

IN THE COURT OF APPEAL OF NEW ZEALAND

CA788/2010
[2011] NZCA 87

BETWEEN WYATT FAMILY TRUST HOLDINGS
LTD
Applicant

AND MARK RODNEY BROUGHTON AND
KATHRYN LYNETTE BROUGHTON
Respondents

Hearing: 15 March 2011

Court: Chambers, Randerson and Wild JJ

Counsel: G J Wyatt in person for Applicant
M G Keall for Respondent

Judgment: 21 March 2011 at 3 p.m.

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs to the respondents as if this were a standard application for leave to appeal on a Band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The applicant company (Wyatt) seeks leave to appeal under s 67 of the Judicature Act 1908 against a decision delivered by Lang J in the High Court in Auckland on 20 October 2010.¹ We allowed Wyatt's director to address the Court.

[2] The decision by Lang J was given in relation to an appeal by the respondents (the Broughtons) and a cross-appeal by Wyatt from a decision given in the District Court by Judge Hinton on 18 June 2010.²

[3] The proceedings in the lower courts arose from a dispute over an agreement for the sale and purchase of rural land in Kaukaupakapa, Auckland. By that agreement, Wyatt agreed to sell the land to "Jack Wright or Nominee". Mr Wright later entered into a deed of nomination under which he nominated the Broughtons as the purchasers under the agreement. The Broughtons duly gave notice to Wyatt of the nomination and provided Wyatt with a copy of the deed together with a transfer and notices of sale.

[4] The sale was conditional on the purchaser conducting a due diligence investigation to ensure that the property was satisfactory for his purposes. The agreement recorded that this condition was for the sole benefit of the purchaser who was required to advise the vendor as to fulfilment of the condition by a specified date. The Broughtons duly notified Wyatt prior to the due date that the condition had been satisfied. They did so at the same time as they gave notice to Wyatt of their nomination as purchasers.

[5] As the High Court Judge noted, from the perspective of the Broughtons, the agreement was then unconditional and settlement was due to occur the following day. However, Wyatt refused to accept that the Broughtons were entitled to confirm fulfilment of the due diligence condition. It took the view that Mr Wright himself was required to take that step. Wyatt considered that the purchaser had not satisfied

¹ *Broughton v Wyatt Family Trust* HC Auckland CIV-2010-404-4303, 20 October 2010.

² *Wyatt Family Trust Holdings Ltd v Broughton* DC North Shore CIV-2009-044-1863.

the condition and purported to give notice avoiding the agreement. The Judge found that it did so because it had received a higher offer.

[6] For their part, the Broughtons did not accept that Wyatt had validly terminated the agreement. They delivered a settlement notice to Wyatt but Wyatt continued to refuse to accept that it was bound to sell the property to the Broughtons.

[7] Some months later, a partial settlement was reached under which the property was transferred by Wyatt to the Broughtons but leaving both parties free to pursue claims against each other in the District Court. As part of the settlement, the Broughtons agreed that if the District Court found that Wyatt was entitled to specific performance (or damages in lieu), they would pay Wyatt \$35,000. In turn, Wyatt agreed that if the Broughtons obtained an order for specific performance (or damages in lieu) against Wyatt, it would meet their actual and reasonable legal costs in relation to the dispute for a period specified in the agreement. In that case, Wyatt also agreed to pay penalty interest for delayed settlement at the rate specified in the agreement for sale and purchase.

[8] Wyatt later issued proceedings in the District Court against the Broughtons. Both parties applied for summary judgment against the other. Judge Hinton dismissed both applications.

The High Court decision

[9] Lang J dealt with the two main arguments on appeal:

- (a) Whether the Broughtons were entitled to enforce the agreement as nominees under the Contracts (Privity) Act 1982 (the CPA).
- (b) Alternatively, whether the Broughtons were entitled to enforce the agreement by virtue of the deed of nomination on the footing that it constituted an effective assignment to them of Mr Wright's interest as purchaser under the agreement both in equity and in terms of s 130 of the Property Law Act 1952.

[10] In a comprehensive judgment, Lang J found in favour of the Broughtons on both issues. As to the first, he relied particularly on a decision of Tipping J in the High Court³ and the decision of this Court in *Laidlaw v Parsonage*.⁴ Both related to proceedings under the CPA. The Supreme Court subsequently declined leave to appeal against the decision of this Court in *Laidlaw*. In particular, the Judge found that the Broughtons were themselves entitled to give notice that the due diligence condition was satisfied and were entitled to enforce the agreement by way of specific performance.

[11] In relation to the alternative argument, the Judge found that the formal requirements of s 130 of the Property Law Act 1952 had been met and there had been an absolute assignment of the agreement for sale and purchase to the Broughtons under that provision. As such, they were entitled as assignees to an order requiring Wyatt to perform its contractual obligation to convey the property to them.

[12] The Judge entered judgment in favour of the Broughtons for \$9,056.25 in respect of their legal costs incurred over a specified time period and a further sum of \$19,935.62 for interest to which the Broughtons were entitled for late settlement. The quantum of both these figures was agreed.

The recall application

[13] Wyatt then sought an order for the recall of the High Court judgment on various grounds. That application was dismissed by Lang J on 29 October 2010.⁵ Amongst other things, Wyatt sought to raise a new argument challenging the right to recovery of the penalty interest. The Judge did not consider there was any merit in any of the points raised by Wyatt and dismissed the application.

[14] Wyatt also applied to the High Court for leave to appeal to this Court. Lang J dismissed that application too, in the same judgment as he delivered on the recall

³ *Rattrays Wholesale Ltd v Meredyth-Young and A'Court Ltd* [1997] 2 NZLR 363 at 383.

⁴ *Laidlaw v Parsonage* [2009] NZCA 291, [2010] 1 NZLR 286.

⁵ *Broughton v Wyatt Family Trust Holdings Ltd* HC Auckland CIV-2010-404-4303, 29 October 2010.

application. Although he agreed it was arguable whether the Broughtons as nominee were entitled to confirm satisfaction of the conditions inserted for the benefit of the purchaser, he did not consider that the issue was one of general importance and noted the relatively small sums of money involved. He was also concerned about delay. He noted that settlement of the property occurred on 12 July 2007 and that Wyatt did not issue its proceeding in the District Court until June 2009, nearly two years after the settlement of the sale of the property. There had also been a delay of six months between the date of hearing of the summary judgment proceedings in the District Court and the issue of judgment therein.

The issues Wyatt seeks to raise on appeal

[15] It is evident that, in the main, the issues Wyatt seeks to raise on appeal are the same as those raised in the lower courts. One of those, the penalty interest question, was only raised by Wyatt at the time of the recall application in the High Court and despite the agreement as to quantum which the parties had reached at the time of the substantive appeal in the High Court. There is one new point relating to the possible application of s 6 of the CPA. We are satisfied, however, that this section has no application to the circumstances of the present case. Wyatt also sought to dispute the date when the deed of nomination was served but that was an agreed fact and it is now too late to raise it.

Discussion

[16] The principles applicable on an application under s 67 of the Judicature Act are well established and not in dispute. Leave for a second appeal may only be granted where the point to be argued on the appeal is of general importance or is of such importance to the parties that it outweighs the inevitable delay and cost that a further appeal will create.⁶

[17] While, as the Judge noted, the issue may be of importance to Wyatt, we are satisfied that no issue of general importance is raised by the proposed appeal. There

⁶ *Waller v Hider* [1998] 1 NZLR 412; *Snee v Snee* (2000) 13 PRNZ 609.

is no obvious error in the conclusion reached by Lang J on the CPA issue and no argument was advanced to us to suggest that the Judge was wrong in his conclusion in relation to the assignment issue.

[18] Even if we had concluded there was a seriously arguable point on the merits, we agree with the Judge that the amounts at issue do not justify the cost and further delay that would be inevitable should leave be granted.

Result

[19] For these reasons, the application for leave to appeal is dismissed.

[20] The applicant must pay costs to the respondents as if this were a standard application for leave to appeal on a band A basis and usual disbursements.

Solicitors:
Vlatkovich & McGowan, Whangaparaoa