IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA316/2018
[2018] NZCA 311

BETWEEN	JAMES JOHN DUNCAN MACFARLANE Appellant
AND	PERPETUAL TRUST LIMITED Respondent

Hearing: 1 August 2018

Court: French, Simon France and Moore JJ

Counsel: Appellant in person
J Edwards and J C Suyker for Respondent

Judgment: 14 August 2018 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed and the orders made by the High Court are confirmed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis with a 20 per cent uplift and usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Macfarlane appeals a decision of Associate Judge Johnston. In the decision, the Associate Judge made orders removing a caveat Mr Macfarlane had

lodged over a homestead property situated in North Canterbury and granted Perpetual Trust Ltd (Perpetual) vacant possession of the property.[1]

Background

[2] The property in question formed part of the estate of Mr Macfarlane's father. The latter had eight children including Mr Macfarlane. Under the father's will, the bulk of the estate including the homestead property was given to the trustees to hold on trust for Mr Macfarlane's mother, Mr Macfarlane, and his seven siblings during the mother's widowhood. In the event of her remarriage or death, the trustees were given an unfettered discretion to wind up the trust and pay the capital to the children in such proportions as the trustees thought fit.

[3] In 1965 the terms of the will regarding capital were varied by Court order.[2] The trustees' unfettered discretion regarding distribution of capital was removed. Instead the capital was notionally divided into 40 equal shares and apportioned. As the Associate Judge noted, the division of the capital into notional shares did not however confer on any beneficiary a gift of any particular property, but rather a fixed proportionate interest in the residue.[3]

[4] In 1992, Perpetual was appointed sole trustee of the estate pursuant to the terms of an order made in the High Court by consent.[4] The order provided among other things that the assets of the estate including the homestead property were vested in Perpetual as trustee of the estate.

[5] Mr Macfarlane lived with his widowed mother in the homestead property. She never remarried and died in October 2016. Mr Macfarlane has continued living there ever since. He does so, despite the property having sustained significant damage in the Kaikōura earthquake of 14 November 2016.

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1 *Macfarlane v Perpetual Trust Ltd* [2018] NZHC 1055 [HC decision].
2 This was the result of a proceeding under the Family Protection Act 1955 brought by Mr Macfarlane's mother.
3 At [8].
4 The appointment was to PGG Trust Ltd which amalgamated in 1998 with Perpetual.

[6] Perpetual, as the registered owner of the homestead property, lodged an insurance claim for the earthquake damage. The claim was eventually settled for $611,784 in July 2017.

[7] Perpetual then decided to sell the property in its damaged state. It entered into an agreement for sale and purchase with a Mrs Flintoft for $170,000. Under the contract, the settlement date was 14 March 2018.

[8] Perpetual served Mr Macfarlane with a notice to vacate the property on 30 November 2017. The notice required him to vacate by 22 February 2018. Mr Macfarlane refused to leave.

[9] On 9 February 2018, Mr Macfarlane registered a caveat over the title to the property, preventing Perpetual from settling the sale to Ms Flintoft.

[10] Then followed three applications to the High Court. Mr Macfarlane filed an application on 14 March 2018 seeking an order under s 145A of the Land Transfer Act 1952 that his caveat not lapse. On 16 March 2018, Perpetual filed an application seeking an order under s 143 of the Land Transfer Act for removal of the caveat together with an application for vacant possession and summary judgment.

[11] All three applications were heard together before Associate Judge Johnston. For present purposes, the Associate Judge's key findings were:

(a) Mr Macfarlane had failed to make out a reasonably arguable case that he had a proprietary interest in the homestead property sufficient to support a caveat.[5]

(b) Even if he did have a reasonably arguable case, the Associate Judge would in any event have been prepared to exercise his residual discretion against Mr Macfarlane.[6]

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5 At [62].
6 At [66].

(c) Mr Macfarlane had no defence to the application for vacant possession.[7]

[12] Therefore, as already mentioned, the Associate Judge declined Mr Macfarlane's application and granted the applications made by Perpetual.

[13] Dissatisfied with that outcome, Mr Macfarlane filed an appeal in this Court. Counsel for Perpetual, Mr Edwards, advised that while Ms Flintoft has been prepared to wait for settlement of the sale transaction meantime, she is not prepared to do so indefinitely and Perpetual is concerned it may lose the sale.

Analysis

Does Mr Macfarlane have a caveatable interest?

[14] Mr Macfarlane accepted as he did in the High Court that, as a general rule, the residuary beneficiaries of an estate do not have a proprietary interest in any particular estate asset sufficient to support a caveat. All they have is a personal right to compel the testator's personal representatives to administer the estate in accordance with the terms of the will. These propositions are well established, and were confirmed by this Court in *Guardian Trust and Executors Co of New Zealand Ltd v Hall*.[8]

[15] However, Mr Macfarlane argued that those principles did not apply to this case for two reasons.

[16] The first was that unlike the estate in *Guardian Trust*, the administration of his father's estate had been completed and therefore, at all relevant times, Perpetual was acting as a trustee, not executor. The case was thus governed by standard principles of trust law. Perpetual held the legal title to the homestead property as trustee. He, as a beneficiary of the trust, had an equitable beneficial interest in the property and that was sufficient to support the caveat.

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7 At [71].

8 *Guardian Trust and Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 (CA).

[17] We agree it is arguable the administration of the estate had been completed at least on the death of Mr Macfarlane's mother. However, in our view even if that is so, it still does not assist Mr Macfarlane. Although the beneficiary of a trust can caveat property held by the trust, the beneficiary must still be a fixed beneficiary with a specific right to the property sought to be caveated. The interest must be more than a general interest in the proceeds from the sale of the property, which is the only interest that Mr Macfarlane holds.[9] Mr Macfarlane conceded Perpetual was able to sell the property, he merely objected to this particular sale.

[18] It follows we agree with the Associate Judge that "regardless of whether the administration of the [e]state [was] complete, Mr Macfarlane only has an interest in the value of the [p]roperty, which is incapable of sustaining a caveat".[10]

[19] The second reason advanced by Mr Macfarlane for distinguishing *Guardian Trust* was that in his case there has been impropriety on the part of the trustee. The alleged impropriety relied upon by Mr Macfarlane relates to amongst other things the circumstances of Perpetual's appointment in 1992, alleged financial irregularities, its handling of the earthquake insurance claim, inadequate disclosure of information, and conduct relating to the sale of the homestead property. Mr Macfarlane suggested in reliance on an 1894 decision *Re Bielfeld, Deceased*, that impropriety on the part of a trustee including a collusive or improper sale could or might of itself confer a caveatable interest in a beneficiary where one might otherwise not exist.[11]

[20] We do not propose to traverse the numerous allegations of impropriety made by Mr Macfarlane nor consider whether the Associate Judge was correct to find them unfounded, because in our view they are simply irrelevant to the issue of whether Mr Macfarlane has a caveatable interest. Correctly interpreted *Re Bielfeld* is not authority for the proposition that Mr Macfarlane advances. Unlike Mr Macfarlane,

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9 *Rutherford v Rutherford* [2015] NZHC 878, [2015] NZAR 1303 at [15]–[23] and [32]–[43]; relying on *Merbank Corp Ltd (in liq) v Price* (1978) 1 NZCPR 24 (SC) at 28; *Holt v Anchorage Management* [1987] 1 NZLR 108 (CA); and *Willingers v McFarlane* (2005) 6 NZCPR 885 (HC). And see NR Campbell "Caveats" in *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [10.009].

10 HC decision, above n 1, at [62].

11 *Re Bielfeld, Deceased* [1894] 12 NZLR 596 (SC).

the caveator in *Re Bielfeld* was entitled to more than a mere share of residue but to the reversionary interest in specific leasehold premises.[12] That was the basis of his right to caveat as was later confirmed by this Court in *Guardian Trust*.[13]

[21] Even if we are wrong in these conclusions and Mr Macfarlane was able to make out an arguable case for a caveatable interest we, like the Associate Judge,[14] would exercise the Court's residual discretion in Perpetual's favour.[15] All the other residuary beneficiaries support the sale and Mr Macfarlane's interests, which are limited to receiving a portion of the sale proceeds, are adequately protected without a caveat. We are satisfied there is no practical benefit to be gained by permitting the caveat to remain and no prejudice to Mr Macfarlane in removing it.

Does Mr Macfarlane have an arguable defence to the application for vacant possession?

[22] At the hearing before us, Mr Macfarlane, who is a qualified lawyer, conceded that he did not have any legal entitlement to occupy the property. However, he argued that, even although he may have no legal entitlement to reside there, the notice to vacate was not valid because it was issued in bad faith. It was void and therefore ineffective. In support of this argument, he invoked the existence of the Court's (presumably the High Court's) inherent supervisory jurisdiction over trustees.

[23] There is no evidential foundation for the allegation of bad faith in the issuing of the notice and the argument is untenable. In particular, we are satisfied there is no evidential foundation for Mr Macfarlane's claim that the property is being sold at an undervalue, nor that the sale process followed by Perpetual was unfair. Nor do we consider there is any tenable argument on the evidence before us that he unequivocally advised Perpetual that he wished to buy the property himself.

[24] This ground of appeal also lacks merit.

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12 At 596.
13 *Guardian Trust*, above n 8, at 1027.
14 HC decision, above n 1, at [63]–[66].
15 See *Pacific Homes Ltd (in rec) v Consolidated Joineries Ltd* [1996] 2 NZLR 652 (CA) at 656.

Costs

[25] The parties agreed that costs should follow the event and be calculated on the basis of a standard appeal. However, Perpetual also sought increased costs which Mr Macfarlane opposed.

[26] Mr Macfarlane told us that his family has lived in the homestead property for 140 years. Understandably, he has a strong emotional attachment to it. We also acknowledge that the earthquake of November 2016 and its aftermath would have been a difficult time for him.

[27] However, those matters do not justify conduct of litigation which unnecessarily and unreasonably contributes to the cost of it to the detriment of the other party and, in this case, ultimately to the detriment of the other beneficiaries.

[28] Much of Mr Macfarlane's submissions both written and oral contained irrelevant material detailing his dissatisfaction with the way the estate and the trust has been administered. The material spanned decades. This unnecessarily prolonged the proceeding. It also transpired during the hearing that Mr Macfarlane was essentially using the caveat procedure as a backdoor method of getting his concerns about Perpetual's trusteeship before the Court rather than the more direct and correct legal avenues which he considered too expensive. In our view, that constitutes an abuse of process. Further, Mr Macfarlane also persisted with his appeal against the order for vacant possession despite knowing he had no legal entitlement to continue occupying the property.

[29] In all those circumstances, we consider increased costs in the order of a 20 per cent uplift are warranted.

Outcome

[30] The appeal is dismissed and the orders of the High Court are confirmed.

[31] The appellant must pay the respondent costs for a standard appeal on a band A basis with a 20 per cent uplift and usual disbursements.

Solicitors:
Russell McVeagh, Auckland for Respondent