IN THE COURT OF APPEAL OF NEW ZEALAND

CA400/2011
[2012] NZCA 122

BETWEEN	PETER JOSEPH VISINI Appellant
AND	MARTIN LEIGH CADMAN AND VANESSA JANE CADMAN Respondents

Hearing: 19 March 2012

Court: Harrison, White and Asher JJ

Counsel: R E Lawn for Appellant
A J Steele and S E Wroe for Respondent

Judgment: 29 March 2012 at 2.15 pm

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 together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The issue in this appeal is whether a party who is sued in negligence for breaching a duty of care by two of three registered owners of a residential property held in trust has an unassailable defence to the claim because the third owner and co-trustee did not consent to or participate in the proceeding when filed.

[2] Toogood J answered that question in favour of the plaintiffs, Martin and Vanessa Cadman, in dismissing an application to strike out the proceeding.[1] The defendant, Peter Visini, appeals on a number of grounds. All emanate from a proposition that the third owner, Peter Wood, was at the time the proceeding was issued a co-trustee who should have joined as a plaintiff; and that without his participation the Cadmans' claim cannot possibly succeed.

Background

[3] In August 1995 the Cadmans settled the Cadman Family Trust. They appointed themselves and Mr Wood as trustees. In that capacity the Cadmans and Mr Wood acquired a residential property at Coatesville, near Auckland.

[4] Some three years later the Cadmans and Mr Wood entered into an oral contract with P J Visini Architectural Services Ltd to supervise construction of a home on the property. The agreed terms were later formalised in writing but a written contract was not executed. Construction of the house was completed in December 1999.

[5] In 2005 Mr Wood advised the Cadmans of his wish to retire. The trust deed provided only for removal, not retirement, of trustees. Thus s 45 of the Trustee Act 1956 applied. The Cadmans were required to consent by deed to Mr Wood's discharge. In 2007 the parties prepared a deed of retirement for Mr Wood and the appointment of Northplan Trustees Ltd as a new trustee. The Cadmans, Northplan and Mr Wood signed the deed. But the Cadmans' signatures were not witnessed.

[6] Toogood J held that the document did not take effect as a deed. That was because it failed to comply with the requirements of s 4 of the Property Law Act 1952, which was then in force, requiring each signature to be witnessed by at least one person. No steps were taken subsequently to transfer title to the property from the Cadmans and Mr Wood jointly to the Cadmans and Northplan. Northplan was later struck off the Companies Register.

---

[1] *Cadman (as Trustees of the Cadman Family Trust) v Visini* HC Auckland CIV-2009-404-7925, 30 May 2011.

[7] The Cadmans never obtained a code compliance certificate for the house under the Building Act 1991. In 2009 they commissioned an expert to certify the house for that purpose. He reported following inspection that the dwelling was suffering damage from high moisture content within some areas of the timber framing – a condition commonly known as leaky home syndrome.

High Court proceedings

[8] On 1 December 2009 the Cadmans issued this proceeding against Mr Visini in the High Court at Auckland. They allege that Mr Visini personally owed them a non-delegable duty to exercise reasonable skill and care when acting as contract supervisor and project manager for the original building work; that he breached that duty in a number of respects; and that as a result the house has suffered damage caused by water ingress. Unspecified damages are sought.

[9] The Cadmans are described in the intituling to the statement of claim as plaintiffs acting in the capacities of trustees of the Cadman Family Trust. When they issued the proceeding they were unaware of the possibility that Mr Wood's deed of retirement was ineffective. In June 2010 Mr Visini applied for an order striking out the Cadmans' claim because it did not disclose a reasonably arguable cause of action and was otherwise an abuse of the process of the Court. In summary, the grounds advanced in support were that, first, while the proceeding was brought on behalf of the Cadman Family Trust, the Cadmans had no authority because all three trustees did not agree to institute the proceeding; and, second, Mr Wood could not delegate to another trustee his powers and duties to act as a co-plaintiff in the proceeding.

[10] In August 2010 Mr Wood swore an affidavit in reply, confirming that after signing the deed of retirement in 2007 his involvement as a trustee ended although he continued to act as the Cadmans' accountant; that in August 2010 he had signed the necessary documents allowing his name to be removed from the certificate of title; and that, if he remained a trustee, he authorised and ratified the issue of the proceeding.

[11] In dismissing Mr Visini's application, Toogood J found in summary as follows:

(a) Mr Wood's trusteeship stemmed from the trust deed and its provisions, not from the certificate of title. So, if the deed of retirement was ineffective in removing him as a trustee, it followed that he remained throughout in that office. Given that the deed did not comply with requirements of s 4 of the Property Law Act 1952, the Cadmans could not be said to have given their consent by deed to Mr Wood's retirement as a trustee.

(b) However, as Mr Wood remained as a trustee, he had the capacity to consent to the issuing of the proceeding ex post facto, which he had done in his affidavit. Accordingly, the Cadmans were entitled to argue that in continuing the proceeding they were validly acting under their powers as trustees in accordance with Mr Wood's retrospective authority. The Cadmans' claim was a representative one, taken on behalf of all trustees, and complies with r 4.24 of the High Court Rules.

Decision

[12] On appeal Mr Lawn largely repeated the comprehensive submissions which he had advanced before Toogood J. The Cadmans have effectively cross-appealed against the Judge's finding that Mr Wood remained in law a trustee when the proceeding was issued in December 2009. In focussing on the parties' intentions as reflected by the deed of retirement, and relying on this Court's authority in *R v Vanstone*,[2] Mr Steele submits that this Court should give effect to the parties' intentions rather than relying on the legal formalities.

[13] Mr Steele's submission has merit but its determination appears to require a factual finding on whether the deed was delivered in escrow. In the absence of such a finding, we shall decide the appeal within the confines of the grounds considered

2 *R v Vanstone* [1955] NZLR 1079 (SC and CA) at 1090–1097.

by Toogood J and on the same premises: namely, that Mr Wood was a trustee on 1 December 2009 when the proceeding was issued; that all trustees must concur in a transaction affecting trust property, including issuing a legal proceeding (the majority can however bind the minority in the event of a dispute but that did not occur here); and that this litigation could adversely affect trust property because if the claim is unsuccessful Mr Visini could enforce a costs award against the trust's assets.

[14] Toogood J was satisfied that r 4.24 of the High Court Rules applied because the Cadmans and Mr Wood had the same interest in the subject matter of the proceeding and Mr Wood had now given his consent. Rule 4.24 provides:

> **4.24 Persons having same interest**
>
> One or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding—
>
> (a) with the consent of the other persons who have the same interest; or
>
> (b) as directed by the court on an application made by a party or intending party to the proceeding.

[15] However, Mr Lawn submits that r 4.24 cannot avail the Cadmans for a range of reasons. His principal arguments appear to be as follows.

[16] First, Mr Lawn says that r 4.24 cannot be invoked after a proceeding is issued. He says that the relevant consent must be given beforehand; and that it cannot be used to pre-empt a limitation defence which would be available to Mr Visini if Mr Wood were joined at this stage, more than 10 years after Mr Visini's allegedly negligent act or omission. The constant theme of his argument is that the proceeding is defective from its inception because all trustees must join as plaintiffs from the outset. He relies on this passage from Baragwanath J's judgment in *O'Hagan v Body Corporate 189855 [Byron Avenue]* to support that proposition:[3]

> [120] I would also place in the first class Ms Clark who bought unit 8 in March 1999 and moved in. For a time she was not concerned about the fact that the building needed attention which she attributed to teething problems, but as time went on she came to understand the extent of the defects and

[3] *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 (CA).

> their consequences, she experienced such stress as to aggravate a condition of tinnitus from which she suffers. With a mortgage of $55,000 she found it necessary to borrow over $180,000 for the repairs. She was forced for economic reasons to leave the unit and rent elsewhere with others so she could let the unit. She transferred the unit to herself and another as trustees of the Clark Family Trust in October 2004. *For the reasons stated at [49] above the transfer has no legal effect upon Ms Clark's standing to sue and the transfer may be disregarded for present purposes. There can be no claim by the trustee who neither occupies the apartment nor has any personal economic interest in it.*
>
> (Emphasis added.)

[17] The flaw in Mr Lawn's argument is that it proceeds on a premise which equates the existence of Mr Wood's consent to the proceeding with a requirement that he be joined as a party. As Mr Steele concedes, trustees must agree unanimously to issue a proceeding.[4] Mr Wood has now given his express consent to the Cadmans' decision to issue the proceeding. The judgment of Romilly MR in *Messeena v Carr* is settled authority for the proposition that one trustee can subsequently approve another trustee's exercise of a discretion.[5] Mr Wood's retrospective consent confirms the trustees' unanimous decision to issue the proceeding. The Cadmans have pleaded a breach of a duty of care owed jointly and severally to each owner of the house. Accordingly one or more of the owners is entitled to sue – the others are not required to join as plaintiffs.[6]

[18] In any event we agree with Toogood J that the law does not require all trustees who have authorised a proceeding to be named as parties. Rule 4.24 specifically allows one trustee to sue on behalf of all trustees where they have the same interest in the subject matter of the proceeding. The Cadmans and Mr Wood have the same interest in the subject matter of the proceeding. They own the property jointly as trustees for the Cadman Family Trust and seek compensation for damage allegedly caused by Mr Visini to the trust's assets. On a plain reading, the Cadmans have satisfied r 4.24(a).

---

4 *Niak v McDonald* [2001] 3 NZLR 334 (CA) at [16].

5 *Messeena v Carr* (1870) 9 LR Eq 260 at 262–263. See also *Laws of New Zealand* Trusts (Reissue 1) (online ed) at [302]; and *Halsbury's Laws of England* (4th ed, reissue, 2007, online ed) vol 48 Trusts at [953].

6 *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 (QB).

[19] In this respect, Baragwanath J's comments in *O'Hagan* do not assist Mr Lawn's argument: the Judge was simply confirming that a co-trustee registered as a joint proprietor of an apartment, but who neither occupied the apartment nor had any personal economic interest in it, was not entitled to claim for general damages.

[20] Moreover, there is no warrant for reading a temporal limit into r 4.24 so as to exclude a retrospective consent. The rule does not require that consent be given before the proceeding is issued. The language of r 4.24(b) is consistent with the prospect of retrospective consent under r 4.24(a). The objective of the High Court Rules is to "secure the just, speedy and inexpensive determination of any proceeding".[7] They are designed to avoid unnecessary and prejudicial expense, delay and technicality.[8]

[21] In our judgment r 4.24 must be given a wide and liberal interpretation to accord with the spirit and purpose of the High Court Rules. It is of no moment to Mr Visini's substantive defence on the merits whether Mr Wood's consent is given before the proceeding is issued or after. Mr Visini will suffer no prejudice either way. Even if the issue is considered solely in procedural terms, the claim was issued within the limitation period; Mr Visini has been aware of its nature since December 2009 and Mr Wood's absence from the nominated plaintiffs has caused him no disadvantage.[9] It would be appropriate to recognise what is plainly an error or omission by treating Mr Wood's consent as complying with r 4.24 by operating retrospectively to the date the claim was filed.

[22] Second, Mr Lawn attaches considerable weight to Toogood J's description of Mr Wood's consent as "ratification of the proceedings".[10] He says that ratification could only be effective if Mr Wood added his name as the plaintiff. Again, he says that that is not possible because Mr Wood cannot be allowed to ratify if the effect is to defeat a limitation defence otherwise open to Mr Visini.[11] Alternatively, by joining in as a plaintiff, Mr Wood would be advancing a new cause of action for the

---

7 High Court Rules, r 1.2.
8 See JR Wild and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR1.2.02].
9 *Pontin v Wood* [1962] 1 QB 594 (QB).
10 At [47].
11 *McCoomb v Fleetwood Motors Ltd* [1967] NZLR 945 (SC).

previously unrepresented one third undivided interests in the property which he represents – again it would be time barred.

[23] However, the decision on which Mr Lawn relies, *McCoomb v Fleetwood Motors Ltd*, does not support his proposition. In that case T A Gresson J dismissed an application to join a new defendant out of time by applying the settled rule that Courts do not allow the addition of a party or cause of action if it will have the effect of defeating a limitation defence. However, the Cadmans do not seek to join a party or add a new cause of action and we have already rejected Mr Lawn's submission that Mr Wood must be joined as a plaintiff.

[24] Mr Lawn's argument is misconceived for another reason. Rule 4.24 requires consent, not ratification. To the extent that there is a difference, we are only concerned with the former, which is a straightforward concept and is satisfied by Mr Wood's authorisation in August 2010 relating back to the date the proceeding was filed.

[25] Third, Mr Lawn says that ss 30 and 31 of the Trustee Act 1956 operate to prevent Mr Wood from delegating to the Cadmans his power as trustee to issue this proceeding. He says that s 30, confirmed by s 31, does not empower a trustee who is a joint owner of land to delegate his function to represent his undivided ownership share in land to other trustees. As a result the Cadmans can only represent their respective undivided shares in the property, which they are holding in trust pursuant to the terms of the trust deed, and not Mr Wood's separate share.

[26] We must confess to some difficulty in following this argument. Section 30 merely empowers a trustee to execute or exercise any trust or power vested in him relating to undivided share in property which is subject to a trust; and s 31 entitles a trustee who is either out of New Zealand or incapacitated to delegate his or her powers by a power of attorney. Neither provision bears on this issue. And in this case Mr Wood is not delegating his powers as trustee. He is himself exercising his power as trustee to authorise or consent to the proceeding. His consent to his co-trustees representing him in the litigation is not a delegation of his powers.[12]

---

[12] *Niak v McDonald*, above n 4, at [17].

[27] In summary, Mr Lawn has not persuaded us that Toogood J erred and his grounds of appeal must fail.

Result

[28] The appeal is dismissed.

[29] The appellant must pay the respondents' costs on a standard band A basis together with all usual disbursements.

Solicitors:
Kumeu-Huapai Law Centre, Auckland for appellant
Martelli McKegg, Auckland for respondents