's findings rejecting Mr Tarr's position are quoted at [5].

[18] Thomas J's conclusions, upholding Judge de Jong, are quoted above at [8].

[19] Second:

> 27. During the meeting Mrs Tarr advised that she wanted to protect the GEL Property from any claim by Mr Tarr's new partner …
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> 28. Mr Sutcliffe then advised the Couple to place the GEL Shareholding in a family trust.
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> 29. The Couple agreed and instructed Mr Sutcliffe to do so.
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> 30. Mr Sutcliffe then produced a share transfer form ("the Transfer") together with other GEL Property purchase documents and advised Mr Tarr that those documents would ensure that the GEL Property was protected by placing it in a family trust.

[20] Both Judge de Jong and Thomas J found there was never any discussion or intention of forming a family trust.[8] GEL was always Mrs Tarr's venture.

[21] Third:

> 41. Mr Sutcliffe then, or later, completed the blank Transfer as a transfer of Mr Tarr's GEL Shareholding to Mrs Tarr.
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> 42. Alternatively to [41], the Firm provided the blank Transfer to Mrs Tarr thereby enabling her to transfer Mr Tarr's GEL Shareholding to herself.

[22] Both Judge de Jong and Thomas J found there was no blank share transfer.[9]

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8 *Judge de Jong decision*, above n 3, at [28]; and *Thomas J decision*, above n 4, at [35].

9 *Judge de Jong decision*, above n 3, at [28(d)]; and *Thomas J decision*, above n 4, at [35].

[23] The first cause of action against Mr Sutcliffe, undue influence, requires the High Court to find that Judge de Jong and Thomas J were wrong:

> 77. Mr Sutcliffe unduly influenced Mr Tarr by advising Mr Tarr to sign a blank Transfer which would be used to place Mr Tarr's GEL Shareholding in a family trust …
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> 78. As a consequence of Mr Sutcliffe's influence Mr Tarr signed the blank Transfer …
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> …
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> 83. As a consequence of Mr Sutcliffe's undue influence and the transfer of Mr Tarr's GEL Shareholding to Mrs Tarr the Family Court erroneously held that:
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> (a) Mr Tarr was holding his GEL Shareholding as a bare trustee for Mrs Tarr; and
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> (b) the GEL Shareholding was Mrs Tarr's separate property.
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> 84. Consequently, Mr Tarr did not receive a half share of the GEL Property and its rental income in the division of the Couple's relationship property.

[24] The second cause of action, breach of fiduciary duty, requires similar findings:

> 91. If Mr Sutcliffe had fulfilled his fiduciary duties Mr Tarr would have retained a beneficial interest in his GEL Shareholding.
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> 92. Instead, as a consequence of Mr Sutcliffe's breaches of fiduciary duties the Family Court erroneously held that:
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> (a) Mr Tarr was holding his GEL Shareholding as a bare trustee for Mrs Tarr; and
>
> (b) the GEL Shareholding was Mrs Tarr's separate property.
>
> 93. Consequently, Mr Tarr did not receive a half share of the GEL Property and its rental income in the ultimate division of the Couple's relationship property.

[25] Mr Butler, for Mr Tarr, submits that Mr Tarr's claim does not require a challenge to the previous decisions. He accepts that some re-pleading would be required, but the essence of Mr Tarr's claim is that through Mr Sutcliffe's breach of equitable duties Mr Tarr lost a chance to not sign the share transfer. If he had not signed the share transfer then he would have retained, or been able to claim, a beneficial interest in the shares as relationship property.

[26] There is no hard and fast rule for the determination of whether a proceeding is an abuse of process. Instead the enquiry will involve a "broad, merits-based judgment".[10]

[27] The circumstances in which proceedings may amount to an abuse of process are varied.[11] One of these is an attempt to relitigate a claim previously determined by the court.[12] As per Lord Diplock in *Hunter v Chief Constable of the West Midlands Police*:[13]

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

[28] Essentially, it will be an abuse of process to bring the same proceeding "in a different garb".[14] If this is the case, it is no bar that the later proceeding is brought against a different party. Claims may be struck out as an abuse of process even though the defendant was not party to the previous litigation.[15]

[29] We are satisfied that Mr Tarr's action against Mr Sutcliffe is an abuse of process of the Court. We acknowledge that the causes of action themselves, undue influence and breach of fiduciary duty (but more particularly the latter), are unrelated to the Family Court proceeding. But, for a cause of action to be viable it must be possible to prove loss arising from proof of the cause of action. Here, that would only be possible if the High Court were to hear afresh the arguments Mr Tarr made to the Family Court and to the High Court and reach different conclusions.

[30] It has been held against Mr Tarr that he never had a beneficial interest in the GEL shares. The business venture involving the incorporation of GEL was always

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10 *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) at 31.
11 *Chamberlains v Lai* [2006] NZSC 70, [2007] 2 NZLR 7 at [61]; and *Dotcom v District Court at North Shore* [2017] NZHC 3158 at [24].
12 *Collier v Butterworths of New Zealand Ltd* (1997) 11 PRNZ 581 (HC) at 586; *Rabson v Judicial Conduct Commissioner* [2016] NZHC 2539, [2016] NZAR 1679 at [31].
13 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541.
14 *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 95.
15 At 99–100. See also *Chamberlains v Lai*, above n 11, at [63].

intended by him and by Mrs Tarr to be Mrs Tarr's alone. All he did was agree to assist Mrs Tarr by holding shares in GEL on express trust for her, and to act as a guarantor. There was no signing of a blank transfer.

[31] If Mr Tarr's action against Mr Sutcliffe were to continue he might or might not be able to establish undue influence by Mr Sutcliffe or a breach of fiduciary duty (the latter most likely around the obtaining of independent advice). But that would avail him nothing unless he could prove loss; and to prove loss he would have to persuade the Court to views contrary to the findings we have just set out at [30].

[32] Mr Butler's argument that the statement of claim can be amended to claim loss of a chance, not involving a challenge to the earlier decisions, cannot succeed.

[33] Loss of a chance is a well-recognised head of damage. However, it has also been recognised that there are peculiar difficulties associated with it.[16]

[34] Prime among these is the issue of causation. The plaintiff faces the onus of establishing the loss of a real and not speculative chance.[17] According to Brennan J in *Sellars v Adelaide Petroleum NL*, this onus is discharged as follows:[18]

> … by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities.

[35] In order to establish the loss of a chance, therefore, Mr Tarr must prove that, hypothetically, he would not have signed the share transfer had it not been for Mr Sutcliffe's breach of equitable duties. However, before attempting to prove this, Mr Tarr would have to establish the facts upon which such a hypothesis would be based. Specifically, he would have to prove that GEL was a joint venture or that the GEL shares were to be held in a family trust. This would require attacking factual findings which have already been determined in the earlier proceedings.

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16 *Powerbeat Canada Ltd v Powerbeat International Ltd* [2002] 1 NZLR 820 (HC) at [188].

17 *Signal v Berry* [2017] NZHC 2466 at [24].

18 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (HCA) at 368 cited in *Powerbeat Canada Ltd v Powerbeat International Ltd*, above n 16, at [191]; and *Precast NZ Ltd v Anystep Ltd* [2015] NZHC 1535 at [56].

[36] It follows we will allow the appeal on this ground.

[37] We will address briefly the other two grounds of appeal.

Laches

[38] According to Lord Selbourne, the doctrine of laches is as follows:[19]

> Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or whereby his conduct or neglect he has … put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted … Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other …

[39] The defence is fact-specific. As the Supreme Court noted in *Eastern Services Ltd v No 68 Ltd*:[20]

> … the doctrine of laches requires a balancing of equities in relation to the broad span of human conduct. In the abstract, facts and the weight to be given to them are infinitely variable. But in a particular case they have to be identified for what they are, as a singular exercise.

[40] The close factual assessment required by the defence of laches makes it inappropriate for summary judgment. As Associate Judge Christiansen said, it will provide an exceptional case where the defence of laches permits a summary determination to occur.[21]

[41] We find no error in Associate Judge Christiansen's decision on this point.

Issue estoppel

[42] Issue estoppel is discussed in *Shiels v Blakeley*:[22]

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19 *The Lindsay Petroleum Co v Hurd* (1874) 5 LR PC 221 at 239–240 cited with approval in *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335 at [34]; *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 at [307]; and more recently *Willis v Thompson* [2017] NZHC 1645, [2017] NZAR 1448 at [121].

20 At [37].

21 *Tarr v Sutcliffe*, above n 2, at [52].

22 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266 cited with approval by *Rooney Earthmoving Ltd v McTague* HC Christchurch CIV-2009-476-471, 30 April 2010 at [32].

> … where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits.

[43] Mr Sutcliffe was not a party to the earlier proceedings. In order for him to claim issue estoppel, he must be a privy of Mrs Tarr. In order to establish privity the following is required:[23]

> … such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[44] We agree with Courtney J's restatement of the purposes of the doctrine that, as a matter of public policy, there should be an end to litigation and that an individual should not be vexed twice in the same matter.[24]

[45] Mr Sutcliffe and Mrs Tarr did not have a mutuality of interest. Mr Sutcliffe was merely a lawyer acting on Mrs Tarr's behalf. This is insufficient to establish that he was her privy for the purposes of issue estoppel.

[46] Again, we find no error in Associate Judge Christiansen's decision on this point.

Decision

[47] The appeal is allowed. The proceeding is an abuse of the process of the Court. We strike it out.

[48] The respondent must pay the appellants one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
McElroys, Auckland for First and Second Appellants
Anderson Creagh Lai Ltd, Auckland for Respondent

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23 *Shiels v Blakeley*, above n 17, at 268.

24 *Wire Supplies Ltd v Commissioner of Inland Revenue* [2006] 2 NZLR 384, (2005) NZTC 19,357 (HC) at [57].