IN THE COURT OF APPEAL OF NEW ZEALAND

CA521/2010
[2011] NZCA 647

BETWEEN	RITA WILSON Appellant
AND	APG HOLDINGS LTD (IN LIQUIDATION) First Respondent
AND	DAVID MURRAY BLANCHETT & GRANT EDWARD BURNS Second Respondent

Hearing: 11 October 2011

Court: Chambers, Ronald Young and Andrews JJ

Counsel: G M Illingworth QC for Appellant
M D Branch and S J Rawcliffe for Respondents

Judgment: 15 December 2011 at 3:00 PM

JUDGMENT OF THE COURT

A The appeal against summary judgment in favour of the first respondent is allowed and that judgment is set aside.

B The appeal against summary judgment in favour of the second respondents is dismissed, except to the extent that the amount the appellant must pay to them under s 298(2) of the Companies Act 1993 is reduced to $249,660.

C The sum payable under order B, namely $249,660, is to carry interest from the date of judgment in the High Court, namely 15 July 2010, down to the date of payment, in accordance with r 11.27 of the High Court Rules.

D **The proceeding is remitted to the High Court for determination at trial of:**

(a) **whether the appellant owes more to the second respondents under the second (now, sole remaining) cause of action;**

(b) **what interest is payable (if any) in addition to that payable under order C; and**

(c) **costs in that Court.**

E **The appellant must pay the second respondents costs for a standard appeal on a Band A basis and usual disbursements. The allowance for item 12 in Schedule 2 of the Court of Appeal (Civil) Rules 2005 is increased from 3.0 days to 3.5 days.**

REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] The first respondent, APG Holdings Ltd, is in liquidation. The liquidators and APG brought summary judgment proceedings in the High Court against the appellant, Rita Wilson, seeking repayment of $1,081,097.53 which they said had been paid by APG to her between March 2004 and July 2006.

[2] APG claimed that its money was advanced to Mrs Wilson repayable on demand (demand having been made). In the alternative, the liquidators claimed the payments were caught by s 298(2) of the Companies Act 1993.

[3] Mr Terry Wilson, Mrs Wilson's husband, was a director of APG from July 2004. The sole shareholder of APG was Capital Events Holdings Ltd.

[4] Mrs Wilson's response to the claims was that she understood the payments made to her were her husband's drawings or his salary from APG. She said she had not borrowed any money from APG and the circumstances were not covered by s 298 of the Companies Act..

[5] In his decision granting summary judgment Associate Judge Bell said that the payments made by APG were not Mr Wilson's salary.[1] He considered that the requirements of s 298 had been established and therefore the payments by APG to Mrs Wilson should be repaid to the liquidators. However, he concluded that Mrs Wilson might be able to establish at trial that payments made by Mr Wilson to APG should be taken into account in assessing the amount of her liability by way of set-off. Once the set-off was allowed for there was a shortfall of $284,659.90 for which he entered summary judgment.

[6] Mrs Wilson's case before us was rather different. Mr Illingworth QC, for Mrs Wilson, accepted the payments to Mrs Wilson could not be her husband's salary. That meant, he said, they must be treated as a loan to Mr Wilson from APG. Mr Wilson, therefore, had an obligation to repay the advances to APG. There was, therefore, proper consideration for the loans (the obligation to repay). Thus s 298 did not apply to the advances to Mrs Wilson.

[7] Mr Illingworth submitted that, even if he was unsuccessful in these arguments, the appeal should still be allowed as to quantum because of arithmetical errors the Associate Judge made.

Factual background

[8] APG Holdings Ltd was, until September 2006, called Capital Events Ltd. Mr Ranjit Keshvara, who is the father of Mrs Wilson, was the director of APG from March 2004 to 23 July 2004. While he was the director of the company the sole shareholder was KAP Nominees (2) Ltd. The sole shareholder of KAP Nominees (2) Ltd was KAP Nominees Ltd. Mr Keshvara, in turn, was the sole shareholder of KAP Nominees Ltd.

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1 *APG Holdings Ltd (in liquidation) v Wilson* HC Auckland CIV-2010-404-1216, 15 July 2010.

[9] On about 23 July 2004, KAP Nominees (2) Ltd transferred its shareholding in APG to Capital Events Holdings Ltd. Mr Wilson asserted that Capital Events Holdings Ltd held its shares on trust for him and Andrew Tauber. He provided no documentary evidence to substantiate that assertion, which seems inherently unlikely to be true. Mr Wilson was a director of APG from 23 July 2004 to 1 October 2006.

[10] As to the payments to Mrs Wilson from APG, three payments, the first of $400,000 on 17 March 2004, the second of $35,000.40 on 8 April 2004 and the third of $40,000 on 27 April 2004 (totalling $475,000.40) were made prior to Mr Wilson becoming a director of the company.

[11] However, Mr Keshvara in an affidavit filed in support of Mrs Wilson said:

> On 16 March 2004 I was requested by Terry Wilson to write out a cheque in the sum of $400,000 to Rita Wilson. I was the company's authorised signatory. Mr Wilson along with Mr Andrew Tauber controlled the business of the plaintiff ... Mr Wilson advised that the cheque was his share of the funds available in the company's account.

[12] The remaining advances were made during the later part of 2004 through to 2006. The last advance, of $3,915.51, was on 18 July 2006. The two larger deposits in 2005 were $125,000 on 12 April 2005 and $400,000 on 19 April 2005.

[13] APG went into liquidation by shareholder resolution on 9 February 2007. On 9 October 2007 APG, through the liquidators, made demand of Mrs Wilson to pay $972,000.

[14] Mrs Wilson, through her lawyer, responded on 15 October. She said that she had no knowledge of any alleged advances. She said that her husband was a director and shareholder of APG and that he took shareholders' advances which were paid from time to time to her account.

[15] Subsequently other advances to Mrs Wilson were discovered by the liquidators and the amount alleged owing was calculated at $1,081,097.53. The liquidators wrote again on 19 February 2008 and asked Mrs Wilson's lawyers:

> In order to advance the liquidation would you please have your client confirm:

(a) that she did receive the payments listed in the Schedule;

(b) the basis of the payments (e.g. were they gifts?); and

(c) what has happened to the funds received?

[16] A reply was requested within 14 days. Mrs Wilson did not respond.

Associate Judge's decision

[17] The Associate Judge did not make any direct findings relating to the claim in contract by APG that the monies advanced by it were loans to Mrs Wilson. It seems to have been put to one side for summary judgment purposes. Notwithstanding that, perhaps through oversight, the Associate Judge ended up giving judgment for "the plaintiffs", without distinguishing between them.

[18] The primary issue before the Associate Judge was whether the liquidators could establish that Mr Wilson's claim that the payments to Mrs Wilson were his salary from APG was not correct. This was relevant to the s 298 issue. If it was arguable that the payments were salary payable to Mr Wilson, then it was arguable that there was consideration for the payments to Mrs Wilson and, therefore, the liquidators could not conclusively establish that s 298 applied to the transactions.

[19] The Associate Judge rejected the claim by Mrs Wilson that the payments to her were Mr Wilson's salary for working at APG. As a result the Associate Judge concluded that s 298(2) applied and the money received by Mrs Wilson was repayable to APG.

[20] After the oral hearing of this appeal it occurred to us that there was an issue on which neither counsel had addressed us. In a minute of 26 October 2011 we described the issue in this way:

> [2] The first cause of action is brought by APG Holdings Ltd (In Liquidation), the first respondent. It is a claim against Rita Wilson in debt (contract). Although APG sought summary judgment on that claim, it seems clear from Associate Judge Bell's decision that APG's application for summary judgment did not succeed. The Judge directed all his attention to the liquidators' claim under s 298 of the Companies Act 1993. The Judge's decision with respect to the APG claim was obviously correct: clearly APG

could not establish that Mrs Wilson had no defence to the claim in debt in circumstances where both Mrs Wilson and Mr Wilson had sworn affidavits to the effect that Mrs Wilson had never entered into a loan agreement with APG. That would have to be resolved at trial.

[3] All attention therefore passed to the "alternative cause of action" against Mrs Wilson, brought by the liquidators under s 298 of the Companies Act. That cause of action was dependent upon the company having received no consideration for the dispositions. It is therefore the very antithesis of the first cause of action, where the company asserts there was consideration, namely a promise to repay on demand.

[4] The problem is this. How can the liquidators get summary judgment on their claim when the company's claim in debt remains unresolved? The respondents are asserting in one breath that Mrs Wilson did provide consideration, in the next that she did not. It is, of course, quite acceptable for a plaintiff to advance mutually exclusive propositions as alternatives. The difficulty arises when the plaintiff seeks summary judgment on the alternative, at a time when the primary claim remains on the table.

[5] In other words, can we be sure there is no defence to the s 298 claim as it may well be at trial that APG is able to establish its claim in debt? If it does establish its claim in debt, of course, then there can be no recovery under s 298.

[6] The net result of this reasoning may be that the respondents are not entitled to summary judgment on either cause of action at this stage. Which of their two causes of action is correct (if either is) will have to be determined at trial.

[7] Another possibility is that the respondents have effectively elected to pursue only the s 298 cause of action. They may be arguing, in effect: "We say the company received no consideration for the dispositions. Accordingly, we accept the first cause of action should be dismissed and we should get summary judgment only on the second." Is it open to the liquidators to advance such an argument without formally discontinuing the first cause of action? Did the liquidators in effect do that before the High Court? Have they ever indicated to Mrs Wilson that the first cause of action is abandoned?

[21] After receiving submissions, we sent a further minute to counsel. That resulted in APG discontinuing its cause of action. We then invited submissions from counsel as to the effect of that discontinuance on the appeal.

[22] The thrust of the Mr Illingworth's response to our minute of 26 October was that the respondents should not have been given summary judgment in the High Court when they could not say Mrs Wilson had no defence to the causes of action. Here, the respondents' case was that, depending upon the Court's analysis of the facts and the law, Mrs Wilson either had no defence to APG's proceeding or, if

rejected, no defence to the liquidators' proceeding. In such a situation Mr Illingworth submitted the respondents could not comply with r 12.4(5) of the High Court Rules and depose to the belief that Mrs Wilson had no defence to the particular cause of action. In response to our most recent enquiry as to the effect of discontinuing the cause of action, Mr Illingworth says that this action does not cure the defect in the summary judgment proceedings.

[23] We accept Mr Illingworth's point that at the summary judgment hearing, given the alternative causes of action, it may not have been possible for the respondents to assert that they believed Mrs Wilson had no defence to either claim given the circumstances we have described in our memorandum of 26 October. However, the position has now changed. Now there is only one cause of action, the s 298 claim, the other cause of action having been discontinued.

[24] It is possible on appeal for a party to change course in the presentation of its case to a limited extent in the absence of any prejudice to the other party. For example, this Court, on an appeal from a summary judgment order, has previously allowed a defendant to raise a defence for the first time on appeal where no further evidence was required.[2]

[25] Mrs Wilson has not claimed she has suffered or will suffer any prejudice if we approach this appeal on the basis that the proceeding now involves only the s 298 cause of action. The difficulty which could have arisen before the Associate Judge does not now, therefore, arise on appeal. Therefore, in the absence of any identified prejudice we proceed with this appeal on the basis that APG's cause of action is discontinued and that the appeal relates solely to the summary judgment in favour of the liquidators.

Companies Act 1993, s 298(2)

[26] Section 298(2) provides as follows:

> **298 Transactions for inadequate or excessive consideration with directors and certain other persons**

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2 *Body Corporate No 95035 v Auckland Regional Council* (1993) 6 PRNZ 559 (CA).

...

(2) Where, within the specified period, a company has disposed of a business or property, or provided services, or issued shares, to—

(a) A person who was, at the time of the disposition, provision, or issue, a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

(b) A person, or a relative of a person, who, at the time of the disposition, provision, or issue, had control of the company; or

(c) Another company that was, at the time of the disposition, provision, or issue, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

(d) Another company that, at the time of the disposition, provision, or issue, was a related company,—

the liquidator may recover from the person, relative, company, or related company, as the case may be, any amount by which the value of the business, property, or services, or the value of the shares, at the time of the disposition, provision, or issue exceeded the value of any consideration received by the company.

[27] The Associate Judge identified three facts which the liquidator must establish before s 298(2) applied.[3] Firstly, that the company had made a disposition of property within the specified period. All the payments to Mrs Wilson's account were made within the specified period. This was not disputed. Secondly, the disposition was to a person within subs (2)(a) to subs 2(d). It was not disputed that Mrs Wilson was a relative of Mr Wilson who was either a director of the company or had control of the company. Thirdly, the value of the disposition exceeded the value of any consideration received by the company. This was in issue.

[28] The liquidators could recover from Mrs Wilson only the amount by which the money paid to her "exceeded the value of any consideration received by the company".[4]

[29] Mr Illingworth conceded that it could not be claimed that the payments were Mr Wilson's salary. He submitted, however, that in the circumstances, the advances

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3 At [12].

4 Companies Act 1993, s 298(2).

had to be treated as loans by APG to Mr Wilson and repayable by him on demand. Mr Illingworth argued that the promise to repay the loans on each advance and the work done by Mr Wilson for APG was valuable consideration in terms of s 298(2). This consideration he maintained was equal to the value of the advance for the purpose of s 298(2). Mr Illingworth accepted, however, that there was no evidence that Mr Wilson had in fact performed any services for APG.

[30] Mr Illingworth said there was nothing to suggest at the time of each payment to Mrs Wilson that Mr Wilson was impecunious and nothing to suggest that he could not meet the repayments. And so the value of the consideration equalled the value of the advance. Indeed, the fact that Mr Wilson is said to have paid more than $700,000 to APG during this time illustrated his capacity to pay.

[31] Both counsel accepted that the consideration in s 298 need not be received directly from Mrs Wilson and could in fact be from anyone. We express no view as to the correctness of this proposition but proceed as agreed between the parties.

[32] Thus, Mrs Wilson's case on appeal is that, if the payments are not salary, they must be advances to Mr Wilson which he must repay. The evidence did not establish that Mr Wilson could not repay these advances and so the Court could not be satisfied there was no consideration and could not, therefore, enter summary judgment against Mrs Wilson.

Discussion

[33] Essential to Mrs Wilson's defence as now presented by Mr Illingworth, is that the payments were loans to Mr Wilson for which he gave consideration, being his promise to repay the loans. We are satisfied the liquidators have established that Mr Wilson did not accept an obligation to repay these loans or that the payments can be categorised as loans to him. Mr Wilson did not accept in his affidavit that he was indebted to APG. He has maintained throughout that the payments from APG were salary, paid as drawings in anticipation of the appropriate compliance with s 161 of the Companies Act. He said the money paid to his wife was variously his "drawings from the company", that he "nominated Rita Wilson's account for the payment of our

(he and Mr Tauber's) salaries" and "they were shareholder salaries". Mrs Wilson in her affidavit said, as she understood it, that the payments "were my husband's drawings from the company". She did not say, however, that her husband had ever accepted an obligation to repay these amounts.

[34] Mr Illingworth's submission was that once it became clear in law that the payments to Mrs Wilson were not salary for Mr Wilson, all that was left was the proposition that the payments were loans to Mr Wilson which included an obligation to repay.

[35] We are satisfied on the evidence that there was no consideration. The evidence of Mr and Mrs Wilson illustrates neither considered the payments included an obligation to repay. There is no evidence that any of these payments were authorised by the company. There is no evidence they were directors' fees, shareholder advances, loans or gifts. If the payments were not salary (which they were not) and if there is no evidence they were otherwise authorised, then they were misappropriations of company property. While such a misappropriation gives rise to an obligation to repay the money, such obligation arises not in contract but rather as the remedy for wrongful conversion. This could not be consideration for the purpose of s 298(2).

[36] In summary, therefore, the payments made to Mrs Wilson were not payments authorised by APG to be paid to Mr Wilson. Mr Wilson has never accepted he had an obligation to repay the money. There was, therefore, no consideration for the payments by APG to Mrs Wilson. The liquidators, therefore, established Mrs Wilson had no defence to their s 298 claim. The liquidators are entitled to recover from Mrs Wilson the money paid to her by APG.

Set-off

[37] The Associate Judge concluded that Mrs Wilson had an arguable case that payments made by Mr Wilson to APG could be set off against the liquidator's claim. We express no opinion as to the correctness of the Associate Judge's view. This was not the subject of challenge before us. However, Mrs Wilson and the respondents

agree that the Associate Judge's mathematical calculation of the amount to be set off and, therefore, the amount for which judgment could be entered, was in error by $35,000.

[38] By agreement between the parties, therefore, the amount for which judgment should have been entered is reduced to $249,660 (by increasing the total paid by Mr Wilson to APG to $831,437). The appeal with respect to quantum of the set-off will, therefore, need to be allowed to that extent.

[39] The second ground of challenge to the quantum of the judgment relates to the Associate Judge's treatment of a payment of $332,937. On 26 August 2004 a payment of $332,937 is recorded in APG's general ledger as being received by APG. The general ledger records that it was an ANZ cheque. Under "Name" it says "Terry Wilson" and under "Memo", "Terry and Andrew". Andrew Tauber, as we have said, is said to have been Mr Wilson's business partner. The Associate Judge attributed half of this payment to Mr Wilson, but did not analyse why it should be divided equally between Mr Wilson and Mr Tauber.

[40] Mr Illingworth says there was insufficient evidence in the circumstances for the Associate Judge to have concluded this payment was equally for the credit of Mr Wilson and Mr Tauber. In these circumstances APG could not establish for summary judgment purposes that Mr Wilson was not entitled to have the full amount of the deposit with APG credited to his account. In those circumstances, the set-off amount would be credited with the full $332,937 and not just half.

[41] We are satisfied the lack of reasoning by the Judge relating to this issue was because Mrs Wilson accepted in the High Court that Mr Wilson should be credited with only one half of the $332,937 deposit. Her then counsel said in his submissions:

> This document shows that Rita Wilson was credited with receiving $972,000.00 and Terry Wilson was credited with depositing $853,437.63. Terry Wilson is also credited along with Andrew Tauber for depositing the sum of $332,937.00. If half this deposit or $166,468.50 is added on to the $853,437.63 it can be seen that Mr Wilson had deposited $1,019,906.13. The net effect is that Mr Wilson introduced back into the company during the relevant period more money than he withdrew as drawings. The

> liquidators have been requested to provide details of the amounts credited to the accounts but have not provided the requested details.

[42] Given that concession it is inappropriate to allow Mrs Wilson to raise this issue on appeal.

Conclusion

[43] We have rejected Mrs Wilson's appeal against the entry of judgment by virtue of the liquidators' claim under s 298(2) of the Companies Act. However, by agreement between the parties the quantum of the judgment is reduced to $249,660. We leave the appropriate interest rate to be applied to this sum for the trial Judge.

[44] We reject Mrs Wilson's second ground of challenge to the quantum of the judgment of the Associate Judge that further money should be brought into account by way of set-off for the reasons given.

[45] Because judgment was entered in favour of APG seemingly in error, the judgment in its favour is set aside.

Costs

[46] Mrs Wilson's solicitor did not properly prepare the case on appeal. The case on appeal did not comply with rr 40B–40D of the Court of Appeal (Civil) Rules 2005. There was no cross referencing between evidence and exhibits. The exhibits were not in chronological order or in any order that was logical. There was no index to the exhibits volume. We wasted a lot of time trying to find the relevant evidence in the exhibits. The respondents' counsel must also have found it time consuming when preparing their submissions. We advised Mr Illingworth at the hearing that we considered these deficiencies should lead to a costs adjustment in terms of r 53E or r 53F depending on the outcome. He properly accepted such adjustment would be appropriate. (We hasten to add that Mr Illingworth himself was in no way responsible for the deficiencies in the case. He was instructed only recently.)

[47] In the circumstances we have decided that increased costs against Mrs Wilson are warranted under r 53E(2)(b)(i). We have increased the costs by a time allocation uplift of 0.5 days for the respondents' "preparation for hearing of appeal" (Item 12, Schedule 2).

Solicitors:
Mark Henley-Smith, Auckland for Appellant
Harkness Henry, Hamilton for Respondents