

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2016-404-001350
[2017] NZHC 547**

BETWEEN PHILIP CLAUDE TARR
 Plaintiff

AND DOUGLAS JOHN SUTCLIFFE
 First Defendant

AND TERENCE SUTCLIFFE AND BRADEN
 MATSON AS PARTNERS OF FROST &
 SUTCLIFFE LAWYERS
 Second Defendant

Hearing: 20 March 2017

Appearances: G Curry and M Kilham for the Respondent/Plaintiff
 P Hunt for the Applicants/First and Second Defendants

Judgment: 24 March 2017

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

*This judgment was delivered by me on
24.03.17 at 3:30 pm, pursuant to
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date.....*

The application

[1] The first defendant (Mr Sutcliffe) and the second Defendant (Frost & Sutcliffe) (the firm) apply for summary judgment or to strike out causes of action brought by the plaintiff (Mr Tarr) which plead undue influence against Mr Sutcliffe and breach of fiduciary duty against the firm.

[2] Mr Tarr also brought his proceeding against His former wife Mrs Tarr but has now since discontinued those claims by which he pleaded Mrs Tarr acted fraudulently in regard to those matters pleaded against Mr Sutcliffe and the firm.

[3] The defendants also apply for an order that Mr Tarr provide security for payment of costs.

Background

[4] Mr and Mrs Tarr were married in 1979. On 13 April 1993 they separated. Mr Sutcliffe and the firm had been their solicitors throughout their marriage. Despite their separation Mr Tarr pleads he and Mrs Tarr maintained a business relationship. In 1996 Mr Tarr entered into a new personal relationship with a new partner.

[5] Mr Tarr pleads that following their separation he and Mrs Tarr continued to have a harmonious marital relationship and maintained a business relationship and that in 1996 they decided to purchase a property at Kepa Road, Orakei (the property). Of significance to his proceeding is Mr Tarr's claim that the purchase of the property was to be part of a joint venture. He said they briefed Mr Sutcliffe of the firm to act for them.

[6] He and Mrs Tarr visited Mr Sutcliffe at the firm's offices on 28 February 1996. He says Mr Sutcliffe advised their meeting was necessary to incorporate a new company to become the purchaser of the property. He advised they chose to call the company the Great Empire Limited (GEL) which had been incorporated the previous

day with Mr Sutcliffe's assistance. Each was appointed a director of GEL and each was issued 500 shares in GEL. GEL obtained a loan from the Bank of New Zealand (BNZ) to purchase the property. Mr Tarr says BNZ would not advance funds for the purchase unless he and Mrs Tarr were to become equal shareholders and each to sign personal guarantees.

[7] Mr Tarr pleads the property was purchased in order to carry on business in common with a view to making a profit. He says the purchase was their joint venture.

[8] Mr Tarr's particular issues focus on a meeting held on 28 February 1996 at the firm's offices with Mr Sutcliffe and Mrs Tarr. He said his attendance was needed to sign documents for the purchase of the property. Each signed a personal guarantee to the BNZ for \$210,000.

The statement of claim

[9] Mr Tarr pleads, inter alia:

- (a) He would not have signed that personal guarantee if he had been advised that his GEL shareholding was to become Mrs Tarr's separate property.
- (b) Mrs Tarr advised that she wanted to protect the property from any claim by Mr Tarr's new partner.
- (c) Mr Sutcliffe advised them to place the GEL shareholding in a family trust.
- (d) They agreed and then instructed Mr Sutcliffe to make those arrangements.
- (e) Mr Sutcliffe then produced a share transfer form together with other company property purchase documents and advised Mr Tarr those would ensure that the property was protected by placing it in a family trust.

- (f) Accepting Mr Sutcliffe's advice he signed the transfer.
- (g) They were then taken into the office of a senior employee Mr Blomfield who witnessed their signatures, Mr Sutcliffe having directing them where each was to sign the transfer.
- (h) Mr Sutcliffe assured them that the property purchase would be finalised and the firm would forward to each of them a copy of the documents in the post.
- (i) When he left, it was then that Mr Sutcliffe advised him that he was pursuing a romantic relationship with Mrs Tarr.
- (j) Mr Sutcliffe then, or later, completed the blank transfer as a transfer of Mr Tarr's GEL shareholding to Mrs Tarr. Alternatively Mr Sutcliffe provided the blank transfer to Mrs Tarr thereby enabling her to transfer Mr Tarr's GEL shareholding to herself.

[10] Mr Tarr says he would not have signed the document if he had been advised that it could be used to transfer his GEL shareholding to Mrs Tarr. He says he was not so advised. He said he anticipated that a formal written trust document would be drafted by Mr Sutcliffe for signing later by him and Mrs Tarr.

[11] Mr Tarr believed that the transfer was to be used only for the purpose of recording a share transfer of his GEL shareholding to a family trust. He claims conflicts of interest arose between Mr Sutcliffe and the firm on the one hand and he on the other. He says that he and Mrs Tarr should have received independent legal advice.

[12] Mr Tarr pleads that on 10 October 1998 he wrote to Mr Sutcliffe requesting copies of the sale and purchase agreement, the transfer, the declaration of trust, and the deeds of lease. He says neither Mr Sutcliffe nor the firm replied to that request.

[13] His claim against Mr Sutcliffe is that he was unduly influenced when advised to sign a blank transfer he having been advised that would be used to place his GEL

shareholding in a family trust when instead that enabled Mrs Tarr to transfer Mr Tarr's shareholding to herself. He says Mr Sutcliffe and their firm breached their fiduciary duties to him by failing to inform him of their conflict of duties and interest in continuing to act for them both after they had separated and while Mr Sutcliffe was pursuing a romantic relationship with Mrs Tarr. Had those fiduciary duties been fulfilled then Mr Tarr would have retained a beneficial interest in the GEL shareholding.

Mr Tarr's Family Court relationship property proceeding

[14] Mr Tarr's statement of claim refers to his relationship property proceedings dealt with in the Family Court and on appeal in the High Court. Mr Tarr filed that proceeding in April 2007. In that Mr Blomfield swore an affidavit confirming Mr and Mrs Tarr had signed the transfer in his presence and that he witnessed their signatures. Mr Tarr pleads that Mr Blomfield did not specify in his affidavit whether the transfer was blank when he witnessed it. He claims Mr Sutcliffe's and the firm's failure to establish the family trust which Mr Tarr says was to retain his GEL shareholding enabled Mrs Tarr to persuade the Family Court that Mr Tarr was holding his GEL shareholding as a bare trustee for her and that the GEL shareholding was her separate property.

[15] The High Court dismissed Mr Tarr's appeal of that finding.

[16] Mr Tarr's claims by his present proceeding seek a setting aside of the transfer of the GEL shares to Mrs Tarr and claims a restitution of those to him. He also seeks exemplary damages, interest and costs.

Overview of claims

[17] The causes of action for breach of fiduciary duties allege Mr Sutcliffe and the firm were in a conflict of interest in acting for both Mr and Mrs Tarr, and that they failed to use the transfer to transfer the shares into a family trust, and that they failed to advise Mr Tarr that the transfer would be used to transfer shares into the name of

Mrs Tarr. He says as a consequence of that breach the Family Court erroneously held that the GEL shareholding was Mrs Tarr's separate property.

The summary judgment/strike out applications

[18] Regarding Mr Tarr's proceeding, Mr Sutcliffe and the firm claim they are seriously prejudiced by the time that has expired between the 28 February 1996 meeting and the filing of these proceedings as they have no records and no recollection in relation to key events. They deny the allegations but are unable to have recourse to the usual means of defence, which would enable them to prove what happened. The applications are based on affirmative defences of *laches*, issue estoppel, and abuse of process. They also seek security for costs.

Laches

[19] The applicant's say their files have been destroyed and they have no recollection of specific events.

[20] As Mr Hunt notes, Mr Tarr deposes to recalling specific events about the meeting but the Family Court found his evidence unreliable, commenting that he had great difficulty remembering past events. The High Court judgment records that Mr Tarr conceded his memory about the transfer document was "hazy".

[21] Mr Hunt submits the lawyer's files would greatly assist the Court in determining what happened; that the absence of those, along with a lack of recollection of specific events now 21 years ago, seriously prejudices the defence to the extent the balance of equities favours a finding of *laches*.

Issue estoppel and abuse of process

[22] Mr Hunt submission refers to the Family Court and High Court having found that the share transfer form was not blank when signed by Mr Tarr and that the 500 shares issued in Mr Tarr's name were held by him in an express trust for the benefit of Mrs Tarr.

[23] Mr Hunt submits this proceeding involves a direct attack on those findings and that such not be permitted because:

- (a) Undue influence should have been raised as part of the Family Court proceeding in Mr Tarr's challenge to the ownership of the shares; and
- (b) The Court has determined issues regarding the signing of the transfer and the ownership of the shares and has heard detailed evidence from Mr and Mrs Tarr and examined what documents were available regarding that transaction.

[24] It follows Mr Hunt submits that allegations of undue influence and breach of fiduciary duty now made do not provide any basis for a later court to revisit those findings, findings which are fatal to Mr Tarr's case as he cannot be entitled to the benefit of shares which were held in trust for Mrs Tarr.

Family Court judgment

[25] By His Honour's judgment dated 23 September 2013 Judge de Jong found against Mr Tarr. Key paragraphs in the judgment include:

[17] The husband accepts he signed the share transfer form but believes the form was not filled out when it was signed. He says the signed share transfer form was filled out later by his wife. His memory is that the transfer was "part of some pre-nup/contracting out documents" that he was "encouraged" by his wife to sign on the same day because he had entered into a new de facto relationship around that time. He says his wife told him "the share transfer document needed to be signed in case we needed to sell the shares or put them into a trust".

...

[26] ...In general terms this Court found the wife to be a reliable witness.

[27] ...The husband had great difficulty remembering past events. For all those reasons the Court finds, in general terms, the husband's evidence was less reliable than the wife's.

[28] This Court is satisfied on the balance of probabilities that the 500 GEL shares issued in the husband's name were held by him by way of an express trust for the benefit of his wife. In summary, the reasons for reaching this conclusion are as 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 her husband. For that reason the wife arranged to incorporate GEL and distribute an equal number of shares to each party.
- (b) The wife contemporaneously arranged for a share transfer form to be prepared by the conveyancing lawyers handling the finance and purchase agreements. 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 the Declaration of Trust".
- (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.
- (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 the 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.
- (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 as their deeds safe, or possibly a record kept of where the documents had been sent to.
- (f) ...this Court is not satisfied this was a joint venture...

[26] On appeal to the High Court Thomas J by decision dated 26 June 2014 found:

[33] The weight of 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' signature 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 Mr 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 the other investment properties. Indeed the impression which the appellant has tried to create (that there was a certain *détente* between the parties) supports Mrs Tarr's version of events.

Legal principles

Summary judgment

[27] Summary judgment is available where a defendant can satisfy the Court that none of the plaintiff's claims can succeed. This can occur when a defendant provides evidence as a complete defence but summary judgment is usually inappropriate where there are factual disputes and where the Court should determine material facts independent of the affidavit evidence.

[28] The general principles for strike out are well settled.¹

- (a) It is assumed the facts pleaded in the statement of claim are true;
- (b) Before a court may strike out the proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.
- (c) Jurisdiction is exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material.
- (d) The fact that an application raises difficult questions of law, and requires extensive argument does not exclude jurisdiction.

Laches

[29] The key principles include:²

- (a) Claims of delay should focus on the extent of prejudice thereby caused.

¹ *A/G v Prince* [1998] 1 NZLR 262 (CA).

² *Eastern Service Ltd v No 68 Limited* [2006] NZSC 42 at [36].

- (b) If it is claimed evidence is lost then focus should be upon how that may affect the claim.
- (c) The length of delay and the nature of the acts done during the interval are important in laying down a balance of justice or injustice between the parties from which inferences may be drawn as a matter of common sense.

[30] For present purposes Mr Hunt submits there has been a delay of 20 years between the 28 February 1996 meeting and the filing of proceedings in June 2016. He says the solicitor's files and other contemporaneous documents would be useful in resolving Mr Tarr's claims. Mr Sutcliffe has said he cannot recall what happened at the meeting. It is submitted contemporaneous documentary records of the meeting and the associated transactions are extremely important in this case.

[31] Mr Tarr says he has recollection of the events but the Family Court and High Court have previously found those shares were held by Mr Tarr in trust for the benefit of Mrs Tarr and that the share transfer form was not blank when he signed it. Mr Hunt submits that by his present proceeding Mr Tarr makes claims contrary to the findings of those courts. Further and as earlier noted the Family Court found Mr Tarr had difficulty in remembering past events and had conceded that his memory about the transfer document was hazy.

[32] Mr Hunt submits Mr Tarr's recollection of events has changed over time. Initially he claimed he did not sign the share transfer document at all. Then he said it was blank but Mrs Tarr later signed it. Now he asserts that either it was blank and Mrs Tarr later completed it, or Mr Sutcliffe later completed it.

[33] Mr Hunt submits the Family Court was clearly hampered by delay and lack of evidence; that documents that would assist this Court's consideration of Mr Tarr's claims include Mr Sutcliffe's file notes, and evidence of dealings with the BNZ to support Mrs Tarr's evidence that it would not loan the money to her alone. Such documents would, if Mr Tarr was correct by his claims, provide evidence of the existence of that trust Mr Tarr alleges the shares should have been transferred to.

Those records would also provide evidence of the prenuptial agreement that Mr Tarr alleges was the reason for his signing the transfer.

[34] Mr Hunt submits Mr Sutcliffe is prejudiced by a lack of memory and the firm likewise by a lack of documents to respond to allegations by Mr Tarr on those very issues the Family Court and High Court have found against him.

Issue estoppel

[35] The cause of action of undue influence seeks the setting aside of the transfer of the GEL shares to Mrs Tarr. Mr Hunt submits that remedy cannot be enforced against the firm and clearly it cannot succeed. He submits it should have been part of the relationship property case brought by Mr Tarr against Mrs Tarr in 2007. Mr Hunt refers to the Court of Appeal decision in *Shiels v Blakeley*³, where the Court of Appeal confirmed that a final judicial decision by a Court of competent jurisdiction over the parties' issues shall prevent any subsequent litigation from disputing or questioning the decision on the merits.

[36] Mr Hunt submits Mr Tarr's case already has the final decision of the Court of competent jurisdiction because both causes of action in his statement of claim allege the Family Court erroneously found the shares were held in trust for Mrs Tarr and that the GEL shareholding was her separate property. Both courts have found that the share transfer form was not blank when signed by Mr Tarr and have found that Mr Tarr's shares were held in trust for Mrs Tarr. Mr Hunt submits therefore it is difficult to see how the present allegations of Mr Tarr could lead to different findings to those reached by the Family Court and High Court in particular because the Family Court heard the parties to the transaction and considered the available documentary evidence, primary to the share transfer.

[37] Those findings examine the interests of Mr and Mrs Tarr, Mr Sutcliffe and the firm regarding the state of the share transfer at the time it was signed and regarding the ownership of the GEL shares.

³ [1986] 2 NZLR 262 (CA).

[38] Mr Hunt submits there is clearly an abuse of process involved and allegations that the judgments were an error are clearly a collateral attack on those judgments and that the making of claims against Mr Sutcliffe and the firm for undue influence in breach of fiduciary duty do not warrant another court determining the same issues.

Opposition

[39] It is pleaded Mr Sutcliffe and the firm breached fiduciary duties when documents drafted for both Mr and Mrs Tarr allowed Mrs Tarr to successfully claim the property as her separate property in the Family Court. Thereby, it said Mr Tarr lost his 50 per cent interest.

[40] In response to claims Mr Sutcliffe and the firm are prejudiced by the passage of time due to lack of memory and their files having been destroyed, Ms Kilham submits there is ample evidence of the retainer and the key documentation and says several other witnesses will be able to give evidence as to the retainer.

[41] Ms Kilham submits therefore it cannot credibly be asserted that there is no defence to the *laches* pleading, and nor should the proceeding be struck out; that neither estoppel nor abuse of process claims answer claims for breach of fiduciary duties.

Review

[42] Mr Tarr has his own recollection regarding documents he signed and the purpose of those. He believed the CEL shares were to be placed in a family trust. He says he signed documents where directed to. He deposes that more than 11 years later on 11 October 2010 Mrs Tarr used the transfer form to transfer Mr Tarr's shareholding in GEL to herself.

[43] The Court notes that it was after that time that Judge de Jong and Justice Thomas provided their own clear factual analysis of Mr Tarr's account. By implication of those it was clear to the Honourable Judges that the consideration of the

establishment of a family trust was not a matter upon which the defendants had been consulted.

[44] Issues of delay must affect the Court's consideration of these applications. Why has this proceeding not been filed earlier and why was it not part of his Family Court dispute? Consideration could have been given to joining the defendants to a proceeding at that time.

[45] Mr Tarr responds saying he put Mr Sutcliffe and the firm on notice that he wanted documentation from the firm's file in October 1998, and again he says on 30 November 2009 he telephoned Mr Sutcliffe. He reports having received no response to those requests.

[46] However, the issues raised by this present proceeding appear to have an element of difference for they are as much about the fact the defendants did or may have offered advice at all to Mr Tarr.

[47] Mr Tarr's pleading by implication at least asserts the existence of a retainer by the defendants to act for him. The defendants deny there was a retainer. But, the facts indicate documents were prepared for Mr Tarr to sign as well. Those included company incorporation documents, the signing of a share transfer form, and completion of bank loan indemnity documents.

[48] It appears the defendants may have been aware of Mr and Mrs Tarr's domestic situation and that Mrs Tarr reportedly expressed concern about a process to prevent Mr Tarr's new relationship partner from claiming an interest in the property.

[49] Also there is evidence about Mr Sutcliffe having arranged for Mr Blomfield to witness certain documents.

[50] Issues raised upon Mr and Mrs Tarr's previous proceeding clearly are related to those raised upon this proceeding but are not necessarily determinative of those issues this proceeding is concerned with.

[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.

[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.

Security for costs

[54] Mr Tarr is impecunious. He says this was caused by Mr Sutcliffe and the firm. He says there is a public interest in this proceeding which outweighs claims for security for costs.

[55] The provisions of Rule 5.45 HCR apply. An applicant for security must satisfy the court there is reason to believe a plaintiff will be unable to pay the defendant's costs if unsuccessful in the proceeding.

[56] Relevant considerations include the merits of Mr Tarr's claim, and the possibility an order for security might prevent Mr Tarr from pursuing his claim. Security may be ordered if Mr Tarr's claim is without merit, or may not be if the proceeding issues may have caused Mr Tarr's impecuniosities.

[57] Mr Tarr says Mr Sutcliffe and the firm have caused his impecuniosities. He says they deprived him of his 50 per cent interest in the property.

[58] The opposite view is that Mr Tarr has extremely limited prospects of success because his case is based on his recollection 20 years after the event and since when, the Family Court has found his evidence unreliable and that he had great difficulty remembering past events. He has himself admitted his recollection is hazy in relation to a key event. Mr Tarr's assertions are contrary to the findings of the Family Court

supported on appeal by the High Court. Mr Hunt submits therefore if those decisions are accepted as correct Mr Tarr's case cannot succeed. Also that the claim of undue influence cannot succeed because the court could not make an order setting aside the transfer of share to Mrs Tarr when she is not a party to the proceeding.

[59] Finally, Mr Hunt submits that Mr Tarr's case that the shares would have been held in the trust means that it is the trust and not he who has suffered loss.

[60] Mr Hunt submits and the Court agrees, it is difficult for Mr Tarr to say his impecuniosity has been caused by his lack of shareholding in a company in which he had no involvement. It had not been his idea to purchase the GEL property and he had no involvement in the running of the company or the property.

[61] It is likely Mr Tarr's current financial position is attributable to factors quite unrelated to GEL.

[62] Mr Hunt submits security be set in the sum of \$20,000 up to preparation for trial, based on band 2 costs on category B basis when such costs are likely to be around \$25,000.

[63] Ms Kilham submits that Mr Barr has a bona fide claim to advance and it would not be in the interests of justice to order security.

[64] The Court has discretion with security for costs applications. Considerations include the nature of the claim and amount sought, the complexity and novelty of issues, the likely extent of interlocutories, the estimated duration of trial and probable costs payable if the plaintiff does not succeed.

[65] More than 20 years has passed since those events that Mr Tarr claims have deprived him of that to which he says he is entitled.

[66] It is far from clear that his current impecuniosities can be attributed to those events.

[67] Security is appropriate. Ms Kilham's calculations do not fully take into account the extent of matters for consideration upon the Court's calculation.

[68] The Court agrees with Mr Hunt's suggestion of \$20,000 to the time of preparation of trial.

[69] There is an order for security accordingly. That sum will need to be paid into court before this matter proceeds any further.

Judgment

[70] The application for summary judgment/strike out is dismissed.

[71] The application for security of costs is granted.

[72] The proceeding is stayed pending payment of security into Court by the plaintiff.

[73] The defendants shall pay 2B costs and disbursements upon their unsuccessful summary judgment/strike out applications.

[74] The plaintiff shall pay 2B costs and disbursements upon its unsuccessful opposition to the plaintiff's security for costs claim.

Associate Judge Christiansen